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THE  
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SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST  
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OF THE

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(43 S. C. 267)

FEWELL et al. v. DEANE et al.

(Supreme Court of South Carolina. March 4, 1895.)

SALE OF GOODS—REMISSION BY BUYER.

Plaintiffs bought goods from defendants by sample, and subsequently resold them. *Held* that, in an action to recover the price on the ground that the oats were worthless, plaintiffs must allege that the goods delivered did not correspond with the sample; that the money received from the resales was returned, or, in case the resales were on time or credit, that the purchasers were released therefrom.

Appeal from common pleas circuit court of York county; Ernest Gary, Judge.

Action by R. T. Fewell & Co. against F. H. Deane & Co. to recover the purchase price of goods sold. From a judgment for defendants, plaintiffs appeal. Affirmed.

The following is the decree entered in the case, and the exceptions upon which the appeal is taken:

"This is an action for damages instituted in the court of common pleas for York county by the plaintiffs, merchants doing business in the city of Rock Hill, S. C., against the defendants, doing business as merchants in the city of Richmond, state of Virginia. The complaint alleges that on the — day of January, 1892, the defendants sold and delivered to the plaintiffs for seeding purposes a certain quantity of oats, aggregating three hundred and thirty-seven bushels, and that plaintiffs paid therefor the sum of one hundred and sixty-eight and 88/100 dollars, being the full value of sound merchantable oats for seeding purposes; that the said oats were unsound, damaged, and worthless for seeding and planting purposes, and that the same were of no value to the plaintiffs; that the plaintiffs bought said oats for the purpose of sale to planters for seeding purposes, and that they, as merchants, would have realized a reasonable profit of sixty and 71/100 dollars on the sale of said oats if they had been sound and saleable, and that the plaintiffs have been damaged in the sum of one hundred and sixty-eight and 88/100 dollars, the amount paid for said oats, and interest thereon, and in the sum of sixty and 71/100 dollars, profits on the same. The defendants in

their answer to the complaint deny the allegations of said complaint, except those therein after admitted; and by way of further answer allege that the defendants were a firm doing business in the city of Richmond, Va., as merchants; that on the 26th day of December, 1891, they sent one W. A. Fewell, a commission merchant of Rock Hill, S. C., a sample of the oats they had in stock, and soon thereafter received an order from W. A. Fewell for 350 bushels 'R. P. oats, same as sample sent,' at 56½ cents per bushel, to be shipped to the plaintiffs; that in pursuance of the said order they, on 31st December, 1891, shipped the plaintiffs the quantity and quality of oats mentioned in the order, and that the said oats so shipped were identical with the sample from which same was made; that the defendants fulfilled their contract with plaintiffs fully and entirely, in every respect, in good faith; that the said oats were sold by sample without any representation as to their condition; that the plaintiffs received them, paid for them, and made no objection to their quality until some months afterwards; that the plaintiffs had an opportunity to examine said oats before, paying therefor, and they have never returned or offered to return the said oats to the defendants; that the defendants did not know for what purpose the plaintiffs purchased said oats, and they never assumed any responsibility as to their quality, but, if the same were unsound and damaged, they became so after shipment, and while in the possession of plaintiffs or their customers; and pray that the complaint be dismissed, with costs. The cause, being at issue, was referred by consent order to W. B. McCaw, as special referee, 'to hear all the testimony and report upon all issues of facts, with leave to report any special matter.' In pursuance of said order, said referee has taken the testimony and filed his report, to which there are no exceptions, finding as matter of fact, among other things, that the oats in question were sold by the defendants to the plaintiffs as 'Rust-Proof Oats'; that the plaintiffs intended to buy the oats for seeding purposes; that they sold the oats for such purposes, and that they were so used by plaintiffs' customers; and that said oats were unsound, etc.

The referee further finds that the defendants had notice and understood from the terms of the order itself that seed oats were desired by plaintiffs. These and the other findings of fact by the referee are fully sustained by the testimony. The referee further finds that the plaintiffs paid one hundred and ninety-seven and 67/100 dollars for the oats, and have sold the same, some for cash and some on a credit. On the cash sales, the plaintiffs have received and have still in hand, unredeemed, the sum of one hundred and twenty-four and 49/100 dollars. The plaintiffs sold to their customers on credit 160% bushels of said oats, at 75 cents per bushel, amounting to the sum of one hundred and twenty and 28/100 dollars. These time customers have not paid the amount of their purchases. The plaintiffs have never entered any suits against any of the parties to enforce payment of the amounts due by them for the oats purchased on time. From the view the court takes of this case, it is not necessary to discuss many of the legal questions so ably argued by the learned counsel engaged in the cause, or to draw the nice and delicate distinctions that arise in applying the principles of caveat emptor or caveat venditor. The recent case of *Kauffman Milling Co. v. Stuckey*, 37 S. C. 8, 18 S. E. 219, seems to be directly in point. It was sought in that case to recover the purchase money of a quantity of flour sold by the plaintiffs to the defendant. The defendant resisted payment of the flour on the ground that it was not good, sound, marketable, or merchantable, and not up to the warrant or sample. The supreme court held that the defendant would have no right to take even a worthless article of the plaintiffs, and then sell it, and defend himself by saying it was worthless, but must account for proceeds of sale, etc. Applying this principle to the present case, wherein have the plaintiffs sustained any damage? They paid for said oats the sum of \$197.67, and have sold them for \$124.49 in cash, and have outstanding accounts against their time customers amounting to \$120.28, aggregating \$244.77. In other words, the plaintiffs have already sold said oats at a profit of \$53.10. I fail to see wherein they have sustained any damage. It is true they may in the future be sued by their customers, and sustain some damage; but until they have either refunded the amount realized on the sale of the oats, or suffered some loss by reason of the sale to their customers, their suit for damages is premature, as was decided in *Stuckey's Case*: "He would have no right to take even a worthless article of the plaintiffs, and sell it, and then defend himself by saying it was worthless; but he must account for the proceeds of sale," etc. Testing this case by the principle announced in the *Stuckey Case*, the plaintiffs have totally failed to show that they have sustained any damage, but, on the contrary, have realized a profit of \$53.10. It is therefore ordered that

the complaint be dismissed. Ernest Gary, Presiding Judge."

Plaintiffs appealed from this judgment on the following exceptions: "(1) Because of error in holding that plaintiffs were not entitled to recover the price paid for a worthless article, supposed to be sound at time of purchase. (2) Because of error in holding that plaintiffs had suffered no damages because they had, in ignorance of its condition, sold the worthless commodity, possessing a latent defect, for more than the price paid. (3) Because of error in holding that the rule caveat venditor had no application to the sale and purchase of said commodity. (4) Because of error in not sustaining plaintiffs' cause of action, and in not holding that true measure of damages was the difference between the worthless article and the value that it would have possessed in South Carolina had it been sound and as represented. (5) Because of error in holding that the sale of part of the worthless goods for \$120.28, on time, to parties who refused to pay for same, was not a matter of damage. (6) Because of error in holding that the sum of \$124.49 realized in cash for a part of the worthless commodity sold, which plaintiffs admitted their liability to refund to the purchasers, was not a matter of damage. (7) Because of error in adding plaintiffs' legitimate profits for handling, storing, and selling said commodity to the items of their cash and credit sales to make up the amount of supposed reimbursement. (8) Because of error in holding that plaintiffs' action was premature, and that the cause of action, if any, could not accrue to plaintiffs until the legal rights and responsibilities existing between plaintiffs and their vendees had been adjusted and settled."

Hart & Cherry, for appellants. Finley & Brice, for respondents.

POPE, J. This action came on for trial before the Honorable Ernest Gary, as presiding judge, at the November term, 1893, of the court of common pleas for York county. The hearing was had upon the report of W. B. McCaw, Esq., as special referee, and the testimony taken by him. On the 28th December, 1893, the circuit judge filed his decree, dismissing the complaint. This decree must be reported in full. The plaintiffs appeal from said decree on eight grounds. These exceptions will be set out in the report of the case. It occurs to us that the plaintiffs maintain a most extraordinary position, namely, that they have the right to buy goods by sample, and, without a denial that the goods so sold and delivered correspond with the sample, sell said goods at a profit, and then, without paying back to their customers the money paid by such customers for the oats (the goods sold) in question, or without, when they sold the oats on time or credit to their customers, releasing their customers from such sale,

that they can require the defendants to pay them back all the purchase money, and a little more, on the ground that the oats sold were worthless. We agree with the circuit judge that the case of *Milling Co. v. Stuckey*, as reported in 37 S. C. 8, 16 S. E. 192, and in 40 S. C. 110, 18 S. E. 219, is conclusive of this case. It is the judgment of this court that the judgment of the circuit court be affirmed.

(43 S. C. 263)

**SULLIVAN v. LATIMER et al.** (two cases).  
(Supreme Court of South Carolina. March 4, 1895.)

#### COSTS ON APPEAL.

Where plaintiffs succeed in modifying the judgment appealed from, though only part of their grounds of appeal are sustained, they became the prevailing parties, and are entitled to costs. *Cleveland v. Cohrs*, 13 S. C. 397, and *Huff v. Watkins*, 25 S. C. 246, followed.

Appeal from common pleas circuit court of Greenville county.

Actions by Charles M. Sullivan, plaintiff, against Joseph P. Latimer and John H. Latimer, as executors of John D. Latimer, defendants, and by Thomas J. Sullivan against defendants Latimer. From the taxation of costs, plaintiffs appeal. Reversed.

R. C. Watts and Westmoreland & Haynsworth, for appellants. J. A. Mooney, J. A. McCullough, and Perry & Heyward, for respondents.

POPE, J. These actions were heard together in this court on appeal. 38 S. C. 158, 17 S. E. 701. The plaintiffs in the court below were the appellants here. The judgment of the circuit court was modified in several important particulars, involving several thousands of dollars. When the remittitur from this court reached the circuit court, and after due notice thereof, the appellants moved before the clerk of the circuit court at Greenville to tax the costs and expenses in the supreme court. After the clerk had taxed the costs and adjusted the allowances, as fixed by statute, in favor of the appellants, the Messrs. Latimer, as defendants, excepted to such taxation, contending that such costs and allowances were not properly and legally taxable against them. When their exceptions came on to be heard before his honor, Judge Norton, during the summer term, 1893, of the court of common pleas for Greenville county, he decided that such taxation of costs and allowance for expenses in the prosecution of the appeal in this court were not proper, and he accordingly held that Joseph P. Latimer was not only not liable to pay any costs to appellants, but that, on the contrary, appellants were liable to pay, and should pay, full costs of appeal to said Joseph P. Latimer; and, further, that, as between the appellants and John H. Latimer, neither party could claim costs of the other; and he di-

rected the taxation of costs to be reformed by the clerk in accordance with those views. From this order of Judge Norton, the appellants have appealed.

The circuit judge is clearly in error. Both in *Cleveland v. Cohrs*, 13 S. C. 397, and in *Huff v. Watkins*, 25 S. C. 246, this court has decided that costs allowed by law on appeals to the supreme court were to be taxed in favor of the prevailing party in such appeal. As was said in the last-cited case by Chief Justice Simpson: "Our statute, we think, gives appeal costs to the prevailing party in the appeal, without reference to the grounds of appeal." These views were sustained in the two cases of *Sease v. Dobson*, 36 S. C. 554, 15 S. E. 703, 704. There is no antagonism to the decisions by the cases of *Stepp v. Life & Maturity Association* (S. C.) 19 S. E. 490, and *Murray v. Manufacturing Co.*, 39 S. C. 457, 18 S. E. 5. In the case of *Stepp*, supra, the court ordered a new trial, unless plaintiff should remit a portion of her recovery, but provided, in case she did so remit, the judgment should be affirmed. The plaintiff did remit; thereby the judgment became affirmed. When the life and maturity association denied its liability to pay the costs of appeal, this court held that Mrs. Stepp was the prevailing party, and was therefore entitled to such costs. In the case of *Murray v. Manufacturing Co.*, supra, —a contest case between two defendants, the Fidelity Company on the one side, and the Bank of New York on the other,—while the bank did not get all it claimed against the Fidelity Company on appeal, still it gained several thousand dollars. The bank claimed its costs of appeal, and this court decided that it was entitled to such costs because it was the prevailing party on appeal. So, in the case at bar, the plaintiffs, Charles M. Sullivan and Thomas J. Sullivan, have succeeded in modifying the judgment appealed from, and, although all their grounds of appeal were not sustained, some of them were, and thus they became "the prevailing parties." It is therefore apparent that the circuit judge was in error. It is the judgment of this court that the order of Judge Norton be reversed, and the cause be remanded to the circuit court, with direction that such court allow the appellants here their costs as the same were taxed by the clerk of the circuit court.

(43 S. C. 264)

#### HAMMOND v. FOREMAN.

(Supreme Court of South Carolina. March 4, 1895.)

#### EQUITY PRACTICE—SUBMISSION TO JURY—APPEALABLE ORDER.

1. Act 1890 (20 St. at Large, 695), providing the methods by which a trial by jury in equitable actions may be had, does not deprive the chancellor of the discretionary power to submit issues of fact to a jury whenever he deems it necessary for the enlightenment of the court.



2. An order by the court sitting in equity, submitting to a jury certain issues involving fraud, does not involve the merits or deny any legal right, and is therefore not appealable.

Appeal from common pleas circuit court of Aiken county; J. J. Norton, Judge.

Action by E. S. Hammond, as trustee, against Thomas L. Foreman. From an order submitting certain issues of fact to a jury, plaintiff appeals. Affirmed.

M. B. Woodward, for appellant. Henderson Bros., for respondent.

POPE, J. It seems that this action, which was on the equity side of the court of common pleas, had been placed on its appropriate calendar, No. 2. The defendant, in his answer, raised a question of fact, and, desiring an issue framed to try the same, gave a notice in writing that he would move the court on the first day of its session to frame such issues of fact for trial by jury. Neither counsel for plaintiff nor defendant happened to be present in court when his honor, Judge Norton, called for issues, as required by the act of 1890 (20 St. at Large, 695); but subsequently, and before the juries for the term had been discharged, the counsel for defendant called up his motion. The order was objected to, because not in time, under the act of 1890, *supra*. The circuit judge, as a chancellor, when the cause was reached on the call of calendar No. 2, passed an order reciting that defendant was not entitled to his order under the above act, but held and announced that questions of fraud in an equitable action are peculiarly appropriate to a jury trial for the enlightenment of the court, and settled these issues for trial before a jury. The plaintiff, conceiving that the act of 1890 was exhaustive as to the mode by which trial by jury of issues of fact in an equitable action may be had, appealed from such order of the circuit judge, and his six grounds of appeal present this question in its several phases.

The defendant assails the appellant's right of appeal. Clearly the appellant has no right of appeal at this time, unless the order in question involves the merits, or, if renounced, will lead to a denial by the court of some substantial legal right of the appellant here. This would be the case if this court should hold that the act of 1890, *supra*, deprived a chancellor of the power of submitting issues to a jury whenever, in his judgment, such a course was necessary to the enlightenment of the conscience of the court. For this court to adopt such a view of the effect of the act in question would work a radical change in the machinery of the court of equity as it has existed from time immemorial. We cannot view this act of 1890 as intended for such a purpose, or as working out such a result. If we did, we would not hesitate to declare it unconstitutional, as subversive of the provisions of the constitution relating to courts of common pleas and this court in

equitable actions. This last course is not necessary in the view of this court. Hence we think the circuit judge, sitting as a chancellor, had a perfect right, in his discretion, as such, to order these issues for a trial by jury; and his order, therefore, did not involve the merits, nor did it amount to a practical denial of a substantial legal right of the appellant. The order was not appealable. It is the judgment of this court that the order of the circuit court now appealed from be remanded to the circuit court, for a trial by jury of the issues framed by the order of Judge Norton, and thereafter for a hearing of the action by the circuit court as in chancery, untrammelled by the provisions of the act of 1890, as found in 20 St. at Large, 695.

GARY, J., concurs in result.

(43 S. C. 205)

### STATE v. SULLIVAN.

(Supreme Court of South Carolina. Feb. 29, 1895.)

NEW TRIAL — NEWLY-DISCOVERED EVIDENCE — DEATH OF WITNESS — MURDER — EXPERT EVIDENCE — EXCLUSION OF EVIDENCE — PREJUDICE — SELF-DEFENSE — ANIMUS OF DECEASED — WITNESS — IMPEACHMENT — FAILURE TO REQUEST — MISCONDUCT OF JURY — REMARKS OF COUNSEL.

1. A new trial will not be granted on the ground of newly-discovered evidence where the proposed witness died after the motion for a new trial was made, but before it was decided.

2. It is error to refuse to allow defendant's attorney, on cross-examination, to ask a medical expert introduced by the state his opinion as to how deceased was standing towards the pistol when the ball entered his body.

3. Where evidence offered by defendant is erroneously excluded, but is afterwards admitted, defendant is not prejudiced.

4. Where defendant alleged self-defense, it was proper to exclude evidence that deceased, before the killing, in speaking of defendant, stated that he was not fit to live in a civilized community, as such statement did not amount to a threat, or necessarily show ill feeling on the part of deceased for the prisoner.

5. Where a witness for the state, in answer to a question as to whether before the trial he did not make a certain statement which was at variance with his testimony, answers, "I do not remember whether I used those words or not," and the words referred to were relevant to the issue, the defense may show that the witness did use the words.

6. A charge that, "If defendant honestly, and with good reason, considered that the note which it is alleged he received on the morning of the fatal encounter was a threat on the part of deceased to do him some bodily harm, and when they afterwards met the conduct of deceased was such as to indicate an intention of immediately carrying that threat into execution, the defendant, if without fault in bringing on the difficulty, was justified in standing his ground, and using such means for his own defense, and, if death ensued thereby, the homicide would be excusable," was properly refused, as it was the province of the jury to determine whether the circumstances justified the belief that defendant was in danger, and because it failed to state that, where there are other available means by which the shedding of human blood might be avoided, it cannot be said that there was any such necessity to take human life as would excuse the slayer.

7. Where a charge was very full, and de-



defendant failed to request any propositions of law, defendant cannot complain that such propositions were not submitted to the jury.

8. A charge on self-defense, which authorizes the jury to determine from particular facts, and not from all the facts, in the case, the right of defendant to shoot, was properly refused.

9. A charge on self-defense, which fails to state that a person cannot take human life where there are available means by which the shedding of human blood can be avoided, was properly refused.

10. A charge that simply drawing a pistol in a quarrel is not an assault is erroneous.

11. Where the facts on which it is sought to set aside a verdict for misconduct of the constable in charge of the jury are disputed, the action of the trial court in refusing to set the verdict aside will not be disturbed.

12. Remarks of prosecuting attorney, not objected to on the trial, will not be considered on appeal.

McIver, C. J., dissenting.

Appeal from general sessions circuit court of Anderson county; Ernest Gary, Order Judge, and W. H. Wallace, Case Judge.

J. Mims Sullivan, convicted of murder, appeals. Pending appeal, a motion was made by defendant for a new trial, on the ground of after-discovered evidence, overruled, and, on appeal, the order overruling it affirmed. Reversed.<sup>1</sup>

S. W. Melton, Perry & Heyward, J. A. McCullough, J. W. Gray, J. E. Breazeale, Murray & Watkins, and M. L. Bonham, for appellant. M. F. Ansel, Earle, Orr & Mooney, and Tribble & Prince, for the State.

GARY, J. This was a motion for a new trial, on the ground of after-discovered evidence, previous leave therefor having been granted by the supreme court. All the affidavits used in the supreme court upon the

motion to suspend the hearing of the appeal until the appellant could make a motion in the circuit court for a new trial, on the ground of after-discovered evidence, were used on the circuit. Among these was the affidavit of W. B. Stoddard, which will be set out in the report of the case. The said W. B. Stoddard died suddenly, subsequent to the hearing of the motion to suspend hearing of the appeal by this court, and before the hearing of the motion herein on circuit.

After hearing read the said affidavits, and after argument of counsel, his honor, Judge Gary, signed the order, which will also be incorporated in the report of this case. The following is appellant's exception to said order: "His honor erred in holding that, W. B. Stoddard having died since the making of the affidavit, the same could not, under the rules of law, be used on the trial of the cause, and it, therefore, not appearing that the result would probably be different from the other evidence exclusive of this, the motion should be refused; whereas he should have held that the said affidavit was properly before the court, was competent for the purposes of said motion, and was entitled to as much consideration as if the said W. B. Stoddard had not died." If the circuit judge had granted a new trial, the testimony of W. B. Stoddard could not have been introduced in evidence upon such trial, because of the death of the said W. B. Stoddard, and the circuit judge was not in error in refusing to consider said affidavit. The courts are not organized for the purpose of deciding legal abstractions. These views are in harmony with the principles announced in the case of State v. Ezzard, 19 S. E. 854, the syllabus of which is as follows: "A motion to

<sup>1</sup>The following are the affidavit of W. B. Stoddard, referred to in the opinion, and the order of the lower court:

"Personally comes W. B. Stoddard, who, upon oath, says: That he was well acquainted with Herman G. Gilreath, and that he knows the defendant, J. Mims Sullivan. That he was a personal friend of the deceased, Herman G. Gilreath. That on the evening of the 18th day of June, 1892, in the city of Greenville, between the hours of 10 and 11 o'clock p. m., he met, in the Mansion House, Herman G. Gilreath. They walked out of the Mansion House together, and walked up Main street to Humphrey's shoe store, and stopped at the corner. As deponent and Herman G. Gilreath walked up the street together, and when at the corner aforesaid, he told this deponent that he had had a difficulty with one J. Mims Sullivan, the defendant, and that he, Gilreath, intended on the following morning to write to said Sullivan a note, and that he, Gilreath, intended to give Sullivan a street caning for the gross insult that he had given him, presenting his walking cane at the same time; further stating that he did not want to shoot Sullivan, and said, if Sullivan resented the caning, and it was necessary, he would use 'this thing,' presenting his pistol. Deponent warned the said Gilreath, at the time of making statement, that he should not be talking in that way, even if he intended to do a thing of that kind, whereupon he asked in reply this deponent to 'say nothing about what he had told him,'

'that he would hear from the whole matter before sundown on the following day.' That deponent did not tell any one of the conversation until after the defendant had been tried and convicted. That deponent is an attorney at law, and is clerk and attorney for the board of county commissioners for Greenville county.

"This is a motion made before me, upon affidavits pro and con, for a new trial upon after-discovered evidence, the supreme court having suspended the appeal in the case until this motion can be made. After hearing the motion, and giving due consideration to the same, and after argument of counsel, the state having shown, among other things, that one of the material witnesses, to wit, W. B. Stoddard, has died since the making of his affidavit, and that two of the other persons whose affidavits are material which were used have been convicted of infamous offenses, and that the same could not, under the rules of law, be used in the trial of the cause, and it, therefore, not appearing to me that the result would probably be different from the other evidence exclusive of this, I cannot grant the motion. It is therefore considered by the court and ordered that the motion for a new trial upon after-discovered evidence be, and the same is hereby, refused. It is further ordered that a copy of this order be certified to by the clerk of this court, and be sent to the clerk of the supreme court of this state, to be there filed with the record of this case in that court. 28th June, 1894. Ernest Gary, Presiding Judge."

suspend an appeal, to enable defendant to move for a new trial on the ground of newly-discovered evidence, will be overruled where it is supported only by affidavits of defendants, who did not testify on the trial, as to his connection with the transactions out of which the prosecution arose, and of witnesses residing beyond the jurisdiction of the court." (Italics ours.) The importance of the fact that the witnesses are within the jurisdiction of the court is shown by the case of *State v. Files*, 3 Brev. 304, in which the court, in refusing a motion for continuance on the ground of the absence of material witnesses, says: "Three things are necessary: (1) That the witness is really material, and appears to the court so to be; (2) that the party who appears has been guilty of no neglect; (3) that the witness can be had at the time to which the trial is deferred." It is the judgment of this court that the order of the circuit court be affirmed.

#### On the Merits.

J. Mims Sullivan, the appellant herein, was indicted for murder, in killing Herman G. Gilreath, in Greenville, in said state, on the 14th of June, 1892. The case was continued by the defense on account of the absence of material witnesses, and at the fall, 1892, term of court, the defense moved for a change of venue, and challenged the array of jurors, on the ground that the sheriff of Greenville county, who was one of the officers charged with drawing the juries and with summoning them, was a half-brother of the deceased. The challenge to the array was sustained, the venue changed, and the case ordered to Anderson, for trial. The case came on for trial at the October, 1893, term of the court of general sessions for Anderson county, before his honor, W. H. Wallace, presiding judge, and a jury duly impaneled. Testimony was introduced in behalf of the state, and also in behalf of the defendant. After being charged by his honor, the presiding judge, the jury rendered a verdict of "Guilty." The prisoner was sentenced by the presiding judge to be hanged on Friday, the 22d of December, 1893. The defendant's counsel gave due notice of intention to appeal, and obtained an order staying execution of the sentence until the termination of the appeal. The appellant filed 18 exceptions, which will now be considered.

First exception: Because his honor erred in excluding the answer of Dr. Swandale, the state's expert, who made the post mortem examination of the deceased, to the question, on cross-examination: "Now, in your opinion, how was the deceased standing towards the pistol when the ball entered?" In the case of *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, Chief Justice McIver, speaking in behalf of the court, says: "The next question objected to was designed to elicit from the

witness his opinion as to the position in which the gun must have been to produce the wounds found on the body. The court, after instructing the witness first to state the facts upon which he based his opinion, and then give his opinion, overruled the objection. The witness who was called on to make the post mortem seems to have made a very intelligent and careful examination, and proceeded to state the facts which such examination revealed, and the opinion which he had framed from such facts, to the effect that the muzzle of the gun must have been higher than the man who was shot. This, it seems to us, was clearly competent. See *Selbles v. Blackwell*, 1 McM. 56; *Jones v. Fuller*, 19 S. C. 66." In the case of *Hopt v. People*, 120 U. S. 430, 7 Sup. Ct. 614, Mr. Justice Field, as the organ of the court, uses this language: "The deceased came to his death from a blow inflicted upon the left side of his head, which crushed his skull. A post mortem examination of the body was made by a physician who was allowed, against the objection of the defendant, to give his opinion as to the direction from which the blow was delivered, after he had stated that his examination of the body had enabled him to form an intelligent opinion on that point. The ground of the objection was that the direction in which the blow was delivered was not a matter for the opinion of an expert, but one which should be left to the jury. The court overruled the objection, and the defendant excepted. The witness stated as his opinion that the blow was delivered from behind and above the head of the person struck, and from the left towards the right. \* \* \* The opinions of witnesses are constantly taken as the result of their observations on a great variety of subjects. All that is required in such cases is that the witnesses should be able to properly make the observations, the result of which they give; and the confidence bestowed on their conclusions will depend upon the extent and completeness of their examination and the ability with which it is made. The court below, after observing that every person is competent to express an opinion upon a question of identity, as applied to persons in his family or to handwriting, and give his judgment in regard to the size, color, and weight of objects, and to make an estimate as to time and distance, cited a great number of cases illustrative of this doctrine. \* \* \* Upon the same principle the testimony of the physician as to the direction from which the blow was delivered was admissible. It was a conclusion of fact, which he would naturally draw from the examination of the wound. It was not 'expert testimony' in the strict sense of the term, but a statement of a conclusion of fact, such as men who use their senses constantly draw from what they see and hear in the daily concerns of life." It

thus appears that the presiding judge was in error in excluding the testimony. The witness was, however, afterwards permitted to give such testimony, and the appellant was therefore not prejudiced by the exclusion of the testimony in the first instance. *Hopt v. People*, 120 U. S. 430, 7 Sup. Ct. 618. On the grounds last mentioned, therefore, the first exception is overruled.

Second exception: Because his honor erred in excluding the statement made to Sullivan, the defendant, by one of his children, at the time the witness Robert Matthews delivered the note from deceased to Sullivan, on the morning of the killing, such conversation being a part of the res gestae of the delivery of the note. We fail to find in the arguments of appellant's counsel where any allusion is made to this exception, and we do not see how, in any point of view, the appellant has been prejudiced by the ruling of the presiding judge. See *State v. Belcher*, 13 S. C. 463; *State v. Jackson*, 32 S. C. 40-41, 10 S. E. 769; *Greenl. Ev.* § 108. The second exception is overruled.

Third exception: Because his honor erred in striking out the testimony of the witness M. L. Davis that deceased said to him some time before the killing, in speaking of the defendant, Sullivan, that he was not fit to live in a civilized community. This expression did not amount to a threat, nor did it necessarily show ill feeling on the part of the deceased towards the prisoner. Furthermore, the witness was permitted, immediately after the said testimony was excluded, to testify as to the feelings of the deceased towards the prisoner. The third exception is overruled.

Fourth exception: Because his honor erred in refusing to permit the defense to put up a witness in reply to the state's witness Finley, who swore at the trial that he did not remember whether he had made a different statement just after the trial or not, for the purpose of contradicting such witness, when the foundation for such contradiction had been properly laid. Fifth exception: Because his honor erred in refusing to permit the defendant to put up a witness in reply to the state's witness Finley, who swore at the trial that he did not remember whether he had made a different statement when the facts were fresh in his mind, and leaving the jury to determine the weight which should be given to his last statement, under the circumstances. These two exceptions will be considered together. The only objection to the introduction of this testimony was because the witness said: "I do not remember whether I used those words or not," etc. The general rule on this subject is stated in *Greenleaf on Evidence* (section 462) as follows: "The credit of a witness may also be impeached by proof that he has made statements out of court contrary to what he has testified at the trial. But it is only in such matters as are relevant to the issue that the

witness can be contradicted." *S. P. Nettles v. Harrison*, 2 McCord, 230; *Anon.*, 1 Hill (S. C.) 251; *Smith v. Henry*, 2 Bailey, 118; *Jones v. M'Neil*, Id. 466. It is insisted, however, that the case of *State v. Bodie*, 33 S. C. 118, 11 S. E. 624, lays down the rule that the witness cannot be impeached by showing he has made statements at another time contrary to those made on the stand, if he testifies that he does not remember making such contrary statements. The court in that case, after holding that the testimony was wholly incompetent and irrelevant, does say: "In addition to this, it does not appear that Arthur denied the statements which were attributed to him, but simply said that he had no recollection of using any such language." This language must be construed in connection with the facts of the particular case in which it was used. The testimony of the witness in that case, being incompetent and irrelevant, could not have been impeached by contrary statements made on the other occasions, even if he had denied making such contradictory statements. See authorities *supra*. *Starkle on Evidence*, at page 213, thus states the rule: "If the witness neither directly admit nor deny the act or declaration, as when he merely says that he does not recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember." 7 Am. & Eng. Enc. Law, p. 109, says: "Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the action, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion; and, if he does not distinctly admit that he has made such a statement, proof may be given that he did not in fact make it." The evidence which the witness Finley gave on the stand was unquestionably relevant, and the testimony of contradictory statements at other times should not have been excluded. The fourth and fifth exceptions are sustained.

Sixth exception: Because his honor erred in refusing to charge defendant's request to charge "5 A," upon the subject of threats. It is as follows: "If the defendant honestly and with good reason considered that the note which it is alleged he received on the morning of the fatal encounter was a threat on the part of deceased to do him some serious bodily harm, and if, when they afterwards met, the conduct of the deceased was such as to indicate an intention of immediately carrying such threat into execution, the defendant, if without fault in bringing on the difficulty, was justified in standing his ground and using such means for his own defense, and, if death ensued thereby, the

homicide would be excusable." In the case of *State v. McGreer*, 13 S. C. 484, the circuit judge was requested to charge the jury: "If the prisoner really thought his life was in danger, or he was in danger of great bodily harm, he is not guilty, *provided he did not negligently come to his conclusion.*" (Italics ours.) This he refused to do, but charged that the prisoner was not to be the judge as to the necessity "to inflict the battery, but that the jury was to judge of the necessity." Upon the appeal to the supreme court, the following rule was laid down by this court: "To make out a case of self-defense, two things are necessary: (1) The evidence should satisfy the jury that the accused actually believed that he was in such immediate danger of losing his life or sustaining serious bodily harm that it was necessary for his own protection to take the life of his assailant; (2) that the circumstances in which the accused was placed were such as would, in the opinion of the jury, justify such a belief in the mind of a person possessed of ordinary firmness and reason. It is not a question which depends solely upon the belief which the accused may have entertained; but the question is what was his belief, and whether, under all the circumstances as they existed at the time the violence was inflicted, the jury think he ought to have formed such belief." Chief Justice McIver, in delivering the opinion of the court in *State v. Wyse*, 33 S. C. 582, 12 S. W. 556, says: "The plea of self-defense rests upon the idea of necessity, — a legal necessity; that is, such a necessity as in the eye of the law will excuse one for so grave an act as the taking of human life. \* \* \* Whether such necessity existed in a given case must be judged of by the jury, and not by the person accused. The jury should not ask themselves the question what they would have done under the circumstances surrounding the accused at the time, \* \* \* but they should, as sworn officers of the law, look carefully at all the circumstances surrounding the accused, as they appeared at the time the fatal wound was inflicted, and ask themselves two questions: First, Did the accused at the time believe that he was in such immediate danger of losing his life or sustaining serious bodily harm that it was necessary for his own protection to take the life of his assailant? Second. Were those circumstances such as would justify such a belief in the mind of a person of ordinary firmness?" The case of *State v. McIntosh* (S. C.) 18 S. E. 1039, says: "Where it appears that there were other probable means by which the shedding of human blood might have been avoided, it cannot, with any propriety, be said that there was any such necessity to take human life as would excuse the slayer." This request was objectionable, because (1) it ignored that requirement of the law of self-defense that "the circumstances in which the accused was placed must be such as would, in the opin-

ion of the jury, justify such a belief in the mind of a person possessed of ordinary firmness and reason"; (2) it ignored that element of the law of self-defense that, "where it appears that there are other probable means by which the shedding of human blood might be avoided, it cannot, with any propriety, be said that there was any such necessity to take human life as would excuse the slayer." The sixth exception is overruled.

Seventh exception: Because his honor erred in omitting to charge the law in reference to threats and their effect as applicable to the testimony in this case, in which the effect of threats was such a prominent and important part of the testimony and case. In the case of *State v. Dodson*, 16 S. C. 463, the court says: "A judge is not bound to lay before the jury all the law which might, under any circumstances, apply to the offense charged, but only such principles as are applicable to the case as made by the evidence; and, if the party charged desires to have any other principles of the law laid down to the jury, it was his duty to request the judge to instruct the jury as to such other propositions as he may desire the jury to be informed of." The charge of his honor, the presiding judge, was very full as to the law of the case generally. The accused was represented by an array of able counsel, and it was their duty to have embodied in their requests to charge such other propositions of law as they thought were applicable to the facts in the case. The seventh exception is overruled.

Eighth exception: Because his honor erred in refusing to charge defendant's eighth request to charge. It is as follows: "If the defendant was without fault in bringing on the difficulty, and believed at the time he fired the fatal shot that deceased had thrown, or was in the act of throwing, his hand to his right hip pocket, for the purpose of drawing his pistol, he was justified in firing without retreating or waiting to become certain of the purpose of deceased in so doing." This request was not only objectionable for the reasons stated in discussing the sixth exception, but also on the ground that it was attempted to make the jury determine the right of the accused to fire without retreating, etc., from certain particular facts in the case, and not from all the facts in the case. The eighth exception is overruled.

Ninth exception: Because his honor erred in refusing to charge defendant's ninth request to charge. It is as follows: "If the jury believe that the defendant was without fault in bringing on the difficulty, and was unlawfully assailed by the deceased, and that the deceased was making towards the defendant with his stick in his hand in a threatening manner, and the stick in the hands of the deceased was sufficient to cause the defendant to apprehend serious bodily harm or death, and if the defendant believed that the object on the part of the de-

ceased in thus assaulting him was to do him some serious bodily harm, the defendant was justified to draw his pistol, and demanding of deceased 'to stand back'; and if deceased refused to stand back, or did any act manifesting an intention, real or apparent, to draw his pistol, the defendant was justified in taking the life of the deceased, if he honestly believed his life or limb was in imminent jeopardy, and, as a man of ordinary firmness and reason, was justified in that belief." This request was objectionable on two grounds: (1) Because it ignored that element of self-defense that a person cannot take human life where there are probable means by which the shedding of human blood can be avoided; and (2) because it was an attempt to make the jury arrive at their conclusion from particular facts, instead of reaching such conclusion from all the facts in the case. The ninth exception is overruled.

Tenth exception: Because his honor erred in charging the jury in reply to the request of Judge Melton, "Will your honor please explain to the jury that, if one attempts to draw a pistol, that is action?" "That would depend on circumstances whether it was an assault or not. Simply drawing a pistol in a quarrel I do not think would be an assault, unless he offered to use it upon the person of another,"—when he should have charged that if two men are in a quarrel, and one of them draws a pistol, the other is not bound to wait to ascertain what he is going to do with it, for such delay might be fatal to his life. The remark of his honor that "simply drawing a pistol in a quarrel I do not think would be an assault, unless he offered to use it upon the person of another," taken in connection with the facts of this case, was calculated to mislead the jury. From this remark the jury might reasonably come to the conclusion that two things are necessary, when a pistol is drawn in a quarrel, to constitute an assault: (1) That the pistol had to be drawn; and (2) that there was an offer to use it upon the person of another. The drawing of the pistol may itself constitute the assault. *State v. Jackson*, 32 S. C. 27, 10 S. E. 769. This exception is sustained.

Eleventh exception: Because the charge of his honor upon this defendant's request to charge "4 B" was misleading to the jury, and not responsive to any testimony in the case. It was not responsive to any testimony in the case, because no witness testified that the deceased was standing quarreling with a pistol in his hand, or that he drew a pistol at all. It was misleading to the jury, because the defendant's defense was that in a quarrel the deceased had attempted to draw a pistol, and that he shot to preserve his life, and the jury could well reason from his honor's statement that "simply drawing a pistol in a quarrel I do not think would be an assault, unless he offered to use it upon the person of another," suited

the case, for Sullivan and Gilreath were quarreling, and even if Gilreath had already drawn a pistol, unless he tried to use it, it would have been an assault. Therefore, as he did not get to draw his pistol to see whether he intended using it or not, of course he did not assault Sullivan, and he was not justified in shooting. The remark of his honor to which the appellant excepts was simply used as an illustration, and was not calculated to mislead the jury. The eleventh exception is overruled.

Twelfth exception: Because his honor erred in refusing to grant a new trial to the defendant on account of the misconduct of the constable in charge of the jury, in telling the jury that they could not see the judge, but would have to reach their verdict on the instructions that had been given them. Thirteenth exception: Because his honor erred in refusing to grant a new trial to the defendant on account of the misconduct of the jury in reaching their verdict as they did. The facts upon which these exceptions are predicated were disputed. They are not reviewable by this court. If the trial judge, in refusing the motion for a new trial, had committed error of law, this court would correct such error. No such question, however, is raised by these exceptions. The twelfth and thirteenth exceptions are overruled.

Fourteenth exception: Because his honor erred in refusing to grant a new trial to the defendant on account of the counsel for the state, Mr. Prince, making derogatory and denunciatory statements against the defendant in his argument to the jury, which nowhere appeared in the testimony. No objection was made to the remarks of Mr. Prince, but, even if objection had been made, it would not have been sufficient ground for a new trial. The fourteenth exception is overruled.

Fifteenth exception: Because his honor erred in refusing to grant a new trial to the defendant, on account of the counsel for the state, Mr. Earle, commenting to the jury on the previous action of the court in this case, the delay in coming to trial, and the change of venue, and drawing inferences unfavorable to the accused from these things, when none of them should have been permitted to be discussed by the state. When the defendant's counsel interposed their objection to the remarks of Mr. Earle, the presiding judge replied: "As I understand, the entire record has been put in evidence by consent." The record alluded to is not set forth in the case, and this court cannot determine in its absence within what bounds the remarks of Mr. Earle should have been confined. This court, however, deems it proper to say that it is in no wise to be understood as lending sanction to comments by attorneys as to matters not before the court in the particular case. The fifteenth exception is overruled.

Sixteenth exception: Because his honor erred in his charge to the jury upon the

solicitor's second request to charge, in presuming that neither of the parties had done anything to justify the other in assaulting him with a pistol. The presiding judge, after reading the concluding part of the solicitor's second request, to wit, "But neither had the right to assault the other with a pistol, and the man that did that was to blame," said, "Well, I charge you that, upon the presumption that the other had done nothing to justify or excuse it." The context clearly shows that the words "upon the presumption" were used in the sense of "provided," and we are satisfied that the jury was not misled by them. The sixteenth exception is overruled.

Seventeenth exception: Because his honor erred in his charge to the jury upon the solicitor's third request to charge. It is as follows: "That if the jury believe from the evidence that the defendant, Sullivan, in the morning of the homicide, armed himself with a pistol, intending to kill the deceased, Gilreath, if he met him that morning, and they afterwards did meet, and Sullivan did carry out his purpose by killing him, then no provocation that Gilreath might have given him immediately before the fatal shot was fired would excuse the killing, and the defendant would be guilty of murder." His honor, the presiding judge, said: "Well, I charge you that, because that proceeds upon the assumption that the killing was done with malice, as I will explain to you hereafter; that if a man meets another, and kills him upon a previously formed intention of killing him, that is murder." The request, coupled with the explanation of the presiding judge, was free from error. The seventeenth exception is overruled.

Eighteenth exception: Because his honor erred in refusing to charge the jury that the transactions of the day before the killing (June 13th) had no connection whatever with the occurrence on the day of the killing, and misled the jury by saying: "I think that would depend upon circumstances. Suppose, for instance, one man tells another, 'I will meet you tomorrow morning, and settle the matter'; the quarrel may be adjourned,"—and to counsel's statement, "It is not that in this case, may it please your honor," replied, "That is for the jury to determine," when there was no testimony to support his honor's supposition. When his honor used the words, "That is for the jury to determine," he evidently referred to the transactions of the day before the killing, and in this we see no error.

It is the judgment of this court that a new trial be granted.

McIVER, C. J. I regret to say that I am unable to concur in the conclusion that there should be a new trial in this case, for I do not think that the grounds relied upon for that purpose can be sustained. The pressure of other and more important official du-

ties forbids me from now devoting the time necessary for the preparation of the reasons for my dissent, and I do not feel justified in delaying the disposition of this appeal until I could find the time necessary for that purpose.

(43 S. C. 225)

MAYO v. SPARTANBURG, U. & C. R. CO.  
(Supreme Court of South Carolina. Feb. 23, 1895.)

COMPLAINT—AMENDMENT—LIMITATIONS.

Where an action was brought under Gen. St. § 1511 (Rev. St. § 1688), providing that a railroad company shall be liable for any property injured by fire communicated to it from a fire originating on the company's property, plaintiff will not, after an action founded on negligence has been barred by limitation, be allowed to amend his complaint by striking out the allegations therein referring to the statute, and inserting in place thereof an allegation that the injury was caused by defendant's negligence.

Appeal from common pleas circuit court of Fairfield county; T. B. Fraser, Judge.

Action by Phillip R. Mayo against the Spartanburg, Union & Columbia Railroad Company for damages caused by a fire communicated from land of defendant to land of plaintiff. From an order denying leave to amend the complaint, plaintiff appeals. Affirmed.

Ragsdale & Ragsdale, for appellant. B. L. Abney, for respondent.

POPE, J. The plaintiff instituted an action against the defendant on the 15th day of August, 1892. After a verdict from a jury in his favor, and after judgment thereon, an appeal was taken therefrom by the defendant. This court granted a new trial. 40 S. C. 517, 19 S. E. 73. Just after the new trial was granted, this court decided the two cases of Hunter v. Railroad Co. (S. C.) 19 S. E. 197, and Lipfeld v. Railroad Co., Id. 497, wherein it was established that under section 1511, Gen. St. (new section 1688 of our Revised Statutes), a right of action did not exist against a railroad for fire communicated to property contiguous to a railroad track by a locomotive engine from fire originating within the right of way of the railroad, when set out by authorized agent of said railroad, if said railroad was then operated by a leased road. When these decisions were announced, the plaintiff's complaint was as follows: "The plaintiff above named, complaining of the above-named defendant, by his amended complaint alleges: (1) That the defendant is a corporation, duly incorporated under the laws of this state, and owns and operates a railroad between the stations of Alston and Spartanburg, in the state aforesaid, operating the same through its lessee, the Richmond and Danville Railroad Company. (2) That the plaintiff is the owner of a certain plantation or tract of land near Alston, in the county of Fairfield, and state aforesaid, which lies along and over the track or roadbed of the defend-

ant. (3) That on the — day of May, A. D. 1892, the defendant, through its agent, set fire out upon its right of way, which fire was communicated to the said land of plaintiff, and burned over about two hundred acres of the same, destroying growing trees, rubbish, and other matter upon which the value and fertility of the said land in a large measure depended, to the damage of the plaintiff in the amount of three hundred dollars, and (contrary to the act of the general assembly in such cases made and provided). Wherefore the plaintiff demands judgment against the defendant for the sum of three hundred dollars damages, and for the costs of this action." So a motion was served upon the defendant's attorney by the plaintiff's attorneys that they would move "upon all the pleadings and proceedings in this action and upon the proposed amended complaint and affidavits herewith served upon you," before Judge Fraser, on the 13th day of June, 1894, at Winnsborough, S. C., for an order granting leave to the plaintiff to amend his complaint by striking out from the third paragraph thereof the words, "contrary to the form of the act of the general assembly in such case made and provided," and inserting in lieu thereof the words, "the plaintiff alleges that the defendant, by its agents and servants, did not observe ordinary care and prudence in setting out said fire, and did not observe ordinary care and prudence, in that its said agents and servants, seeing and knowing that the said fire was spreading out on the plaintiff's land, to his great damage, made no effort to extinguish the same." Accompanying this notice was the proposed complaint, which conformed strictly to the notice. These affidavits also accompanied the notice, which alleged, among other things, "that the facts upon which the plaintiff bases his right to recover in this action *as shown at the last trial* [italics ours], and as defendant is prepared again to show, are as follows: About the 16th day of May, 1892, one Jacob Powell, the section master in the employ of the defendant, caused a fire to be set out on the defendant's right of way, which was contiguous to this plaintiff's land; that the said fire was put out at a very dry season, and at a point where there was much dry, combustible matter, which was easily ignited; that it was communicated to deponent's land without any effort whatsoever on the part of defendant's agents and servants to arrest its course, although they were present, and saw the said fire spreading out on deponent's land; that the said fire was burning on the lands of deponent for two or three days; that it did great damage thereto, and endangered the deponent's buildings, and, although it was seen so burning by the defendant's agents and servants, and was known by them to have resulted from the fire set out by them on defendant's right of way as aforesaid, they made no effort whatever to extinguish the same; and this deponent alleges that the said agents and

servants of the defendant were guilty of gross negligence and want of care in setting out the said fire at the time and place aforesaid, and they were guilty of gross negligence and want of care, in that they made no effort to extinguish the said fire." The motion was heard by Judge Fraser, whereupon, on the 21st June, 1894, he made the following order: "This cause came before me at chambers, at Winnsborough, on a motion on due notice, accompanied with affidavits for leave to amend the complaint so as to add an allegation of negligence, in that there was on the part of the agents of the defendants a want of ordinary care and prudence in setting out fire on the right of way, and in that the said agents, seeing and knowing that the fire was spreading to the plaintiff's land, made no effort to extinguish the same. The complaint alleged a cause of action for damages by fire originating in defendant's right of way, under Gen. St. § 1511. The cause of this action under this section is complete without any allegation of negligence. The proposed amendment would, therefore, be objectionable, in that there would be in this complaint, thus amended, two causes of action, without stating them separately. If this difficulty were out of the way, and the proposed amendment put into the complaint as a separate cause of action, the difficulty would be that this new cause of action would be protected by the statute of limitations in the same way as if made a part of the complaint at the commencement of the action; thus a new action, and not an amendment. There are valuable remedies as to this second cause of action now proposed to be set up by way of amendment, which would have been available if the action had been commenced in reference to it when the original complaint was served, but are now lost by lapse of time, unless it can be set up by way of amendment. I think, in cases like this, the amendment ought not to be allowed. It is ordered that the motion to amend be, and the same is hereby, dismissed." From this order of Judge Fraser the plaintiff now appeals: (1) Because his honor erred in holding "that the proposed amendment would be objectionable, in that there would be in the complaint, thus amended, two causes of action, without stating them separately." (2) Because his honor erred in holding that, if "this difficulty were out of the way, and the proposed amendment put into the complaint as a separate cause of action, the difficulty would be that this new cause of action would be protected by the statute of limitations in the same way as if made a part of the complaint at the commencement of the action; thus a new action, and not an amendment." (3) Because his honor erred in holding that "there are valuable remedies as to this second cause of action now proposed to be set up by way of amendment, which would have been available if the action had been commenced in reference to it when the original complaint was served, but are now lost by the lapse of



time, unless it can be set up by way of amendment. (4) Because his honor erred in refusing the plaintiff's motion for leave to amend."

May we not venture to suggest that much of the difficulty in reconciling our different decisions will disappear when we patiently examine and compare the cases bearing upon the question of amendment? This cause is rendered absolutely necessary when a particular class of cases is to be differentiated from the much larger class of such cases. To make our meaning plain, let us state that unquestionably the case of *Lilly v. Railroad Co.*, 32 S. C. 142, 10 S. E. 932, presents an instance of the first class, and that of *Wallace v. Railroad Co.*, 34 S. C. 62, 12 S. E. 815, presents an instance of the second class. In the case of *Lilly v. Railroad Co.*, supra, the right of amendment was decided upon the express ground that when such amendment was applied for, to wit, in March, 1889, more than two years had elapsed since the death of Green Lilly (who was killed in February, 1887), and therefore the statute of this state had barred the action, and therefore the court, in granting the amendment, would nullify this statute of limitation. This was the language of this court at page 145, 32 S. C., and page 932, 10 S. E. (*Lilly's Case*, supra): "Next as to the amendment refused. Amendments are provided for in the Code, and allowed sometimes by the court for certain purposes, and, while not entirely discretionary in the sense that the ruling of the court is unappealable in all cases, yet it must be a clear case of error when its discretion will be interfered with. In this case the demurrer was properly held fatal to the complaint, the effect of which was, in substance, to turn the plaintiff out of court, on the ground that she had no cause of action. That was her status even before the demurrer was interposed, and although the motion to amend was made before the demurrer was interposed, yet when his honor considered the motion to amend he was compelled to consider whether there was anything in the complaint to amend by, and upon examination he found no cause of action stated, and, if the amendment was allowed, it would not simply supplement a faulty statement of a cause of action by adding or striking out the name of a party, or by correcting a mistake in the name of a party, etc., or by inserting other allegations material to the case, but it would be absolutely giving a cause of action when more was alleged; and in this case, when none could exist *for the reason that the two years allowed within which to bring such motion had elapsed* [*italics ours*], we think his honor was right in holding that the amendment proposed would have entirely changed the nature of the action, and therefore not allowable." Code, § 194. From the foregoing extract from the opinion of the justice who announced the judgment of this court, it is evident that the amendment was

refused because when it was applied for the statutory bar of two years had already elapsed. In the case of *Wallace v. Railroad Co.*, supra, no bar to the action existed when amendment was applied for. Hence the court sustained the right of amendment as allowed by the circuit judge. In that case, in which the complaint, as it originally existed, was faulty in failing to formally plead the fact of negligence, an amendment to accomplish this purpose was allowed under section 194 of the Code of Civil Procedure.

Now let us inquire into the cause at bar. We find that the plaintiff, after the fire in May, 1892, by which his property was injured, had two causes of action therefor against the defendant,—one under section 1511, Gen. St. (now section 1688 of our Revised Statutes); the other under the common law for negligence. In his complaint as originally prepared he set out as his cause of action that under section 1511. Having begun his action in September, 1892, any judgment therein would have entitled him to the privileges set out in section 1528, Gen. St. (now section 1691 of our Revised Statutes), which is as follows: "Whenever a cause of action shall arise against any railroad corporation for personal injury or injury to property sustained by any person or persons and such cause of action shall be prosecuted to judgment by the person or persons injured, or his or their legal representatives, said judgment shall relate back to the date when the cause of action arose, and shall be a lien as of that date of equal force and effect with the lien of employes for wages, upon the income, property, and franchises of said corporation, enforceable in any court of competent jurisdiction by attachment or levy and sale under execution, and shall take precedence and priority of payment of any mortgage, deed of trust or other security given to secure the payment of bond made by said railroad company: provided, any action brought under this section shall be commenced within twelve months from the time that said injury shall have been sustained." We remarked just a moment ago that the plaintiff had two causes of action against the defendant because of this fire set out by its authorized agents in May, 1892. In the case of *Hunter v. Railroad Co.* (S. C.) 19 S. E., at page 198, Chief Justice McIver stated the doctrine in these words: "It cannot be claimed that the provisions of section 1511 supersede the right of action at common law based upon negligence, for there is nothing in the section to indicate that the legislature intended to take away any previously existing right of action, and the contrary view is expressly recognized in *Rogers v. Railroad Co.*, 31 S. C. 388, 9 S. E. 1059, and in the recent case of *Kinard v. Railroad Co.*, 18 S. E. 119, this court expressly adopted the same view in considering a case under another section of the same chapter of the General Statutes analogous to the section now under consid-



eration, so far at least as this particular question is concerned." An examination of the complaint as originally amended, and upon which the first trial was had, will show that there are no allegations of negligence whatsoever. Under section 1511 no such allegations were necessary. *Hunter v. Railroad Co.*, supra. But in the second cause of action such allegations are necessary. Such allegations would be obliged to go in as an amendment. In view of *Lilly v. Railroad Co.*, supra, would this not be giving a cause of action when before there was none, after the expiration of the statutory period? It seems to us that it would be doing so. We cannot agree with the circuit judge that the allowance of this amendment would allow two causes of action in the same statement. If the language is stricken out referring to the action under section 1511, and the amendment proposed inserted in lieu thereof, there would only remain one cause of action. We understand the circuit judge to base his view as to this effect upon the language of the amendment purporting to give a cause of action for negligence, and he thinks the words "want of due care in putting fire out on the right of way" might sustain a cause of action in themselves. We think, if this were so, it was in the power of the circuit judge, in his order allowing the amendment, to have guarded against this result. It would not necessitate a disallowance of the amendment. We would sustain the first exception, if it would be of any service to the plaintiff in this case, but it will not be. Under the views hereinbefore expressed, we overrule the second, third, and fourth grounds of appeal. From these considerations it appears there was no reversible error in the court below. It is the judgment of this court that the order appealed from be sustained, and the appeal dismissed.

McIVER, C. J. (dissenting). It seems to me that the amendment asked for was refused in the exercise of the discretion of the circuit judge, and that, under the circumstances, his discretion was not only not abused, but was properly and wisely exercised.

(43 S. C. 233)

**KNOBELOCH v. GERMANIA SAV. BANK OF CHARLESTON.**

(Supreme Court of South Carolina. Feb. 27, 1895.)

**LIABILITIES OF BANK—CASHING CHECKS ON TRUST FUND—SUIT BY ADMINISTRATOR DE BONIS NON—FRAUD OF EXECUTOR.**

1. An implied contract arises between a bank and a depositor that the bank will pay all checks drawn by the depositor so long as there remains a sufficient amount to his credit.  
2. The liability of a bank for cashing checks drawn by its president, as executor, on a fund deposited in trust for beneficiaries under the will, with knowledge of the nature of the fund, and that he intended to convert it to his own use, can be enforced only in a court of chancery,

and a jury trial cannot be demanded as a matter of right.

3. An administrator de bonis non with the will annexed, appointed on the death of the executor named in the will, is the successor in office of such executor.

4. An administrator de bonis non with the will annexed cannot maintain an action to invalidate an executed transaction between his predecessor and the defendant on the ground of fraud and collusion between them.

5. Questions not raised in the trial court will not be considered on appeal.

Appeal from common pleas circuit court of Charleston county; I. D. Witherspoon, Judge.

Action by Jacob Knobloch, administrator, against the Germania Savings Bank of Charleston, to recover money due his intestate. From an order placing the action on the chancery side of the calendar, and from another dismissing the complaint, plaintiff appeals. Affirmed.

The complaint is as follows:

"The plaintiff, Jacob Knobloch, administrator de bonis non cum testamento annexo of the last will and testament of William Knobloch, Sr., deceased, complaining of the defendant herein, alleges:

"First. For a first cause of action: (1) That the defendant, Germania Savings Bank of Charleston, South Carolina, is, and was at the times hereinafter mentioned, a corporation duly chartered under the laws of the state of South Carolina, and carrying on a banking business in the said city of Charleston, in the state aforesaid. (2) That on or about the 26th day of September, 1890, William Knobloch, Senior, departed this life, leaving in force his last will and testament, bearing date the 19th day of November, 1874, and that the said last will and testament subsequent to the decease of the said William Knobloch, Senior, to wit, on the 6th day of October, 1880, was duly proved in common form before the Honorable W. E. Vincent, judge of probate in and for the county of Charleston, and on the same day Jacob Small and William Knobloch, Junior, the executors nominated therein, duly qualified thereon, and assumed upon themselves the burden of the administration of the estate of the said William Knobloch, Senior, deceased. (3) That on or about the 29th day of May, 1890, William Knobloch, Junior, one of the said executors, departed this life, leaving surviving his coexecutor, Jacob Small, who continued the administration of the estate of the said William Knobloch, Senior, deceased, as the surviving executor thereof. (4) That the said Jacob Small, anterior to the 7th day of February, 1891, to wit, from the — day of —, 1874, continuously and up to the date of his decease, on or about the 5th day of December, 1893, was a director and president of the defendant corporation, Germania Savings Bank of Charleston, South Carolina, and was charged with and exercised the general supervision of the affairs of said

bank. (5) That the executors of William Knobloch, Senior, deceased, anterior to and on the 7th day of February, 1891, had on deposit in the Germania Savings Bank of Charleston, South Carolina, inter alia, the sum of seven thousand seven hundred and twenty-eight 48/100 dollars, said amount belonging to the estate of the said William Knobloch, Senior, and forming a part thereof, and being the property of the cestuis que trustent thereunder, who were parties other than Jacob Small; all of which defendant well knew. (6) That on or about the 7th day of February, 1891, Jacob Small, then being a director and president of the Germania Savings Bank of Charleston, South Carolina, directed the said bank to pay over to him, and did take from the said defendant bank, the sum of two thousand dollars, the property of the estate of the said William Knobloch, Senior, deceased, as aforesaid, and then intended to and did misappropriate and convert the same to his own use, and not to the use of the said estate of the said William Knobloch, Senior, as aforesaid,—all with the knowledge of the said defendant, the Germania Savings Bank of Charleston, South Carolina; and the said misappropriation and conversion did not become known to any of the cestuis que trustent of the estate of William Knobloch, Senior, deceased, entitled to said fund, until on or about January 19, 1894. (7) That the said plaintiff, Jacob Knobloch, on or about the 19th day of January, 1894, duly qualified as administrator de bonis non cum testamento annexo of the last will and testament of William Knobloch, Senior, deceased, and letters of administration on said estate were granted to him on the same day by the Honorable A. G. Magrath, probate judge for Charleston county, state aforesaid, and he thereupon undertook the burden of the administration of the same. (8) That on or about the 29th day of January, 1894, this plaintiff made demand upon the defendant for the payment to him, as administrator de bonis non cum testamento annexo of the last will and testament of William Knobloch, Senior, deceased, of the said sum of two thousand dollars, with interest from the 7th day of February, 1891, and the said defendant refused to pay the same, or any part thereof.

"Second: For a second cause of action: (1) That the defendant, Germania Savings Bank of Charleston, South Carolina, is, and was at the times hereinafter mentioned, a corporation duly chartered under the laws of the state of South Carolina, and carrying on a banking business in the said city of Charleston, in the state aforesaid. (2) That on or about the 26th day of September, 1880, William Knobloch, Senior, departed this life, leaving in force his last will and testament, bearing date the 19th day of November, 1874, and that the said last will and testament, subsequent to the decease of the

said William Knobloch, Senior, to wit, on the 6th day of October, 1880, was duly proved in common form before the Honorable W. E. Vincent, judge of probate in and for the county of Charleston; and on the same day Jacob Small and William Knobloch, Junior, the executors nominated therein, duly qualified thereon, and assumed upon themselves the burden of the administration of the estate of the said William Knobloch, Senior, deceased. (3) That on or about the 29th day of May, 1890, William Knobloch, Junior, one of the said executors, departed this life, leaving surviving his coexecutor, Jacob Small, who continued the administration of the estate of the said William Knobloch, Senior, deceased, as the surviving executor thereof. (4) That the said Jacob Small, anterior to the 28th day of February, 1891, to wit, from the — day of —, 1874, continuously and up to the date of his decease, on or about the 5th day of December, 1893, was a director and president of the defendant corporation, Germania Savings Bank of Charleston, South Carolina, and was charged with and exercised the general supervision of the affairs of said bank. (5) That the executors of William Knobloch, Senior, deceased, anterior to the 7th day of February, 1891, had on deposit in the Germania Savings Bank of Charleston, South Carolina, inter alia, the sum of seven thousand seven hundred and twenty-eight 48/100 dollars, and anterior to, up to, and on the 28th day of February, 1891, had on deposit in the Germania Savings Bank of Charleston, South Carolina, inter alia, the sum of five thousand seven hundred and twenty-eight 48/100 dollars; said amount belonging to the estate of the said William Knobloch, Senior, and forming a part thereof, and being the property of the cestuis que trustent thereunder, who were parties other than Jacob Small, all of which defendant well knew. (6) That on or about the 28th day of February, 1892, Jacob Small, then being a director and president of the Germania Savings Bank of Charleston, South Carolina, directed the said bank to pay over to him, and did take from the said defendant bank, the sum of five thousand seven hundred and twenty-eight 48/100 dollars, the property of the estate of the said William Knobloch, Senior, deceased, as aforesaid, and then intended to and did misappropriate and convert the same to his own use, and not to the use of the said estate of the said William Knobloch, Senior, deceased, aforesaid,—all with the knowledge of the said defendant, the Germania Savings Bank of Charleston, South Carolina; and the said misappropriation and conversion did not become known to any of the cestuis que trustent of the estate of William Knobloch, Senior, deceased, entitled to said fund, until on or about January 19, 1894. (7) That the plaintiff, Jacob Knobloch, on or about the 19th day of January, 1894, duly qualified as ad-

ministrator de bonis non cum testamento annexo of the last will and testament of William Knobloch, Senior, deceased, and letters of administration on said estate were granted to him on the same day by the Honorable A. G. Magrath, probate judge for Charleston county, state aforesaid, and he thereupon undertook the burden of the administration of the same. (8) That on or about the 29th day of January, 1894, this plaintiff made demand upon the defendant for the payment to him, as administrator de bonis non cum testamento annexo of the last will and testament of William Knobloch, Senior, deceased, of the said sum of five thousand seven hundred and twenty-eight 48/100 dollars, with interest from the 28th day of February, 1891, and the said defendant refused to pay the same or any part thereof.

"Wherefore the plaintiff demands judgment against the defendant for the sum of seven thousand seven hundred and twenty-eight 48/100 dollars, together with interest on two thousand dollars thereof from the 7th day of February, 1891, and with interest on five thousand seven hundred and twenty-eight 48/100 dollars thereof from the 28th day of February, 1891, and his costs and disbursements herein."

The answer is as follows:

"The defendant above named, the Germania Savings Bank of Charleston, South Carolina, answering the complaint herein:

"First. For a first defense to the first cause of action: (1) The defendant admits the allegations of paragraphs 1, 2, 3, and 4 of the first cause of action of the complaint herein. (2) This defendant, in answer to paragraph 5 of the first cause of action of the complaint, admits that the executors of William Knobloch, Senior, deceased, anterior to and on the 7th day of February, 1891, had on deposit in the said the Germania Savings Bank of Charleston, South Carolina, inter alia, the sum of seven thousand seven hundred and twenty-eight 48/100 dollars, but it alleges that the said deposit was made and entered on its books to the credit of Jacob Small and William Knobloch, executors of the estate of William Knobloch. It denies that it had any knowledge or information sufficient to form a belief, or any knowledge whatever, as to whom the said money belonged, except as indicated by the said deposit credited as aforesaid. And this defendant denies every other allegation of said paragraph 5 not specially answered by this paragraph of this answer. (3) As to the allegations contained in paragraph 6 of the first cause of action of the complaint herein, this defendant admits that on or about the 7th day of February, 1891, Jacob Small was a director and president of this defendant, and it alleges that the said Jacob Small, as surviving executor of the will of the said William Knobloch, Senior, drew of the said amount on deposit in the said the Germania

Savings Bank of Charleston, South Carolina, as stated in the last preceding paragraph of this answer, the sum of two thousand dollars, which was then and there paid to him; but this defendant denies that the said Jacob Small, as president or director of the said the Germania Savings Bank, directed the said bank to pay over to him the said sum of two thousand dollars. This defendant denies that it had any knowledge or information sufficient to form a belief, or any knowledge whatever, as to whom the said money belonged, except as indicated by the said deposit account; and not only denies any knowledge or information sufficient to form a belief as to whether or not the said Jacob Small then intended to misappropriate and convert the same to his own use and not to the use of the said estate of William Knobloch, Senior, but denies that it knew, or had any reason to suspect, when said money was drawn out and paid as aforesaid, that said Jacob Small intended to misappropriate and convert the same to his own use, and not to the use of the said estate of William Knobloch. This defendant has no knowledge or information sufficient to form a belief as to whether or not any misappropriation and conversion of the said money by the said Jacob Small, as alleged in said paragraph 6 of said first cause of action of the complaint, was made, and as to when such misappropriation and conversion, if any such there has been, became known to any of the cestuis que trustent of the estate of William Knobloch, Senior, deceased. And this defendant denies each and every other allegation of said paragraph 6 of said first cause of action of the complaint not hereinbefore in this paragraph of this answer specially answered. (4) This defendant admits the allegations of paragraphs 7 and 8 of the first cause of action of the complaint.

"Second. For a second defense to the first cause of action: (1) This defendant admits the allegations of paragraphs 1, 2, 3, and 4 of the first cause of action of the complaint. (2) In answer to paragraph 5 of the first cause of action of the complaint this defendant admits that the executors of William Knobloch, Senior, deceased, anterior to and on the 7th day of February, 1891, had on deposit in the Germania Savings Bank of Charleston, South Carolina, inter alia, the sum of seven thousand seven hundred and twenty-eight 43/100 dollars, but it alleges that the said deposit was made and entered on its books to the credit of Jacob Small and William Knobloch, executors of the estate of William Knobloch. It denies that it had any knowledge or information sufficient to form a belief, or any knowledge whatever, as to whom said money belonged, except as indicated by the said deposit credited as aforesaid; and this defendant denies every other allegation of said paragraph 5 not specially answered by this paragraph of this answer. (3) As to the al-

legations contained in paragraph 6 of the first cause of action of the complaint herein, this defendant admits that on or about the 7th day of February, 1891, Jacob Small was a director and president of this defendant, and it alleges that the said Jacob Small, as surviving executor of the last will and testament of the said William Knobeloch, Senior, drew of the said amount on deposit in the said bank, as stated in the last preceding paragraph of this answer, the sum of two thousand dollars, which was then and there paid to him; but this defendant denies that said Jacob Small, as president or director of said bank, directed said bank to pay over to him said sum of two thousand dollars. This defendant denies that it had any knowledge or information sufficient to form a belief, or any knowledge whatever, as to whom said money belonged, except as indicated by said deposit account; and not only denies any knowledge or information sufficient to form a belief as to whether or not said Jacob Small then intended to misappropriate and convert the same to his own use, and not to the use of said estate of William Knobeloch, Senior, but denies that it knew, or had any reason to suspect, when said money was drawn out and paid as aforesaid, that said Jacob Small intended to misappropriate and convert the same to his own use, and not to the use of the said estate of William Knobeloch. This defendant has no knowledge or information sufficient to form a belief as to whether or not any misappropriation and conversion of said money by said Jacob Small, as alleged in said paragraph 6 of said first cause of action of the complaint, was made, and as to when such misappropriation and conversion, if any such there has been, became known to any of the cestuis que trustent of the estate of William Knobeloch, Senior, deceased. And this defendant denies each and every other allegation of said paragraph 6 of said first cause of action of the complaint not hereinbefore in this paragraph of this answer specially answered. (4) This defendant admits the allegations of paragraphs 7 and 8 of the first cause of action of the complaint. (5) This defendant, further answering, alleges on information and belief, acquired since the commencement of this action, as follows, to wit: That the last will and testament of William Knobeloch, Senior, mentioned in paragraph 2 of the first cause of action of the complaint, is, as shown by the copy thereof, hereto annexed, marked 'Exhibit A,' and made a part of this answer. That Joseph Knobeloch, mentioned in said last will and testament, predeceased the testator, William Knobeloch, Senior, deceased, unmarried, intestate, and without issue. That a partition and division of the estate of said William Knobeloch, Senior, was made by his said executors some time previous to the 5th day of February, 1891, and during the lifetime of said William Knobeloch, Jr., one of the said executors, wherein and

whereby the said executors set apart one-third of said testator's estate, according to the direction of said testator's will, for Susan Knobeloch, his widow, and divided the remaining two-thirds thereof into four equal shares, paying over, transferring, and delivering one of said shares to William Knobeloch, Junior, one of said shares to Jacob Knobeloch, and one of said shares to John Knobeloch, and retaining the other one share, holding the same in trust for Fredericka Ostendorff, on the trust set out in reference to her share in the will of said testator. And this defendant further alleges, on information and belief acquired since the commencement of this action, that a part of the said one-third of the estate of said testator, William Knobeloch, Senior, so set apart for Susan Knobeloch, consisted of certain money on deposit to the credit of the said Jacob Small and William Knobeloch, executors of estate of William Knobeloch, in said Germania Savings Bank of Charleston, South Carolina; that on or about the 29th day of May, 1890, the said William Knobeloch, Junior, one of the sons, and also one of the executors, as aforesaid, of said testator, William Knobeloch, Senior, died, leaving his last will and testament, whereby he appointed his wife, Eliza G. Knobeloch, sole executrix, but, in case of her marriage, appointed Jacob Knobeloch and Jacob Small executors thereof, which said last will and testament of the said William Knobeloch, Junior, was admitted to probate before the judge of probate for Charleston county, aforesaid, on 4th June, 1890, when said Eliza G. Knobeloch qualified as executrix thereon; that upon the death of the said William Knobeloch, Junior, the said Jacob Small, having survived him, under the power contained in the said last will and testament of William Knobeloch, Senior, by an instrument of writing dated 5th February, 1891, a copy of which is hereto annexed, marked 'Exhibit B,' and made a part of this answer, substituted Jacob Knobeloch as trustee of Fredericka Ostendorff under said will in place of William Knobeloch, Junior, deceased; that the said Susan Knobeloch, widow of William Knobeloch, Senior, died on or about 29th November, 1890, whereupon, in the months of January and February, 1891, said Jacob Small, then surviving executor of the said last will and testament of said William Knobeloch, Senior, made a partition of the said one-third of the estate of said William Knobeloch, Senior, and which consisted in part of said money on deposit in said bank, as aforesaid, paying one-fourth part of said money to said Jacob Knobeloch, one-fourth part thereof to said John Knobeloch, and deposited one-fourth part thereof to his credit as Jacob Small, surviving executor under the will of William Knobeloch, Senior, which said deposit is still in said bank, undrawn, and for which deposit the bank book is in the possession of the said Eliza G. Knobeloch, who claims

the said deposit as executrix of William Knobloch, Junior. And this defendant alleges that on the 7th day of February, 1891, the said Jacob Small, as surviving executor, as aforesaid, drew out of said bank two thousand dollars, as hereinbefore mentioned, of the amount remaining to the credit of said account in said bank with said executors of William Knobloch, Senior, as aforesaid, and on the 28th day of February, 1891, drew out of said amount five thousand seven hundred and twenty-eight 48/100 dollars, the balance thereof; that this defendant has no knowledge or information sufficient to form a belief, nor any information whatever, as to whether the said sum of two thousand dollars was misappropriated and converted by said Jacob Small as alleged in the complaint, or was paid by him to such of the parties as were entitled thereto under said last will and testament of said William Knobloch, Senior. And this defendant further alleges on information and belief that said John Knobloch died on or about the — day of —, 1893, leaving his last will and testament, which was duly admitted to probate before the probate judge for Charleston county, aforesaid, on January 21, 1893, when Jacob Knobloch, executor therein named, qualified as such. And this defendant further alleges that said Jacob Small died on or about the 5th day of December, 1893, leaving his last will and testament, which was duly proved before the judge of probate for Charleston county on the 11th day of December, 1893, and that letters of administration with the will annexed were issued by said judge of probate to Rudolph Siegling on 4th January, 1894. That the said Jacob Knobloch, individually and as executor of John Knobloch and as trustee of Fredericka Ostendorff under the said will of said William Knobloch, Senior, the said Eliza G. Knobloch, as executrix of the will of said William Knobloch, Junior, and said Rudolph Siegling, as administrator of the will of Jacob Small, are necessary parties to this action.

"Third. For a first defense to the second cause of action: (1) This defendant admits the allegations of paragraphs 1, 2, 3, and 4 of the second cause of action of the complaint. (2) This defendant, in answer to paragraph 5 of the second cause of action of the complaint, admits that the executors of William Knobloch, Senior, deceased, anterior to and on the 7th day of February, 1891, had on deposit in the said the Germania Savings Bank of Charleston, South Carolina, *inter alia*, the sum of seven thousand seven hundred and twenty-eight 48/100 dollars, and anterior and up to and on the 28th day of February, 1891, the sum of five thousand seven hundred and twenty-eight 48/100 dollars; but it alleges that the said deposits were made and entered on its books to the credit of Jacob Small and William Knobloch, executors estate of William Knobloch. It denies that it had any knowledge or information sufficient to form a be-

lief, or any knowledge whatever, as to whom said money belonged, except as indicated by the said deposit credited as aforesaid. And this defendant denies every other allegation of said paragraph 5 not specially answered by this paragraph of this answer. (3) As to the allegations contained in paragraph 6 of the second cause of action of the complaint herein, this defendant admits that on or about the 28th day of February, 1891, Jacob Small was a director and president of this defendant, and it alleges that the said Jacob Small, as surviving executor of the will of the said William Knobloch, Senior, drew of the said amount on deposit in the said the Germania Savings Bank of Charleston, South Carolina, as stated in the last preceding paragraph of this answer, the sum of five thousand seven hundred and twenty-eight 48/100 dollars, which was then and there paid to him; but this defendant denies that the said Jacob Small, as president or director of the said the Germania Savings Bank, directed the said bank to pay over to him the said sum of five thousand seven hundred and twenty-eight 48/100 dollars. This defendant denies that it had any knowledge or information sufficient to form a belief, or any knowledge whatever, as to whom the said money belonged, except as indicated by the said deposit account; and not only denies any knowledge or information sufficient to form a belief as to whether or not the said Jacob Small then intended to misappropriate and convert the same to his own use, and not to the use of the said estate of William Knobloch, Senior, but denies that it knew, or had any reason to suspect, when said money was drawn out by and paid as aforesaid, that said Jacob Small intended to misappropriate and convert the same to his own use, and not to the use of the said estate of William Knobloch. This defendant has no knowledge or information sufficient to form a belief as to whether or not any misappropriation and conversion of the said money by the said Jacob Small, as alleged in said paragraph 6 of said second cause of action of the complaint, was made, and as to when such misappropriation and conversion, if any such there has been, became known to any of the cestui que trust of the estate of William Knobloch, Senior, deceased. And this defendant denies each and every other allegation of said paragraph 6 of said second cause of action of the complaint not hereinbefore in this paragraph of this answer specially answered. (6) This defendant admits the allegations of paragraphs 7 and 8 of the second cause of action of the complaint.

"Fourth. For a second defense to the second cause of action: (1) This defendant admits the allegations of paragraphs 1, 2, 3, and 4 of the second cause of action of the complaint. (2) This defendant, in answer to paragraph 5 of the second cause of action of the complaint, admits that the executors of William Knobloch, Senior, deceased, ante-

rior to and on the 7th day of February, 1891, had on deposit in the said the Germania Savings Bank of Charleston, South Carolina, inter alia, the sum of seven thousand seven hundred and twenty-eight 48/100 dollars, and anterior and up to and on the 28th day of February, 1891, the sum of five thousand seven hundred and twenty-eight 48/100 dollars; but it alleges that the said deposits were made and entered on its books to the credit of Jacob Small and William Knobloch, executors of estate of William Knobloch. It denies that it had any knowledge or information sufficient to form a belief, or any knowledge whatever, as to whom the said money belonged, except as indicated by the said deposit credited as aforesaid. And this defendant denies every other allegation of said paragraph 5 not specially answered by this paragraph of this answer. (3) As to the allegations contained in paragraph 6 of the second cause of action of the complaint herein, this defendant admits that on or about the 28th day of February, 1891, Jacob Small was a director and president of this defendant, and it alleges that the said Jacob Small, as surviving executor of the will of the said William Knobloch, Senior, drew of the said amount on deposit in the said the Germania Savings Bank of Charleston, South Carolina, as stated in the last preceding paragraph of this answer, the sum of five thousand seven hundred and twenty-eight 48/100 dollars, which was then and there paid to him; but this defendant denies that the said Jacob Small, as president or director of the said the Germania Savings Bank, directed the said bank to pay over to him the said sum of five thousand seven hundred and twenty-eight 48/100 dollars. This defendant denies that it had any knowledge or information sufficient to form a belief, or any knowledge whatever, as to whom the said money belonged, except as indicated by the said deposit account, and not only denies any knowledge or information sufficient to form a belief as to whether or not the said Jacob Small then intended to misappropriate and convert the same to his own use, and not to the use of the said estate of William Knobloch, Senior, but denies that it knew, or had any reason to suspect, when said money was drawn out and paid as aforesaid, that the said Jacob Small intended to misappropriate and convert the same to his own use, and not to the use of the said estate of William Knobloch. This defendant has no knowledge or information sufficient to form a belief as to whether or not any misappropriation and conversion of the said money by the said Jacob Small, as alleged in said paragraph 6 of said second cause of action, was made, and as to when such misappropriation and conversion, if any such there has been, became known to any of the cestuis que trustent of the estate of William Knobloch, Senior, deceased. And this defendant denies each and every other allegation of said para-

graph 6 of said second cause of action of the complaint not hereinbefore in this paragraph of this answer specially answered. (4) This defendant admits the allegations of paragraphs 7 and 8 of the second cause of action of the complaint. (5) This defendant, further answering, alleges on information and belief acquired since the commencement of this action, as follows, to wit: That the last will and testament of William Knobloch, Senior, mentioned in paragraph 2 of the second cause of action of the complaint, is, as shown by the copy thereof, hereto annexed, marked 'Exhibit A,' and made a part of this answer. That Joseph Knobloch, mentioned in said last will and testament, predeceased the testator, William Knobloch, Senior, unmarried, intestate, and without issue. That a partition and division of the estate of said William Knobloch, Senior, was made by his said executors some time previous to the 5th day of February, 1891, and during the lifetime of said William Knobloch, Junior, one of said executors, wherein and whereby the said executors set apart one-third of said testator's estate, according to the direction of said testator's will, for Susan Knobloch, his widow, and divided the remaining two-thirds thereof into four equal shares, paying over, transferring, and delivering one of said shares to William Knobloch, Junior, one of said shares to Jacob Knobloch, and one of said shares to John Knobloch, and retaining the other one share, holding the same in trust for Fredericka Ostendorff, on the trusts set out with reference to her share in the will of the said testator. And this defendant further alleges, on information and belief acquired since the commencement of this action, that a part of the said one-third of the estate of said testator, William Knobloch, Senior, so set apart for Susan Knobloch, consisted of certain money on deposit to the credit of said Jacob Small and William Knobloch, executors of the estate of William Knobloch, in said Germania Savings Bank of Charleston, South Carolina; that on or about the 29th day of May, 1890, the said William Knobloch, Junior, one of the sons, and also one of the executors, as aforesaid, of said testator, William Knobloch, Senior, died, leaving his last will and testament, whereby he appointed his wife, Eliza G. Knobloch, sole executrix, but, in case of her marriage, appointed Jacob Knobloch and Jacob Small executors thereof, which said last will and testament of the said William Knobloch, Junior, was admitted to probate before the judge of probate for Charleston county aforesaid on the 4th day of June, 1890, when said Eliza G. Knobloch qualified as executrix thereof; that upon the death of the said William Knobloch, Junior, the said Jacob Small, having survived him, under the power contained in the said last will and testament of William Knobloch, Senior, by an instrument of writing, dated 5th February, 1891, a copy of

which is hereto annexed, marked 'Exhibit B,' and made a part of this answer, substituted Jacob Knobloch as trustee of Fredericka Ostendorff under said will, in place of William Knobloch, Junior, deceased; that the said Susan Knobloch, widow of the said William Knobloch, died on or about the 29th November, 1890, whereupon, in the months of January and February, 1891, said Jacob Small, then surviving executor of the said last will and testament of said William Knobloch, Senior, made a partition of the said one-third of the estate of said William Knobloch, Senior, which consisted in part of said money on deposit in said bank as aforesaid, paying one-fourth part of said money to said Jacob Knobloch, one-fourth part thereof to said John Knobloch, and deposited one-fourth part thereof to his credit as Jacob Small, surviving executor under the will of William Knobloch, Senior, which said deposit is still in said bank, undrawn, and for which deposit the bank book is in the possession of the said Eliza G. Knobloch, who claims the said deposit, as executrix of William Knobloch, Junior. And this defendant alleges that on the 7th day of February, 1891, the said Jacob Small drew out of said bank two thousand dollars, as hereinbefore-mentioned, of the amount remaining to the credit of said account in said bank with said executors of William Knobloch, Senior, as aforesaid, and on the 28th day of February, 1891, drew out of said amount five thousand seven hundred and twenty-eight 48/100 dollars, the balance thereof; that this defendant has no knowledge or information sufficient to form a belief, nor any information whatever, as to whether the said sum of five thousand seven hundred and twenty-eight 48/100 dollars was misappropriated and converted by said Jacob Small, as alleged in the complaint, or was paid by him to such of the parties as were entitled thereto under said last will and testament of said William Knobloch, Senior. And this defendant further alleges on information and belief that said John Knobloch, died on or about the — day of —, 1893, leaving his last will and testament, which was duly admitted to probate before the judge of probate for Charleston county, aforesaid, on January 12, 1893, when Jacob Knobloch, executor therein named, qualified as such. And this defendant further alleges that the said Jacob Small died on or about the 5th day of December, 1893, leaving his last will and testament, which was duly proved before the judge of probate for Charleston county on the 11th day of December, 1893, and that letters of administration with the will annexed were issued by the said judge of probate to Rudolph Siegling on 4th January, 1894; that the said Jacob Knobloch, individually and as executor of John Knobloch and as trustee of Fredericka Ostendorff under the said will of said William Knobloch, Senior, the said Eliza G. Knobloch, as executrix of the

will of said William Knobloch, Junior, and said Rudolph Siegling, as administrator with the will annexed of Jacob Small, are necessary parties to this action."

Bulst & Bulst, for appellant. Simons, Seigling & Cappelmann, for respondent.

POPE, J. This action was commenced on the 31st January, 1894, and came on for trial under a written stipulation between the parties, at chambers, before his honor, Judge Witherspoon, on the 14th June, 1894, in the city of Charleston, in this state. The first question submitted to the circuit judge for decision was, is the action one in chancery, and, if so, should it be placed on calendar 1 for trial? The circuit judge held that it was an action in chancery, and, therefore, that it should be placed on calendar 2, and not on calendar 1, for trial.

The next question submitted to the circuit judge was, does the complaint state facts sufficient to constitute a cause of action? The circuit judge held that it did not, and dismissed the complaint. From the two orders in writing made by Judge Witherspoon on these two questions, the plaintiff has appealed on these seven grounds: (1) Because his honor erred in holding that the pleadings show a case in chancery; (2) because his honor erred in ordering this action stricken from calendar 1 and placed on calendar 2; (3) because his honor erred in holding that the plaintiff, in his complaint, does not state facts sufficient to constitute a cause of action against the defendant; (4) because his honor should have held that the plaintiff could maintain this action as administrator de bonis non cum testamento annexo; (5) because his honor erred in sustaining defendant's oral demurrer, and dismissing the complaint; (6) because his honor erred in not holding that the defendant had waived the right to question plaintiff's legal capacity to sue, having failed to do so by written demurrer, or to mark it in his answer; (7) because his honor erred in not holding that defendant's demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action was defective, because it failed to state wherein the pleading objected to is insufficient.

In order that our decision of the matter involved in this appeal may be understood, it will be necessary, in the report of this case, that the complaint and answer shall be reported in full. This being done, it will be readily seen that, stripped of the verbiage necessary to the pleadings, whereby the issues are carefully presented on both sides, the plaintiff, in his representative character of administrator de bonis non cum testamento annexo of William Knobloch, Sr., deceased, seeks to recover from the defendant the sum of \$2,000, paid to one Jacob Small, as surviving executor of the last will



and testament of the said William Knobloch, Sr., deceased, on his check therefor, from funds then on deposit to his credit as said executor in the defendant bank, on the 7th February, 1891, and also the further sum of \$5,728.48, paid to said Jacob Small, as surviving executor of said last will and testament of William Knobloch, Sr., deceased, on his check therefor, from funds then on deposit to his credit as said executor in the defendant bank, on the 28th day of February, 1891, upon the ground that both of said payments, made as aforesaid, were while the said Jacob Small was the president and a director of said defendant bank, and that the defendant knew at the time such two payments were made that the said Jacob Small intended to and did misappropriate and convert the said funds deposited by him in his name as executor as aforesaid to his own use, and not to the use of the estate of his said testator, and with the further knowledge on the part of said defendant bank that said funds so deposited by the said Jacob Small, as executor, as aforesaid, were the property of certain cestuis que trustent under the said will of William Knobloch, Sr., deceased, and of which said cestuis que trustent the said Jacob Small was not one; that knowledge of these checks and the misapplication of the funds thereof only came to such cestuis que trustent about 19th January, 1894; that Jacob Small departed this life on or about the 5th day of December, 1894; that the plaintiff was appointed administrator de bonis non cum testamento annexo of the said William Knobloch, Sr., deceased, on or about the 19th day of January, 1893, by the probate court for Charleston county, in this state. The defendant, by its answer, denies its liability to pay said two sums of money, or any part thereof. Among other things, it alleges who are the cestuis que trustent under the will of the said William Knobloch, Sr., deceased, and states who is the executor of the will of Jacob Small, who died testate. The plaintiff, conceiving that his action was one which, under the law, was triable before a jury, placed the same in calendar 1 (which is the appropriate calendar for such cases). The defendant objected to the action being placed on calendar 1 for trial by jury, alleging that it was alone cognizable by a court of chancery. The judge below concurred in the latter view. Was this error? We think not, and will briefly indicate the grounds of our conclusion. When the executors of the last will and testament of William Knobloch, Sr. (of whom Jacob Small was one), placed on deposit as such executors in the defendant bank the sum of \$7,728.48, under the decisions of the court of last resort in this state (*Forgarties v. State Bank*, 12 Rich. Law, 518; *Simmons Hardware Co. v. Bank of Greenwood* [S. C.] 19 S. E. 502), then arose an implied contract between the de-

fendant bank and said executors, or the survivor of them, that such defendant bank would pay all checks drawn by such executors in such amounts, and to such persons, as may be maintained in such checks, as long as there remained to the credit of such executors in such account an amount sufficient to pay such checks. This statement as to this implied contract of the defendant bank is made substantially as a quotation from the latter case at pages 506 and 507. If this proposition of law is sound, —and under the authority of the two cases just cited we hold it to be sound law in this state,—there could be no liability in law, as distinguished from equity, upon the defendant bank, for paying the checks of the depositing executor. If the payment of such check by the defendant bank could create any liability, it must be for a breach of some trust owed by the bank to the cestuis que trustent under William Knobloch's last will. It is this liability arising from some breach of some such duty or trust alone which the plaintiff here seeks to enforce. This can alone be done in a court of chancery. The action, therefore, was not triable of right by the plaintiff before a jury. It should not have been placed on calendar 1, but on calendar 2. If we had reached a contrary conclusion, we would have been obliged to have held, of necessity, that the order or judgment sustaining the demurrer must be reversed whether we agreed with the circuit judge or not; but, having held that the circuit judge was right in ordering the action from calendar 1 to calendar 2, we will now inquire into the second proposition of error, namely, that the circuit judge erred in sustaining the demurrer.

Is the plaintiff the successor in office of Jacob Small? What office does the plaintiff hold? Clearly he has been appointed to execute the will of William Knobloch, Sr., deceased. His very appointment and his character before the court is administrator with the will annexed of William Knobloch, deceased. That will is as much the chart for his guidance and control as it would have been had he been named as executor by the testator. When it is remembered that in this case it is by the death of Jacob Small, who was the surviving executor nominated by the testator in and by his will, and that, by his death before he fully executed that trust, the plaintiff has become associated with the estate of William Knobloch, Sr., deceased, there can be no other conclusion than that the plaintiff is the successor in office of Jacob Small, now deceased. Jacob Small must have been, of necessity, his predecessor. Such being our conclusion, the next inquiry is, can the plaintiff, as such successor in office of Jacob Small, maintain in his representative capacity this action to invalidate a complete transaction between his predecessor in office, Jacob Small, and the defendant bank? We hold that he can-



not. The two cases in our state—*Johnston v. Lewis, Rice*, Eq. 40; *Steele v. Atkinson*, 14 S. C. 154—are conclusions of this contention. In the former case it was announced on circuit and affirmed on appeal that the complainants, *Johnston and Wall*, who had succeeded *Mrs. Martha G. Pickett* as the administratrix of the estate of *James R. Pickett*, deceased, could not invalidate a transaction of the first administratrix, *Mrs. Pickett*, with the defendant, *Lewis*, in that case, because of a fraudulent collusion between them; that *Mrs. Pickett* herself, as such administratrix, could not have done so; and "that all acts binding upon a predecessor are equally binding upon a successor." And the court, in that case, pointedly held that if the first administratrix, *Mrs. Pickett*, had, in collusion with the defendant, *Lewis*, committed a fraud upon the rights of the creditors or distributees of the estate of *James R. Pickett*, deceased, a right of action existed in the creditors or distributees to assail it, but that in so doing the administrators must be made parties. Also, in the second case,—*Steele v. Atkinson*,—when the decision of the supreme court was announced by the present chief justice, he said: "It appears to us that the plaintiff in the outset encounters an insurmountable obstacle which effectually prevents him from maintaining this action. He, as administrator *de bonis non*, is seeking to set aside a transaction between his predecessor and a debtor of the estate, upon the ground of a fraudulent collusion between them. He is not asking that the estate be protected from a fraud practiced upon his predecessor, the former administrator, but the ground of his complaint is that such preceding administrator himself fraudulently colluded with the debtor to the prejudice of the estate. The case of *Johnston v. Lewis, Rice*, Eq. 40, conclusively shows that the plaintiff cannot maintain the action." In the case at bar the complaint is exhibited by the administrator *de bonis non cum testamento annexo*, and not by any one of the cestuis que trustent under the will of *William Knobeloch, Sr.*, deceased, nor by any creditor of said testator. The demurrer should have been sustained, unless we can discover merit in the somewhat technical grounds to be now noticed.

In the sixth ground of appeal it is suggested that his honor, the circuit judge, ought to have held that the defendant had waived the right to question plaintiff's legal capacity to sue, having failed to do so by written demurrer, or to make it in its answer. We think that the stipulation in writing entered into before any hearing before Judge Witherspoon took place plays an important part just here. This is its language: "The above-entitled action having been placed upon calendar No. 1 of the court of common pleas for Charleston coun-

ty: (1) The defendant \* \* \*. (2) The defendant has given notice to the plaintiff of its intention to demur orally to the complaint in this action, on the ground that it does not state facts sufficient to constitute a cause of action. (3) \* \* \* It has therefore been agreed, and is hereby agreed, by the attorneys for plaintiff and the attorneys for defendant herein, that the several matters hereinbefore mentioned and enumerated be heard at chambers by his honor, Judge I. D. Witherspoon, now in the First circuit, and the said plaintiff and defendant, by their respective attorneys, by this stipulation, consent to such hearing at chambers, with the same rights of appeal to the said parties plaintiff and defendant, respectively, as if the said hearing was had in open court." Signed by Messrs. *Bulst & Bulst* for plaintiff, and Messrs. *Simons, Seigling & Cappelmann*, defendant's attorneys. It seems to us, if notice in writing had been required, this would be sufficient. It does not appear that this question was raised before the circuit judge. It is too late now.

The seventh exception imputes error to the circuit judge in not overruling the demurrer because the grounds thereof were not distinctly specified. It does not appear that this question was raised before the circuit judge. He certainly did not pass on it, and hence we are not required to do so. But we might say, in passing, that we seriously question the validity of any rule of court that seems to contravene the rights of suitors secured by statutes, and, should such a question occur, we prefer to leave ourselves free to consider and decide it after a full argument.

Having thus passed upon the different grounds of appeal, we might dismiss the subject at this point. The court feels its obligation to respond with a careful attention to the arguments and authorities cited in support of the same, and we do not know when an abler exposition of the views of both sides of a cause has been made than has appeared in the hearing of this appeal. But when we are satisfied that our own decisions furnish an answer to questions presented, we prefer to adhere to them; and this statement must serve as an explanation of our failure to comment on very many of the cases cited in the arguments on both sides of the case at bar. It is the judgment of this court that the judgment of the circuit court be affirmed.

(43 S. C. 246)

ROWLAND v. SHOCKLEY et al. (YOUNG, Intervener).

(Supreme Court of South Carolina. Feb. 28, 1895.)

ACTION ON JUDGMENT—ORDER OF REVIVAL—ENTRY ON ABSTRACT OF JUDGMENTS.

1. Code Civ. Proc. § 810, provides that a judgment shall be a lien on real estate of a debt-

or for 10 years from date, and that it may be revived within three years thereafter for a like period, by service of summons on the debtor requiring him to show cause, at the next term of court, why it should not be revived. Section 111 provides that an action on a judgment may be commenced within 20 years. *Held*, that where a judgment creditor, more than 13 years after the date of his judgment, complains on his judgment as unsatisfied, to the end that the judgment may be revived, and commences his action by service of summons and the complaint on the judgment debtor, under section 111, and does not avail himself of the provisions for revival contained in section 310 by service of summons to renew, the court may make an order reviving such judgment, which is binding on the judgment defendant and his privies.

2. Such order need not be entered in the abstract of judgments, in order to be effective.

Appeal from common pleas circuit court of Laurens county; T. B. Fraser, Judge.

Action by Sarah F. Rowland against William L. Shockley and others. John H. Young intervened. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

The decree of Judge Witherspoon, referred to in the opinion, is as follows:

"This is an action for the partition of three hundred and thirty acres of land, known as the 'Joseph J. Rowland Home Place.' The plaintiff alleges that she and defendants above named, except the defendant John H. Young, are seised and possessed as tenants in common of the land described in the complaint. After the complaint was filed, the defendant John H. Young was permitted by the court to be made a party defendant in the action. In his answer the defendant John H. Young alleges that he is in possession of, and has the legal title to, the land sought to be partitioned, and that the plaintiff and the other defendants have no interest in said tract of land. A trial by jury was waived, and this case was heard upon the pleadings, the testimony taken by the presiding judge, including records submitted, and the arguments of counsel. It appears that Joseph J. Rowland died in 1862, seised and possessed of the tract of land described in the complaint. He left a will, in which he appointed his son Robert E. Rowland as his executor, and also appointed his widow, Elizabeth L. Rowland, as executrix durante minore aetate of his son Robert E. Rowland. Elizabeth L. Rowland duly qualified as executrix durante minore aetate of Robert E. Rowland, February 13, 1863. After attaining his majority, Robert E. Rowland renounced his appointment as the executor; and Elizabeth L. Rowland, on the 4th of October, 1871, was duly appointed and qualified as administratrix under the will of Joseph Rowland. In his will, Joseph Rowland devised the land described in the complaint to his wife, Elizabeth L. Rowland, during her natural life, with remainder at her death to his two sons, Robert E. Rowland and Ludy T. Rowland, and to his daughter, Sarah F. Rowland, who subse-

quently married the defendant William L. Shockley, and died in 1883 or 1884. His heirs at law are defendants in this action. Judgments were obtained (two judgments) in the common pleas for Laurens county against Elizabeth L. Rowland, as administratrix, for \$1,040 each, and for costs, October 2, 1875, upon the debt of Joseph J. Rowland, contracted prior to the constitution of 1868. These two judgments seem to be based upon the same debt. These two judgments were assigned to R. N. S. Young, a brother of Elizabeth L. Rowland, and the father of the defendant John H. Young, December 22, 1876. A summons was issued to revive said judgments, and on the 23d of July, 1891, Judge Kershaw granted an order reviving said judgments. R. N. S. Young died, intestate, July 23, 1891, and John H. Young was duly appointed administrator of his estate on the 29th of July, 1891. Executions were issued upon the judgments as revived, under which the sheriff, on November 22, 1892, sold the land described in the complaint for \$1,000, which was applied as a credit upon the executions, leaving a considerable balance still due on the executions. The defendant John H. Young became the purchaser at said sale as administrator of his deceased father, R. N. S. Young, received titles from the sheriff, and went into possession of the land. On the same day, John H. Young conveyed the land to W. L. Shockley, taking a mortgage to secure the purchase money. The land was afterwards sold under a judgment of foreclosure against W. L. Shockley, and was purchased February 6, 1893, by the defendant John H. Young, he receiving titles from the sheriff. Both of the deeds to John H. Young are duly recorded. It should have been stated that the summons to revive and the order of Judge Kershaw reviving the judgments were not separately enrolled, but were filed with the original judgment rolls. The title of the cause appears in the direct and cross indexes of judgments, but no entry of the revival was made in the abstract of judgments in the clerk's office until 9th of March, 1893. It appears that Elizabeth L. Rowland lived with her husband upon the land in dispute for ten or twelve years prior to the death of her husband, Joseph J. Rowland, in 1862. She continued in possession of the land after the death of her husband up to November 22, 1891, when the land was sold, since which period the defendant John H. Young and W. L. Shockley, claiming under him, have been in the adverse possession of land under a legal title. This action was instituted January 10, 1893. On the 25th of July, 1892, Elizabeth L. Rowland, the life tenant, and Robert E. Rowland and Ludy T. Rowland, remainder-men, conveyed their interest in this land to the plaintiff, Sarah F. Rowland. These deeds were recorded October 6, 1892. On the 7th of January, 1893,

the plaintiff, Sarah F. Rowland, conveyed one-half of her interest in the same to the defendant W. H. Martin. The summons was issued to revive the judgments, and the order of Judge Kershaw reviving the judgments was issued more than fifteen years after the original judgments were obtained against the administratrix.

"It is urged by plaintiff's counsel that Judge Kershaw had no authority to revive the original judgments, and that the judgments and executions under which the land was sold, and purchased by the defendant John H. Young, are void. I do not think that the failure to separately enroll and to enter the proceedings to revive the judgment in the abstract of judgments in the clerk's office can have the effect to render the judgments and executions void. The judgments and executions under which the land was sold are based upon Judge Kershaw's order reviving the original judgments of the subject-matters, and the record shows that the court acquired jurisdiction of the person of Elizabeth L. Rowland, as executrix, by her acceptance of the summons to revive the original judgments. I conclude that if Judge Kershaw erred in granting the order reviving the original judgments after such a lapse of time, as contended by plaintiff, it was an error of law that cannot be reviewed by another circuit judge, and that it cannot be corrected in this action. I further conclude, as a matter of law, that the judgments and executions under which the sheriff sold and conveyed the land described in the complaint to the defendant John H. Young cannot be impeached in this action, but must be respected until vacated and set aside in some appropriate proceeding.

"Assuming, for the purposes of this action, that the judgments and executions under which the land was sold are valid, what title to or interest in the land did the defendant John H. Young acquire under the sheriff's conveyance to him? In *Huggins v. Oliver*, 21 S. C. 147, after reviewing the cases in this state holding that land can be sold under a judgment against an administrator, on page 159 the rule is stated to be 'that while, as a general proposition, it is true that lands of an intestate may be sold under a judgment recovered against the administrator upon a debt of the intestate, yet if the lands have passed into the actual and exclusive possession of the heirs before the judgment has been recorded, and before any lien has thus been fixed upon them, they can no longer be sold under such judgment, and can only be reached by the usual proceeding to subject real estate in the hands of the heir to the payment of the debt of the ancestor, to which proceeding the heir would, of course, be a necessary party.' This is a question of fact. The evidence shows that Elizabeth L. Rowland, the widow, was in the possession

of the land at the time the original judgments were obtained against her as administratrix of her husband, Joseph J. Rowland, with the will annexed; but the evidence fails to show the character of the possession at the time,—whether she held the possession as the administratrix or as the life tenant under her husband's will. It would not be fair to either of the parties to indulge in presumptions as to the character of the possession of the land by Elizabeth L. Rowland or any of the other devisees under the will of Joseph J. Rowland at the time that the judgments were originally obtained against Elizabeth L. Rowland, as administratrix, under which the land was sold by the sheriff. It is therefore ordered that it be referred to J. H. Wharton, Esq., clerk of the court, as special referee, to take additional testimony after giving due notice to all parties to the above-entitled action, and to inquire as to who was in the possession of the land described in the complaint on the 2d of October, 1875, when J. S. Craig and J. Goodwin, as plaintiffs, obtained judgments against Elizabeth L. Rowland, as administratrix, in the common pleas for Laurens county, as well as at the date of the sale of said land by the sheriff in November, 1891; also, as to the character of said possession,—whether held as executrix, administratrix, or devisee, and whether said possession was actual and exclusive. The said special referee is further directed to file the testimony in his office taken under his order, and notify the parties to this action of such filing at least fifteen days before the opening of the next term of the court of common pleas for Laurens county.

"The only point intended to be decided in this action is that the order of Judge Kershaw reviving the judgments cannot be reviewed by me, and that the judgments and executions under which the land was sold by the sheriff cannot be impeached in this action. All other points raised by the pleadings and the evidence already taken are left open, without prejudice, for future adjudication. The evidence taken at the former hearing will be filed with the order, to be considered hereafter as part of the evidence taken in the cause."

W. H. Martin, F. P. McGowan, and Mower & Bynum, for appellant. Ferguson & Featherstone and Johnson & Richey, for respondents.

POPE, J. Joseph J. Rowland departed this life in July, 1862, or 1863, leaving of force his last will and testament, wherein he devised a tract of land to his widow, Elizabeth L. Rowland, for and during her life, and, at her death, to his three children, Robert E., Ludy T., and Sarah E. Rowland, in equal portions. The testator nominated his son, Robert E. Rowland, the executor of

said will, and further nominated his widow, Elizabeth L. Rowland, to be the executor of this will during the minority of the said Robert E. Rowland. Elizabeth L. Rowland, early in the year 1863, qualified as such executrix *durant* *minore* *aetate* of the said Robert E. Rowland. The said Robert E. Rowland, having attained full age in the year 1871, formally renounced the executorship; whereupon the said Elizabeth L. Rowland was duly appointed administratrix with the will annexed of the estate of the said Joseph J. Rowland, deceased, in that year 1871. The estate of Joseph J. Rowland was in debt, and in 1875 a judgment was obtained on a debt he had contracted in his lifetime, in the suit of J. S. Craig and Joseph Goodwin, as executors, as plaintiffs, against Elizabeth L. Rowland, as administratrix, etc., of the estate of Joseph J. Rowland, deceased, in the court of common pleas for Laurens county, in this state, for \$1,040, debt and interest, and \$140 costs. This judgment was duly assigned, in 1876, to one R. S. N. Young, and a payment of \$154.53 was duly made on the 22d December, 1876. The only land belonging to the estate of the said Joseph J. Rowland was a tract containing 330 acres, lying in Laurens county, in this state. Elizabeth L. Rowland still continued to occupy this land after her husband's death, until sales day, in November, 1891, when the same was purchased at sheriff's sale by John H. Young, as administrator of the estate of R. S. N. Young, who had died on 23d July, 1891. But before the death of R. S. N. Young he had commenced, on 1st July, 1891, an action against the said Elizabeth L. Rowland, as administratrix cum testamento annexo of the estate of Joseph J. Rowland, deceased, to revive the judgment of J. S. Craig and Joseph Goodwin, as executors, against the said Elizabeth L. Rowland, as administratrix, as aforesaid. To the summons therein her acceptance of service thereof appears as made on 1st July, 1891, but she made no answer, nor did she give any notice of appearance therein. On the 23d July, 1891, his honor, Judge Kershaw, revived said judgment. On the 7th day of October, 1891, the sheriff of Laurens county levied upon the tract of land (330 acres), and on the 2d November, 1891, he sold the same to John H. Young, as administrator, at the price of \$1,000, which sum was duly credited upon the revived judgment. On the 25th July, 1892, Elizabeth L. Rowland, the life tenant, and Robert E. Rowland and Ludy T. Rowland, two of the remainder-men under J. J. Rowland's will, conveyed by deed their respective estates in the tract of land of 330 acres to Sarah F. Rowland. It should have been stated earlier that Sarah E. Rowland, the other remainder-man under J. J. Rowland's will, departed this life in 1883 or 1884, leaving as her heirs at law her husband, William L. Shockley, and four children,

Mary Etta, who has intermarried with one Watts, William G. Shockley, Arthur Shockley, and Lillian Shockley. The said Sarah F. Rowland conveyed by deed the one-half of her interest in the tract of land to W. H. Martin on 7th January, 1893. On the 10th day of January, 1893, Sarah F. Rowland began her action for partition of this tract of land, and made defendants to her action William L. Shockley, Mary Etta Watts, William G. Shockley, Arthur Shockley, Lillian Shockley, and W. H. Martin. The defendants, except William L. Shockley, answered, admitting the facts, and consenting to partition. William L. Shockley, by his answer, denied all the facts of the complaint, except the minority of his three children, William G., Arthur, and Lillian Shockley, and prayed "that said complaint as to him be dismissed," etc. These minor defendants were represented by a guardian ad litem. John H. Young was allowed, upon his own motion, to be made a party defendant, with leave to answer, by the order of his honor, Judge Wallace. His answer denied every allegation of the complaint, and, further: "By way of defense to the plaintiff's supposed cause of action, he alleges that he has the legal title to and is in possession of the premises described in the complaint, and he denies that the plaintiff, or any of the other defendants, have any interest in the same." Thus a new line of battle was formed, changing the action from one of partition in equity to an action to try title on the law side of the court of common pleas. The action came on for trial before his honor, Judge Witherspoon, a jury having been waived. He heard testimony, and thereafter, on 30th December, 1893, filed his decree. This entire decree must be reported. Its effect was against the plaintiff, but on a point he was not satisfied to pass, namely, as to the character of the possession of the land by Elizabeth L. Rowland, or any of the other devisees under the will of Joseph J. Rowland, at the time that the judgments were originally obtained against Elizabeth L. Rowland, as administratrix, under which the land was sold by the sheriff, and he accordingly referred it to J. H. Wharton, as clerk, to take testimony and report as to who was in possession of said land on 2d October, 1875, when the judgment was originally obtained, as well as at the date of the sale, in November, 1891; also as to the character of said possession,—whether held by Mrs. Rowland as executrix, administratrix, or as devisee, and whether such possession was actual and exclusive. Testimony was taken upon these questions. A hearing thereof was had before Judge Fraser. He decided that Elizabeth L. Rowland, being the administratrix with will annexed of the testator when the judgment was recovered, and when the sale was made of the land in dispute by the sheriff thereunder, could not hold the same in the char-

acter of devisee or life tenant, so far as the rights of her testator's creditors were concerned—the law fixed the character of her possession; but admitted that he would have held otherwise if she had not been such personal representative. Thus holding himself, and giving due effect to the conclusions reached by Judge Witherspoon, he decreed that the complaint be dismissed. The plaintiff, and all the defendants except W. L. Shockley and John H. Young, appealed from both the decree of Judge Witherspoon and that of Judge Fraser on 10 grounds. We will now consider these grounds of appeal.

The first assails the correctness of Judge Fraser's conclusion "that Elizabeth L. Rowland could not hold the lands in dispute in any capacity other than as personal representative of Joseph J. Rowland, deceased, when he found, as matter of fact, that she held the same as devisee, and that no question but the character of the possession was before him." The appellants have erred in alleging that Judge Fraser held, in his decree, that, as a matter of fact, she held the land as devisee. An examination of its terms falls to show that the circuit judge announced any such finding. We cannot see any error in the conclusion of the circuit judge that one who holds lands as executor or administrator cannot set up an independent holding or tenure of said lands while so holding as executor or administrator. To hold otherwise would be to allow a trustee of an express trust to gain a personal advantage from such office, at the expense of devisees and creditors of the testator, or the creditors and heirs at law of an intestate, as the case might be. This exception must be overruled.

The next ground of appeal, which is the second, alleges that Judge Fraser erred in not holding that Judge Kershaw had no jurisdiction or power to grant the order of July 23, 1891, purporting to revive the original judgment, with leave to issue execution thereon." An inspection of Judge Fraser's decree shows that no such question as this was considered or passed on by him. Indeed, the decree of Judge Witherspoon, on this question, shut off any such inquiry from Judge Fraser. Hence this ground of appeal is untenable.

And, as the third ground of appeal imputes error to Judge Fraser for "not holding that neither the original judgments nor the attempted revival of the same had any lien upon the said premises at the time of the sale by the sheriff," we may dispose of this ground as we have the second. No such question was presented or considered by Judge Fraser, nor, under Judge Witherspoon's decree, could such matters have been considered by Judge Fraser. This ground of appeal is dismissed.

Having passed upon the exceptions to the decree of Judge Fraser, and having ascer-

tained there were no errors therein, it remains to consider the objections to the decree of Judge Witherspoon.

The fourth exception, which complains that Judge Witherspoon "erred in holding that any entry after the alleged revival of said judgment was ever made in the abstract of judgments in the office of the clerk of the court of common pleas for Laurens county," upon an examination of the decree itself, will be found to be untenable, for the reason that Judge Witherspoon did not so hold. Hence this exception is untenable. And the fifth exception is likewise founded in error as to what Judge Witherspoon held touching the jurisdiction or power of Judge Kershaw in granting the judgment of revival. This exception is therefore overruled.

We will consider the remaining five exceptions in a group. They are as follows: "(6) Because he erred in holding that the orders of Judge Kershaw could not be attacked in this proceeding. (7) Because he erred in holding that the said judgment and execution, under which the land described in the complaint was sold, were valid, and could not be impeached. (8) Because he erred in not holding that the said judgments and purported revivals had no lien upon the said premises sold to the defendant John H. Young. (9) Because he erred in not holding that the original judgments lost their lien at the expiration of thirteen years, and that the order of Judge Kershaw created no lien, because—First, more than thirteen years had elapsed; second, because no judgment predicated upon said orders was ever entered in the book of abstract of judgments. (10) Because he erred in not holding that the attempted sale of the land by the sheriff to the defendant John H. Young was void, because—First, there was no lien upon the land; second, because an execution could not be predicated upon a mere order; and, third, because the execution did not direct the sale of the property in the hands of the defendant in execution to be administered."

When Joseph J. Rowland died, in 1862, his property, real and personal, was liable to the payment of his debts, and this was true, notwithstanding he left a will and attempted to devise his lands. His wife, Elizabeth L. Rowland, by her own act, became his personal representative, and so continued until to-day—First, as executrix *duranti minore aetate* of Robert E. Rowland up to 1871; second, from 1871 up to the present time, as administratrix *cum testamento annexo*. By law it was made her duty to pay testator's debts, if his estate was sufficient therefor. In 1875, not having paid the debts of J. J. Rowland, two creditors sued her, as administratrix, to judgment. These judgments were duly enrolled, and executions were issued thereupon. She paid \$154.53 on these judgments, 22d December, 1876. By law these judgments became liens upon Joseph J. Row-

land's real property for 10 years, from 1875, with leave, at any time during the 3 years immediately ensuing the year 1885, to wit, until 1888, to renew such judgments, for like period of 10 years, with their liens, upon the property of J. J. Rowland. See Code, § 310.<sup>1</sup> Now, the plaintiffs in such judgments having waited until after 1888, to wit, until 1891, before they applied to the court to renew such judgments, the children, or their grantees, of Joseph J. Rowland, say that it was not in the power of the circuit court to revive such judgments after the year 1888. It is well to notice that the power by which judgments are renewed, as provided for under section 310 of our Code of Civil Procedure, was by the "service of a summons on the debtor, as provided by law, requiring him to show cause, if any he can, at the next term of the court for his county, why such judgment should not be revived." Then it is manifest that if the plaintiffs in execution had at any time, between 1885 and 1888, applied to the court, in accordance with section 310, Code Civ. Proc., by service of a summons, to renew their judgment upon Mrs. Rowland, as administratrix, such judgment would have been continued for 10 years thereafter. The plaintiffs in execution did not avail themselves of section 310, by service of a summons to renew, but, under section 111,<sup>2</sup> they moved by service of a summons and a complaint upon the debtor in execution (Mrs. Rowland, as administratrix), wherein they duly alleged that on the 25th July, 1875, they had obtained judgment in the court of common pleas for Laurens county against the defendant Elizabeth L. Rowland, as executrix, of Joseph J. Rowland, deceased, for the sum of \$1,047, and \$100.12 as costs; that such judgment was duly entered, docketed, and enrolled in the proper office, and execution issued thereon; that no part of said judgment, except the sum of \$154.68, paid on the 22d December, 1876, had been paid thereon; that the plaintiffs are now the holders thereof. Wherefore the plaintiffs demand judgment against the defendant that the said judgment be revived, to have all the force and effect of the former recovery, and that they be allowed to issue

execution thereon for the amount due on the same, as above set forth. The service of this summons and complaint was duly accepted by Mrs. Rowland on 1st July, 1891. Not having answered or demurred to such action, or caused any notice of appearance to be served within 20 days after such acceptance of service of the summons and complaint, Judge Kershaw made an order on the 23d July, 1891, reviving said former judgment. From this order of revival no appeal was taken. Under such order of revival, execution was issued and levied upon the lands in question, and sold by the sheriff to the defendant John H. Young. Can it be said that the court of common pleas for Laurens county in this state was without power to render this judgment? It had the jurisdiction of the subject-matter, for the original judgment was not 20 years old, and had been rendered in an action in the county where testator died, and where his personal representatives lived, and the basis of this action was a contract of a person dying testate there. It had jurisdiction of the person of the defendant. She was the personal representative of one who died testate in Laurens county, owing a debt by contract to be fulfilled there, and she had by her own acts enabled the court to acquire jurisdiction of her person. The judgment rendered bound Mrs. Rowland and her privies. Were not the plaintiffs and the defendant W. H. Martin her privies? Their right of action during her lifetime originated in a transfer by deed to them of her life estate in said lands. There is no such privy, however, in this respect, in the Shockley children. They are bound because the judgment is against the estate of their testator on a debt he contracted.

But it is contended, also, that the order of revival was not entered in the abstract of judgments, as required by the Code of Procedure, and hence there was, technically or legally speaking, no judgment. This proposition would have merit in it if the plaintiff in execution had sued upon the judgment of 1875 as his cause of action,—as his debt, so to speak. *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861; *Garvin v. Garvin*, 27 S. C. 477, 4 S. E. 148, and cases there cited. In this latter case, the last judgment would have absorbed within itself or have merged the previous judgment of 1875, and therefore would itself have been necessarily entered up in the book of abstract of judgments. The plaintiff in execution did not follow this plan, however. He, on the contrary, complained on this judgment as unsatisfied, to the end that the old judgment (that of 1875) might be revived. Hence, when the circuit judge, Judge Kershaw, made the order of revival of the judgment of 1875, with leave to issue an execution to enforce the same, it was not necessary or proper to place this order of revival on the abstract of judgments. If it had been so entered, it would have appeared to the world as two judgments, instead of

<sup>1</sup> Code Civ. Proc. § 310, provides that final judgments entered in a court of record after the 25th day of November, A. D. 1873, shall constitute a lien upon the real estate of the judgment debtor in the counties where the same are entered for a period of 10 years from the date of entry, and that the plaintiff in such judgment may, at any time in three years after its active energy has expired, revive the judgment, with like liens as in the original, for a like period, by service of a summons on the debtor, as provided by law, requiring him to show cause, if any he can, at the next term of the court for his county, why such judgment should not be revived.

<sup>2</sup> Code Civ. Proc. §§ 110, 111, provide that an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, must be brought within 20 years.

one, and this would have been improper. It does not seem to us, therefore, that there was any error there.

Again, it is contended that the land was sold by the sheriff under a judgment that had no lien upon the land. If the judgment of 1875 was revived by the order of Judge Kershaw, in 1891, it had a lien upon the land, under the act of 1873, providing liens to judgments. Candidly speaking, there could be nothing in any of the matters of appeal to commend them to our approval, for they are opposed to the idea of a testator's estate being made liable to the payment of his honest debts, and this, too, for the benefit of his own devisees. We know that sometimes creditors wait so long they are bound by lapse of time,—statute of limitation, or some kindred defense. But in the case at bar none of these things appear. If we were disposed to conjecture, we might say that R. N. S. Young, who was a brother of Mrs. Rowland, in order to keep her home from being sold and to give her an opportunity to pay for it, bought up these judgments, and waited on her, to see if this could be effected. But we will not yield to this suggestion to deal in conjectures. The facts themselves are sufficiently stubborn in this case to bar plaintiff, and the defendants who act with her, from any recovery here. Under the facts as found by Judge Witherspoon, we are not disposed to question his conclusion that the plaintiff here, and her allies among the defendants, cannot impeach the judgment order of revival pronounced by Judge Kershaw in 1891. Beyond this announcement we do not think it necessary for this court to go. These exceptions here discussed must be overruled. It is the judgment of this court that the judgment of the circuit court appealed from be affirmed.

McIVER, C. J., concurs in result.

REID et al. v. NORFOLK CITY R. CO.  
et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Nov. 9, 1894.)

APPEAL—DEFECTIVE SUPERSEDEAS BOND—DISMISSAL.

Where a supersedeas is awarded, but the bond on appeal required by Code 1887, §§ 3470, 3471, is conditioned to pay only costs and damages, and not the debt, the court will, on motion, discharge the supersedeas, but will allow the appeal to remain in force on filing a new bond.

Appeal from circuit court of city of Norfolk.

Action by the Norfolk City Railroad Company and others against D. P. Reid & Bro. From the judgment, defendants appeal. A supersedeas was awarded them by the su-

preme court of appeals, but the bond was conditioned to pay costs and damages only, and not the debt. The appellee moved to dismiss both appeal and supersedeas, because a proper bond had not been given, as required by Code 1887, §§ 3470, 3471; whereupon the appellants made a counter motion to discharge the supersedeas and allow the appeal to remain in force, which latter motion the court sustained, but required another bond.

Harmerson, Heath & Heath, for appellant. White & Garnett, for appellee.

This day came the parties by counsel, and the court having maturely considered the motion of the appellees to "dismiss this cause for the reason that the appellants have failed to give a proper bond, as required by sections 3470 and 3471 of the Code of Virginia of 1887," doth overrule said motion. And thereupon, on motion of the appellants, it is ordered that the order allowing an appeal and supersedeas in this cause be modified so as to allow an appeal only, not to operate as a supersedeas to, or in any manner hinder or delay the execution of, said decree, upon the said appellants, or one of them, or some one for them, executing before the clerk of the said circuit court a bond in the penalty of \$300, conditioned for the payment of all damages, costs, and fees which may be awarded against or incurred by said appellants, and that a certificate of the clerk of said circuit court that said bond has been given, and the names of the sureties therein indorsed on a copy of this order, be filed with the clerk of this court within 60 days from this day; and, unless such bond be given and such certificate filed as aforesaid, it is ordered that said appeal be dismissed. And it is ordered that a copy of this order be certified to the clerk of said circuit court.

(116 N. C. 40)

MORRIS et al. v. BURGESS et al.

(Supreme Court of North Carolina. Feb. 19, 1895.)

MORTGAGES—FORECLOSURE—DOCUMENTARY EVIDENCE.

A judgment rendered in a foreign state on a note under seal is admissible in evidence, in an action, in North Carolina, commenced before such judgment was rendered, on the same note, and to foreclose a mortgage given to secure it.

Appeal from superior court, Perquimans county; Armfield, Judge.

Action by W. H. Morris & Sons against J. J. Burgess and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. H. Blount, for appellants. L. L. Smith, for appellees.

EVERY, J. The action was brought for judgment upon a note under seal, and for

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

foreclosure of a mortgage upon land executed to secure the debt. The court had, in its discretion, refused to allow an amendment declaring on a judgment rendered on the bond in a court of competent jurisdiction of the state of Virginia, instead of upon the bond itself. The plaintiffs offered on the trial a properly certified copy of the judgment to prove that the defendants still owed the debt for which the note was given. The defendants excepted to its admission as evidence of the debt, and also to the instruction, subsequently given by the court to the jury, that it concluded the defendants from showing any payment upon the debt. It was held by this court in *Peebles v. Guano Co.*, 77 N. C. 237, that a judgment in proceeding of attachment was "conclusive evidence that the debt sued on was due to the plaintiff in it to the value of the property attached, but of nothing more." The court in that proceeding in rem acquired no jurisdiction of the person, and the judgment could be used to show nothing except the right of recovery to the value of the property proceeded against. *Herm. Estop.* § 322; *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198. But for that purpose and to that extent it was competent. Here the action upon the note in the same state was in personam, but is admissible upon the same principle as in the other case, when it was offered, not to prove the debt sued on, but to show the amount of damage the plaintiff was entitled to recover. *Bigelow, Estop.* (5th Ed.) p. 48. The constitution of the United States (article 4, § 1), and the acts of congress passed in pursuance of it (*Rev. St. U. S.* § 906), were construed at an early day as giving to a judgment of a sister state the same effect as an exemplification of it would have in another court of the same state in which it was rendered. *Mills v. Duryea*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 224. When such judgment is made the basis of an action, it is conclusive on the merits in every other state, if it appear that the court in which it was rendered had jurisdiction of the parties and the subject-matter. 2 Black, *Judgm.* §§ 857, 859. The rule is that the judgment, "if valid at home," is valid in any other state, and when sued on is conclusive on the merits, even though under the laws of the state in which suit is brought to enforce it such a judgment would have been void on account of the manner or form of entering it. *Ritter v. Hoffman*, 35 Kan. 215, 10 Pac. 576; 2 Black, *Judgm.* § 859. The authorities in this country are conflicting upon the question whether one party must plead the record of a judgment of a sister state in order to give it a conclusive effect upon the opposing party. *Id.* § 783. Even where it is conceded to be the general rule, however, that a record is available as an estoppel only when specially pleaded, a former judgment, whether domestic or foreign, is both competent and conclusive as to the merits, in case it was rendered after issue was joined in the

action in which it is offered as evidence. 7 Am. & Eng. Enc. Law, 33, and note 3; 2 Black, *Judgm.* § 784, and note. The judgment under consideration was rendered after the fall term of the superior court of Perquimans county, when the pleadings were filed, and the plaintiffs could not have made it the basis of an action begun before it was in existence. They had had no opportunity to avail themselves of it till the trial. For the reasons given, and upon the authorities, we feel no hesitation in holding that the exemplification of the judgment of a sister state was admissible in evidence. Without entering into a discussion of the general doctrine of pleading specially records, deeds, or matters in pais, relied on to work an estoppel, there can be no question about the right to offer the evidence constituting the alleged estoppel, where it appears that there has been no opportunity afforded a party to specially plead it. In our case not only was the judgment obtained after this suit was at issue, but the plaintiffs took the doubtful precaution of asking to be allowed to declare upon a cause of action which it might have been contended did not exist when the action was brought. There was no error. The judgment is affirmed.

(110 N. C. 926)

# JOHNSON et al. v. EAST CAROLINA LAND & RAILWAY CO.

(Supreme Court of North Carolina. Feb. 26, 1895.)

## DEED—PAROL EVIDENCE—ESTOPPEL.

1. Where a deed authorized defendant to take so much of the land as was sufficient for its roadway, ditches, etc., evidence of a parol agreement that the defendant should pay for any excess over 20 feet, in addition to the consideration expressed in the deed, is admissible.

2. Where a grantee accepts a deed, and avails itself of the benefits thereof, it cannot say that the person who negotiated the purchase was not its agent.

Appeal from superior court, Craven county; Brown, Judge.

Action by Kate F. Johnson and others against the East Carolina Land & Railway Company to recover the value of land purchased and appropriated by defendant, according to the terms of a written and parol agreement, as alleged by plaintiffs. From judgment for plaintiffs, defendant appeals. Affirmed.

The terms of the deed upon which the controversy is based are as follows: "For the use, operating, and business of the road in, through, and over a strip of land one hundred and twenty-five feet wide, \* \* \* and, in case of embankments and deep cuts, such additional width as may be necessary; not invading the dwelling, curtilage, garden, or graveyard of the parties of the first part."

F. M. Simmons and Shepherd & Busbee, for appellants. W. W. Clark, for appellees.



FAIRCLOTH, C. J. When an agreement is reduced to writing, the rule of evidence that parol testimony is not admissible to contradict, add to, or explain it is too well established to require further argument, and, whether the law requires it to be in writing or not, still the written memorial is the surest evidence. The deed of plaintiff to the defendant is uncertain as to the amount of land on the home plantation conveyed to defendant, but it allows that matter to be made certain by authorizing defendant to take an amount of land sufficient for the use of its roadway, ditches, etc. This sufficiency cannot be determined by the terms of the deed, and could, if the parties were not agreed, only be done by evidence aliunde. The plaintiff offers to prove that at the time the deed was made, with this indefinite provision, it was agreed by parol that, in addition to the main consideration expressed, the defendant should pay for the excess over 20 feet, whenever so used. This is denied, but found to be so by the jury, upon the testimony of witnesses. We cannot see that this evidence violates the rule of evidence above referred to. It is in furtherance of an agreement not expressed in the deed, but arising naturally out of the uncertain feature of the deed already pointed out, and as a part of the main transaction. The witness Foy says he was assisting the defendant gratuitously, and, when it was decided that the road was to come, he went to plaintiff's agent, Rhem, to get the right of way, and insisted on it with more than 20 feet, and handed him the deed, to be signed by him and the plaintiff, and saw the plaintiff, and told her she must give the road all the land necessary through the home plantation; that he had the deed prepared, and she signed it and handed it to him; that he had it recorded, and sent it to the defendant, at Wilmington,—and says he did not agree to pay anything for the excess, and that he had no power to agree to pay the plaintiff one cent, and was afterwards a director in the defendant company. Here was certainly a good deal of active and gratuitous work for some one. The defendant has accepted this deed, and, by building its road on the home plantation, has availed itself of the contract, whatever it was, and of the benefits thereof, and cannot now be heard to say that Foy was not its agent. The right or power to purchase implies the right or power to pay, or to agree to pay. We see no error, and the judgment is affirmed.

(116 N. C. 78)

STONEBURNER et al. v. JEFFREYS et al.  
(Supreme Court of North Carolina. Feb. 18, 1895.)

**ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.**

1. An assignment for the benefit of creditors which includes a stock of merchandise is

not void on its face because the trustee is authorized to sell and dispose of the property "in such manner as he may deem most beneficial to the interests of all concerned."

2. Nor is it invalid because it authorizes the trustee to replenish the stock with money from sales, if he "deem such to be for the best interest of the creditors," where it shows that the desire of the assignor is that the trustee shall manage the property not for his own benefit, ease, or comfort, but so that the trust shall be executed for the benefit of all for whom the trustee is acting as fiduciary, by selling the goods in the best way to promote their interests, and collecting and disbursing the proceeds of sale as speedily as possible.

Appeal from superior court, Edgecombe county; Armfield, Judge.

Action by Stoneburner & Richards and others against C. W. Jeffreys, individually and as doing business under the name of C. W. Jeffreys & Co., and H. L. Staton, trustee, on claims due them from defendant Jeffreys, to set aside an assignment as in fraud of creditors, and for the appointment of a receiver. From a judgment allowing the claims, but declaring the assignment valid, and refusing to set it aside, plaintiffs appeal. Affirmed.

John L. Bridgers and Jas. E. Moore, for appellants. H. G. Connor and H. L. Staton, for appellees.

EVERY, J. The contention of the plaintiffs' counsel upon which he mainly rested his argument was that the court below erred in refusing to charge the jury that the deed of assignment was fraudulent in law. It is like threshing over old straw to draw at length the distinctions between an assignment that is void upon its face, one the language of which raises a presumption of fraud, and one of the third class. When there is nothing in the instrument itself to so suggest fraud as to demand explanation, the presumption of law in favor of good faith sustains the instrument till proof is offered to rebut it. *Bobbitt v. Rodwell*, 105 N. C. 236, 11 S. E. 245; *Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. 482; *State v. Mitchell*, 102 N. C. 368, 9 S. E. 702. It was insisted that the deed should be declared void upon its face, first, because the trustee was not in express terms restricted as to the time or manner of disposing of the property committed to his care, but was left to "sell and dispose of the same in such manner as he may deem most beneficial to the interests of all concerned." Where the deed is silent as to the manner or terms of sale, the law presumes, until the contrary appears, that the fiduciary will act in good faith, will be guided by the paramount desire to promote and protect the interests of the creditors, and, with that end in view, will exercise his best judgment in determining whether it is advisable to sell publicly or privately, or to extend or withhold credit. *Bobbitt v. Rodwell*, *supra*. The language of the instrument which gives rise to the contention of the plaintiffs can be most safely construed

by considering the connection in which it is used, and by giving weight to every word or clause that may qualify or explain it. The words upon which the plaintiffs rely to sustain their view of the meaning and proper construction of the assignment will be found embodied in the following paragraph of it: "In special trust, nevertheless, and to and for the uses, interest, and purposes following, viz.: That the said party of the second part shall at once take possession of the property hereby assigned, and with all reasonable diligence sell and dispose of the same in such manner as he may deem most beneficial to the interest of all concerned, and convert the same into money, and shall also with all convenient speed collect, get in, and recover all the said debts, dues, bills, bonds, judgments, mortgages, claims, and demands hereby assigned, and, with the proceeds of said sales and collections, that the said party of the second part shall first pay all just and reasonable expenses, costs, and charges attending the drawing and due execution of this instrument, all legal and clerical services which the execution of the same may require, and the carrying into effect the trust hereby created; and to this end the party of the second part shall have authority to employ such clerks and servants as may be required, to replenish by purchase the said stocks of merchandise, to pay for the same out of the said sales and collections, if the party of the second part shall deem such to be for the best interest of the creditors herein," etc.

The next question presented in the well-considered and exhaustive argument of counsel was whether the insertion in a deed of assignment of the power to replenish a stock of goods with the money arising from the sales of the property conveyed is proof conclusive of a fraudulent intent, or, of what is equivalent, a plain purpose to hinder or delay the creditors in the collection of their claims. Authority is given to the trustee to employ clerks and servants, and to replenish, by purchase, etc. (if he "shall deem such to be for the best interest of the creditors herein"), the stock of goods; and this grant of power is preceded by the qualification that it is to be exercised with a certain end in view ("and to this end"). Looking to the language that precedes these words, for an interpretation of their meaning, it is manifest that the maker of the deed has given expression, not to a purpose or desire that the trustee should manage the property for the benefit, ease, or comfort of the debtor, but to the wish and direction that the trust should be executed for the benefit of all for whom the trustee should act as fiduciary, by selling the property in the way best calculated to promote their interests, and collecting and disbursing the proceeds of sale as speedily as possible. Such deeds have been pronounced void in law only where the debtor appeared in ex-

press terms to be providing for his own ease, comfort, or benefit, to the possible detriment or delay of creditors. And even where *prima facie* the deed must be construed as reserving to the debtor some unconscionable benefit, or as subjecting the creditor to some unjust hindrance or delay, if it appear upon the face of the instrument that the language of the deed is susceptible of such explanation, by evidence aliunde, as will make it consistent with good faith, it is held that the issue of fraud must be submitted to the jury to determine whether such extrinsic testimony as may be offered is sufficient to rebut the presumption of *mala fides* raised by the deed. *Hardy v. Skinner*, 9 Ired. 191; *Cannon v. Peebles*, 2 Ired. 449; *Young v. Booe*, 11 Ired. 347. The instruction asked by the plaintiff did not suggest the question whether the deed was *prima facie* fraudulent, but we are of opinion that upon its face there is nothing to destroy the usual intentment in favor of honesty in its execution. We can conceive of many cases in which it might be advisable, and some in which it would be essential, in order to achieve the best results in the disposition of the trust property, to make new purchases. The maintenance of something like a full stock of merchandise must tend sometimes to hold the trade of customers, while it may often become essential to the fulfillment of contracts to supply farmers who have given agricultural liens to the assignor that the trustee should keep a supply of such articles as the trustor had agreed to furnish. *Burrill, Assignm.* p. 242, § 182; *De Wolf v. Manufacturing Co.*, 40 Conn. 282, 326. The grant of powers to a trustee, which, if exercised honestly and with good judgment, must often prove a boon both to creditor and debtor, is neither fraudulent *per se*, nor does it raise a presumption which shifts the onus of sustaining the deed on the maker. Where there is evidence of the incompetency or dishonesty of the trustee or of injury caused by his negligence, the remedy, as suggested in *Bobbitt v. Rodwell*, *supra*, is an application to the court for his removal. Not only is there no sufficient internal evidence of bad faith to raise even a presumption against the validity of the instrument, but it is somewhat exceptional, in that the assignor appears to have turned over all of his property, reserving neither homestead nor personal property exemptions, which he might lawfully have done. *Eigenbrun v. Smith*, 98 N. C. 207, 4 S. E. 122; *Bobbitt v. Rodwell*, *supra*.

The omission by the copyist of the claim of a single creditor in the copy of the deed registered in Edgecombe county falls far short of sufficiency to shift the burden of proof on the issue of fraud. At most, it was only competent as a circumstance to be considered with other evidence tending to show bad faith. The burden of proof is sometimes shifted in the progress of the trial, but it is only by the introduction of testi-

mony which the law has declared to be prima facie proof of fraud, but which may be rebutted by evidence deemed by the jury sufficient to explain such suspicious circumstances, and thereby overcome the artificial weight that the law has attached to them as evidence. *McLeod v. Bullard*, 84 N. C. 515; *Lee v. Pearce*, 68 N. C. 77.

The issue of fraud was properly submitted to the jury. To have pursued any other course would have been an invasion of the province of the jury. *Beasley v. Bray*, 98 N. C. 266, 3 S. E. 497.

There was no error, and the judgment is affirmed.

(116 N. C. 93)

GAY et al. v. GRANT et al.

(Supreme Court of North Carolina. Feb. 26, 1895.)

**REFEREE'S REPORT—MODIFICATION—COMPLIANCE WITH ORDER OF COURT.**

Where, on appeal, the case is remanded with an order that the referee modify his report in certain particulars, so as to conform to the rulings of the court, the referee's duties are purely those of an accountant, and may be performed without notice to the parties to the action.

Appeal from superior court, Northampton county; Bynum, Judge.

Action by J. T. Gay and others against William Grant, administrator, and others. From a judgment in favor of part of the plaintiffs, the rest of the plaintiffs appeal. Affirmed.

This case, begun on the 5th of March, 1878, was before this court at its September term, 1888, upon exceptions filed by both plaintiffs and defendants to the rulings of his honor, Judge Shepherd, made at June term, 1886, of Northampton superior court, and was reported in 101 N. C. 206, and 8 S. E. 99, 106. The numerous exceptions were carefully considered by this court, the report corrected, and the account stated in the report, in many of its items, specifically modified and altered. The case was remanded, with the order that the account filed by the referee be modified in accordance with the opinion in the case.

At the fall term, 1890, of the superior court of Northampton, the following order was made in the case by the judge presiding: "In this cause it is referred to R. O. Burton, Jr., the former referee, to state the amount due the plaintiffs in accordance with the judgment of Judge Shepherd rendered as of June term of the superior court of Northampton county, 1886, as modified by the decisions of the supreme court, rendered on appeal from said judgment. [Signed] Spier Whitaker, J., etc. "To the above judgment the plaintiffs excepted." Under the said order, the referee made a second report, as follows: "This cause having been re-committed to me to correct the judgment of Judge Shepherd, as directed by the supreme

court, and report the same, I respectfully submit the following: (1) The counsel for the plaintiffs contended that he had the right to introduce additional testimony as to matters prior to January 1, 1882, and asked leave to do so. I declined to permit the same, and he excepted. (2) I filed herewith a summary of corrections ordered by the court (Exhibit No. 1), aggregating \$6,011.40, corrected account of Ida Martin (Exhibit No. 2), and corrected account of Mattie D. Maddrey (Exhibit No. 3). (3) I find that Ida Martin is entitled to judgment for \$1,582.48, with interest on \$1,027.59 from January 1, 1892; and that Mattie D. Maddrey is entitled to judgment for \$352.82, with interest on \$220.51 from January 1, 1892. (4) The share of Samuel E. Long is the same as that of Mattie D. Maddrey, to wit, \$352.82, with interest on \$220.51 from January 1, 1892. But on the 19th day of August, 1884, the said Samuel E. Long, in consideration of \$350 paid, executed to the defendant W. J. Rogers, as administrator of J. M. S. Rogers, deceased, the following assignment and transfer of all his interests: "In consideration of three hundred and fifty dollars to me paid by W. J. Rogers, as administrator of J. M. S. Rogers, deceased, I hereby transfer and assign to him all my distributive share in and to the proceeds of sale of the real estate; in and to the personal property, and in and to the real estate of Green Stancell, deceased, and covenant not to sue him further on account of the same. Given under my hand and seal, this 19th day of August, 1884. [Signed] Samuel E. Long. [Seal.] Witness: R. T. Stephenson." Respectfully submitted, December 15, 1891. R. O. Burton, Jr., Referee." To the second report of the referee the plaintiffs filed the following exceptions: "(1) For that no notice was given to them, or either of them, or their counsel, of the time and place of taking and stating said account. Had an opportunity been offered, they would have been able to show that the following debts, not charged against defendants in said report, were actually collected by the administrators, to wit: The notes against Sol. Deloatch, W. H. Deloatch et al., W. J. Taylor, Alfred Hart et al., Henry Pruden, J. W. Coker, and W. H. Garriss. T. S. Taylor et al., W. B. Stubblefield (two notes), T. W. Jordan (of extent of fifty dollars), Mildred Buxton, T. H. Jordan, Samuel Pruden, W. J. Edwards, and J. S. Rogers; and that many other notes with which defendants were charged by the judgment of Shepherd, J., and with which they were not charged, according to the exceptions sustained by the supreme court, could have been collected by ordinary diligence on the part of the administrators. (2) For that, according to the judgment of the probate court, the following plaintiffs were entitled to recover the following sums, none of which were allowed them in the said report filed December 20, 1891, to wit: Marga-

ret A. Gay and husband, one-thirteenth of the indebtedness of S. T. Stancell to his testator, \$204.91, with interest from January 1, 1892, less \$71.13, with interest from May 1, 1874; Adella Gay and husband, \$584.43+ \$264.91, with interest on \$584.43 from May 1, 1874, and on \$264.91 from January 1, 1882, less \$335.37, with interest from January 1, 1882; Mary E. Gay and husband, \$64.87, with interest from May 1, 1874, + \$264.91, with interest from January 1, 1882; Alice P. Stephenson and husband, \$264.91, with interest from January 1, 1882, less \$29.15, with interest from May 1, 1874; B. D. Stancell, \$107.04, with interest from May 1, 1874, + \$152.20, with interest from May 1, 1874; Rosa Gay and husband, W. Y. Gay, \$639.91+ \$152.20, with interest on both from May 1, 1874, less \$330 paid December 1, 1879, and \$240.50 paid December 1, 1880. (3) For that the referee failed to state what was due Rosa Gay and husband. She, being a minor at time the suit in 1871 was commenced, was entitled to the same as Ida Martin, to wit, \$1,582.48, less the difference in payments to her appearing from account B. Wherefore plaintiffs ask that said report be set aside, and they have an opportunity of offering evidence before said referee to show that the bonds and notes referred to in these exceptions were collected, or could have been collected."

At April term, 1892, of said Northampton court, the following order was made by the judge presiding: "It is ordered that the referee Burton report further to the court as to whether plaintiffs had any notice of the last hearing, when the report was corrected in accordance with the decision of the supreme court; also, whether, on said last rehearing, the plaintiffs offered any evidence, and what it was. [Signed] G. H. Brown, Jr., Judge," etc.,—in obedience to which the referee made a third report, the following part of which only is essential to the hearing of the case before us: "To the Honorable John Gray Bynum, Judge Presiding: In obedience to the order of his honor, Judge Brown, at April term, 1892, I beg leave to report: That I gave no notice to any one of the time and place of stating the account when recommitment to me. My construction of the order was that I had only to take the old account as modified by Judge Shepherd as a basis, and do merely the work of making it conform to the decision of the supreme court. Capt. R. B. Peebles, counsel for the plaintiffs, told me that he had evidence to offer which antedated the first statement of the account by me, to wit, January 1, 1882. He contended that the matter stood as if a new trial had been granted, and wanted to offer evidence. I told him I had no power to take new evidence as to the status of the account, and should hear no evidence of matters covered by the statement, but that I would give him the benefit of the offer, exclude it, and allow him an exception; that I

saw no need of any offer of specified testimony, but, if he desired to write out what he wished to prove, I would reject it, for want of power to hear it, and give him an exception. There was considerable delay before I acted, and no specific offer was ever made."

At August term, 1893, of said court, the following judgment was entered up by the judge presiding (Bynum, J.): "This cause coming on to be heard, at this term of said court, upon the report of R. O. Burton, referee, ascertaining the amount of the judgment to which the plaintiffs hereinafter named are entitled, in accordance with the judgment of Shepherd, J., heretofore rendered in this court, as modified by the decision of the supreme court, and said report appearing to the court to be in conformity to said decision, it is now considered and adjudged by the court that the exceptions of plaintiffs to said report are overruled, and the said report is hereby confirmed. It is further adjudged that the plaintiff Ida Martin do recover of the defendant William Grant, as administrator with the will annexed of Edmund Jacobs, and of the defendant W. J. Rogers, as administrator of J. M. S. Rogers, the sum of \$1,582.48, with interest on the sum of \$1,027.59 from the 1st day of January, 1892, till paid. It is further adjudged that plaintiff Mattie D. B. Maddrey recover of said defendants, as administrators aforesaid, the sum of \$352.82, with interest on the sum of \$220.51 from the 1st day of January, 1892, till paid. It is further adjudged that the plaintiff Samuel E. Long, to the use of W. J. Rogers, assignee, recover of the said defendants, as administrators aforesaid, the sum of \$352.82, with interest on the sum of \$220.51 from the 1st day of January, 1892, till paid. It is further adjudged that the plaintiffs Ida Martin, Mattie D. B. Maddrey, and Samuel E. Long recover of the said defendants, as administrators as aforesaid, their costs incurred herein, to wit, two-thirteenths of the costs of the action, to be taxed by the clerk. It is further considered and adjudged that the other plaintiffs to this action take nothing by their said action, and that they and their sureties to the prosecution bond pay the residue of the costs of this action, to be taxed by the clerk; and it is so adjudged." From this judgment the plaintiffs appealed to this court, and assigned as errors the following: "(1) The overruling of each of the exceptions to the report of said referee which purports to modify and conform the said referee's former reports to the rulings and judgment of the supreme court in this action, which said exceptions and reports appear of record, and will be sent up as a part of said record and case on appeal. (2) For that the plaintiffs offered evidence before said referee tending to show that the claims due Green Stancell's estate, mentioned in plaintiffs' said exceptions, were actually collected by his admin-

istrators, the said L. D. Gay and S. T. Stan-cell, prior to the original hearing of the cause by said referee, and said referee refused to hear and consider such evidence. Said evidence could have been procured and used before the referee on the original hearing. (3) For that the judgment of Judge Whitaker, rendered at fall term, 1890, was erroneous, and not authorized by the judgment and rulings of the supreme court."

R. B. Peebles, for appellants. Thos. N. Hill and Thos. W. Mason for appellees.

MONTGOMERY, J. There was no error in his honor's overruling each and every one of the plaintiffs' exceptions to the reformed report (second) of the referee. As to the first exception, it was not necessary for the referee to have given any notice to any party to the suit as to when or where he intended to make the corrections which this court had instructed him to make, at its September term, 1888. The account was not opened for the taking of additional testimony. As to the second exception to the report of the referee, it is only necessary to say that the plaintiffs made no demand for any such sums as those therein set forth in their complaint or replication, nor did they offer any proof claiming them. They ignored the said judgment, and sought and had an account of the administration from the beginning. Besides, it appears from the records in the case, Judge Shepherd's judgment of June, 1888, and affirmed by this court at its September term, 1888 (*Gay v. Grant*, 101 N. C. 206, 8 S. E. 99, 106), that these sums were not due. As to the third exception to the referee's report, it is nowhere to be met with in the pleadings or evidence. It must have got into the exceptions through mistake. No mention of it was made by plaintiffs' attorney in his argument before this court. After a comparison of the first report of the referee with that of the second or reformed one, it is apparent that the referee has made the corrections which he was instructed to make by this court, and that it is in all respects proper and in conformity with the ruling of this court in this case, reported in 101 N. C. 206, 8 S. E. 99, 106.

The second assignment of error is without force. The case was remanded by this court at its September term, 1888, with an order that the referee be instructed to modify the account which he had filed with his report, in accordance with the opinion of this court. No additional testimony was asked to be taken by the plaintiffs, and none ordered by the court. The duties imposed upon the referee were simply those of an accountant instructed to alter and modify, in certain stated particulars, an account already stated, and to make it conform to the rulings of this court in certain specified items. It was in no sense a new trial of the whole matter, and the referee properly rejected the offer to

take other testimony. It is to be observed that, if the matters which the plaintiffs complain they were not allowed to make proof of were material and pertinent, they have themselves to blame for not putting them in evidence in the original taking of proof by the referee, because the plaintiffs admit that "said evidence could have been procured and used before the referee on the original hearing."

The third assignment of error is not sustained. We think the judgment of his honor, Judge Whitaker, was correct, and in conformity to the ruling of this court made at its September term, 1888, in this case. There is no error in the judgment of the court below, and the same is affirmed.

(116 N. C. 102)

# SMITH v. EASTERN BLDG. & LOAN ASS'N OF SYRACUSE.

(Supreme Court of North Carolina. Feb. 26, 1895.)

## PLEADING AND PROOF — CLAIM FOR MONEY PAID.

Plaintiff declared on a contract whereby he agreed to act as agent of a loan association, at his own expense, in consideration of a commission for stock sold by him and a renewal interest on monthly installments,—alleging certain sums to be due as commissions, and as earned renewal interest,—and averred a wrongful repudiation of the contract by defendant. Defendant pleaded payment of the earned renewal interest, and thereafter plaintiff abandoned the allegations as to the commissions and as to the breach of the contract. *Held*, that he could not show that he had expended a certain amount in behalf of defendant, in rendering the services under the contract, that cause of action not having been pleaded.

Appeal from superior court, Craven county; Brown, Judge.

Action by Isaac H. Smith against the Eastern Building & Loan Association of Syracuse, N. Y., to recover money under contract. From a judgment for plaintiff for a part of the money sued for, plaintiff appeals. Affirmed.

The first cause of action declared on by plaintiff is as follows, viz.: "(1) That the defendant is a corporation duly incorporated under the laws of the state of New York, as plaintiff is informed and believes. (2) That on the 23d day of December, 189—, the defendant entered into a contract with the plaintiff, a copy of which is hereto attached, and made a part hereof, marked 'A.' (3) That the plaintiff fully performed said contract upon his part. (4) That subsequently the defendant agreed with the plaintiff to pay the plaintiff the whole of the membership fee, to wit, one dollar per share on installment stock, instead of 95 per cent. thereof, as specified in said contract. Said agreement is contained in a letter dated the — day of —, a copy of which is hereto attached, marked 'B.' (5) That under said agreement and contract the plaintiff sold twenty-five thousand four hundred and ninety-nine shares of installment stock, and

collected the membership fee thereon. (6) That the defendant, without cause, and in violation of said contract, refused to issue said stock so sold by the plaintiff, whereby the plaintiff lost the membership fee on said stock, which amounted to the sum of twenty-five thousand four hundred and ninety-nine dollars. (7) That from the date of said contract until the commencement of this action, a period of fourteen months, the defendant received monthly installments on about fifteen hundred shares of stock which had been sold by the plaintiff for the defendant in the states of North Carolina and Alabama. (8) That, under said contract, defendant agreed to pay the plaintiff the sum of one and one-half cents per share on all monthly installments of said stock, which amounted to the sum of three hundred and fifteen dollars during said period. (9) That the sums hereinbefore specified, though due and demanded by the plaintiff, have not been paid by the defendant. (10) That the defendant, as an inducement to the plaintiff to greater activity in the interest of the defendant, agreed to continue said renewal interest of one and one-half cents per share on all monthly installments of stock until the maturity of said stock, to wit, seventy-eight months from its issue. (11) That the defendant has unlawfully repudiated its said contract with the plaintiff, whereby the plaintiff has been damaged by the loss of the renewal interest aforesaid on about fifteen hundred shares of installment stock for the period of sixty-four months subsequent to the commencement of this action, amounting to the sum of fourteen hundred and forty dollars, and on twenty-five thousand four hundred and ninety-nine shares for the period of seventy-eight months, amounting to twenty-nine thousand eight hundred and thirty-three 44-100 dollars, the two said amounts aggregating \$31,273.44."

Following are the material portions of the contract referred to in the complaint, viz.: "This agreement between the Eastern Building and Loan Association of Syracuse, New York, an incorporated company under the laws of New York, represented by John J. W. Reynolds, its secretary and general manager, having authority to contract as herein stipulated, as party of the first part, and Isaac H. Smith, of New Berne, N. C., party of the second part, witnesseth, as follows, viz.: The said Eastern Building and Loan Association of Syracuse, N. Y., being desirous of extending its business over the state of North Carolina, hereby appoints the said Isaac H. Smith, party of the second part, as their agent in the state of North Carolina, to carry into effect its purposes and to extend its business in said state, with his central and principal office at the city of New Berne, N. C., under and by virtue of the powers granted to him, as follows: To visit, build, and reorganize, when necessary,

all the local boards located within the said territory, and to establish other local boards at other points throughout the state, under the laws, rules, and regulations of said company; and for that purpose, also, to put such agents and agencies in the field and into effect as promise the best results, not inconsistent with the rules of said company, calculated to increase and extend the business of said corporation in said state, either by district agencies or boards or other means, so that a strict and accurate account of said business may be had and kept at his said central office, and at the said district agencies and local board, open at all times to the inspection, revision, and control of said corporation, as their interest in managing their general business at Syracuse, N. Y., may demand or require. Second. To organize local boards all over the balance of the territory as soon as practicable and possible, and as the interest of both parties may seem to demand. Third. To place in the field canvassing and district agents and managers as fast as the same can be prudently done. Fourth. To assist in making and supervising loans and selling shares of stock. Fifth. To do and perform such general duties as will seem to be required to build up, strengthen, and extend the business of said association in said state, always under such general or specific directions as said corporation may lawfully and reasonably adopt to extend its business. Sixth. To give bond, with good and sufficient security, of not less than three thousand dollars (\$3,000), at any time to be increased as the demands of the business may require, in the judgment of said first party. Seventh. It is further expressly agreed that, in addition to the territory above named, the said second party shall act as special agent for the procurement of business, among the colored people only, in such towns and places within the state of Alabama as may be designated from time to time by said first party, and to exercise the same supervision over the business and agents so procured in said territory as in the state of North Carolina. In consideration for said duties performed or caused to be performed by said second party at his own costs and expense, the first party hereby agrees to pay said second party for such services the following sums and commissions, to wit: Two dollars per share on all paid-up stock or fully-paid certificate procured by or through him in said territory, 95 per cent. of the membership fee on all installment stock, together with a renewal interest of one and one-half cents (1½) per share on all monthly installments on stock within said state and special territory of Alabama."

W. W. Clark, for appellant. M. De W. Stevenson, for appellee.

EVERY, J. It is a well-settled legal principle, repeatedly recognized by this court,

that a recovery cannot be had upon proof without corresponding allegations. *McLaurin v. Cronly*, 90 N. C. 50; *Abernathy v. Seagle*, 98 N. C. 553, 4 S. E. 542; *Greer v. Herren*, 99 N. C. 492, 6 S. E. 257. The plaintiff, in the progress of the trial, abandoned his second cause of action entirely, as well as that founded on the breach of contract alleged in sections 5 and 6, and the repudiation of it declared upon in the eleventh section, of his first cause of action, while the defendant conceded the justice of the demand embodied in sections 7 and 8, but pleaded, and offered evidence to prove, payment in full of that claim. After erasing all that is no longer insisted upon, there is no other allegation upon which a recovery can be asked, unless it be in the general averment contained in the third section of the complaint, construed in connection with the contract, a copy of which was filed as an exhibit. After abandoning the claims of two dollars per share on paid-up stock and of 95 per cent. on membership fees, and after his demand of 1½ per cent. on monthly installments paid upon stock had been admitted, the plaintiff was allowed to testify (the defendant objecting) that "from December, 1891, to December, 1892," he had "spent \$5,000, out of his own pocket, in and about work for the association." Was he entitled to recover back from the defendant any part or all of the money expended, as designated by him, in the face of the fact that the two demands abandoned, and that conceded to him in the answer, were, by express stipulations of the contract, to be paid, if at all, in consideration "of duties performed, or caused to be performed, by said second party, at his own cost or expense"? If it were possible to maintain an action founded upon the alleged expenditure in the conduct of the business, because in furtherance of the purposes in contemplation of the parties in entering into the written agreement, the defendant would be entitled to a more definite understanding of what he proposed to prove than can be gathered from the portions of the complaint left intact, or all of it, probably, with the exhibit added. But the contract is one involving mutual considerations,—that on the part of the plaintiff to do certain things at his own expense, and that on the part of the defendant to pay him at a given rate for certain services, if performed. Now that plaintiff, by abandoning his grounds of action, has admitted his inability to prove that he performed two kinds of service, for which he was to receive payment, and the defendant has conceded his remaining claim, it would be manifestly wrong to allow him to recover in consideration of working at his own expense for the only service rendered, and then to permit him to recover back the consideration on his part. This case bears no analogy to that class of cases where a plaintiff is held to have declared in his complaint both upon a special contract and a quantum meruit or

a quantum valebat (though often inartificially drawn), and afterwards directs his proof to the second ground of action only. Here the plaintiff declares upon the stipulations of the contract, makes good his claim to have performed one of them, and then demands, under a general count, the repayment of the consideration in money paid by him in the performance of what he had engaged, in the written instrument, to do. A plaintiff is not allowed to declare on one cause of action, and prove another, because, if such variances are tolerated, however diligent the defendant may be, he cannot so prepare his defense as to meet surprises. *Willis v. Branch*, 94 N. C. 142; *Conley v. Railroad Co.*, 109 N. C. 692, 14 S. E. 303. For the reasons given, we think there was no error.

(116 N. C. 361)

## STATE v. WYNNE.

(Supreme Court of North Carolina, Feb. 26, 1895.)

## BASTARDY—JURISDICTION—JUDGMENT—CONSTITUTIONAL LAW.

1. Code, § 35, imposing a fine for begetting a bastard child, makes the act a criminal offense.

2. The crime of begetting a bastard child is complete when the child is begotten, so as to give the superior court jurisdiction, under Code, § 892, as amended by Act 1889, in the bastardy proceedings, on failure of a justice of the peace to take cognizance of the crime for 12 months after it was committed.

3. The provision that the court, in bastardy proceedings, in addition to a fine, may compel defendant to pay an allowance to the mother, is not unconstitutional, as authorizing imprisonment for debt.

4. Under Code, § 32, expressly authorizing the court, in bastardy proceedings, to commit defendant "until he find surety," such a judgment, though conditional, is valid.

Appeal from superior court, Franklin county; Coble, Judge.

Walter Wynne, convicted of bastardy, appeals. Affirmed.

The indictment is, in substance, as follows: "The jurors," etc., "present that Walter Wynne, \* \* \* on the 4th of October, 1893, in and upon the body of one Mary Neal, did willfully and unlawfully beget a bastard child, she, the said Mary Neal, being then and there an unmarried woman, and the said bastard child, as begotten by said Walter Wynne, having been born alive on the 4th day of July, 1894, still lives, and is likely to become a county charge, and he, the said Walter Wynne, then and there refused to provide for the maintenance of said child, against the form of the statute," etc. The defendant's counsel contended that the court did not have jurisdiction of the offense, as will more fully appear from the opinion of the court. Upon the trial the defendant was convicted, and appealed from the judgment pronounced.

N. Y. Gulley, for appellant. The Attorney General, for the State.

EVERY, J. The statute (Code, § 35) by imposing a fine for begetting a bastard child, makes the act a criminal offense. *State v. Parsons*, 115 N. C. 730, 20 S. E. 511; *State v. Burton*, 113 N. C., at page 662, 18 S. E., at page 657; *Myers v. Stafford*, 114 N. C., at page 240, 19 S. E., at page 764. The limiting of the punishment to a fine of \$10, ipso facto, confers exclusive original jurisdiction of the criminal offense upon the courts of justices of the peace for 12 months from the time when the offense is committed (Laws 1889, c. 504); but after the lapse of a year the concurrent jurisdiction of superior and criminal courts attaches, under the provisions of Code, § 892. When is the criminal offense complete? It is, clearly, when the child is begotten, because the mother, as soon as she becomes conscious of her pregnancy, is allowed to complain (Code, § 32), and procure the issuing of a warrant, upon which the accused may be arraigned and tried immediately, on being brought before a justice of the peace, unless the justice shall deem it proper to grant him a continuance (Id. § 34). Following the principle announced in *State v. Burton*, supra, the court said in *Myers v. Stafford*, supra, that: "The question being now presented in such shape that it is necessary to be decided, we are of the opinion that the begetting of a bastard child \* \* \* has become a petty misdemeanor. It was demonstrated in *State v. Burton*, supra, that a fine can only be imposed for a crime or misdemeanor or a contempt." The charge embodied in the indictment, and sustained by the proof upon which the defendant was found guilty, was that he "on the 4th day of October, in the year of our Lord 1893, \* \* \* in and upon the body of one Mary Neal, did willfully and unlawfully beget a bastard child," etc. The indictment was sent, and returned "A true bill," at January term, 1895, of the court,—more than 12 months after the child had been begotten, and the offense had become complete. Construing Code, § 892, with the amendatory act of 1889, prolonging the period for the exercise of exclusive original jurisdiction by the justice from 6 to 12 months, we cannot escape the conclusion that after one year from the perpetration of the petty misdemeanor of begetting a bastard child, that, like all other offenses for which no greater punishment can be imposed than a fine of \$50, or imprisonment for one month, becomes cognizable in the superior court, as well as before a justice of the peace, until the prosecution is barred by the lapse of time.

The plea of not guilty necessarily involves the question of paternity, upon which the finding, on the issue raised by it, depends. When, therefore, the defendant is convicted of the criminal offense, the incidental authority to enforce the police regulation, as pointed out in *Parsons' and Burton's Cases*,

supra, is immediately vested in the court that takes cognizance of the misdemeanor. The power of the court to imprison for fine and costs as well as for nonpayment of the allowance, and the relation sustained by the mother of the bastard and of the county commissioners to the judgment, were fully discussed in *State v. Parsons*, supra. The incidental authority to enforce the police regulation is expressly conferred by statute, and there can be no reasonable doubt about the power of the legislature in the premises. At common law, in addition to the infliction of punishment of fine and imprisonment for a public nuisance, the court might order that the nuisance be abated. 2 Whart. Cr. Law (7th Ed.) § 2377. So that to clothe the court with some incidental power to further provide for the public protection, after making an example of the offender, is to neither transcend the limit of legislative authority, nor to depart from the practice prescribed in other cases.

The learned counsel for the defendant referred on the argument to a warrant, but the record sent up is entirely consistent with the idea that the prosecution had originated in the superior court by the sending of the indictment after that court had concurrent jurisdiction. If we could conceive, therefore, of any principle upon which the fact of the assumption of jurisdiction by a justice, where neither the pendency of a prosecution in nor the judgment of that court had been pleaded or set up in bar, would defeat the jurisdiction of the superior court to try after the lapse of 12 months from the commission of the offense (*State v. Drake*, 64 N. C. 589), we can take no judicial knowledge of matters outside of the record.

By permission of the court the defendant's counsel has been allowed, since the foregoing was written, to present to the court some additional reasons for maintaining that there was error below. The statute (Code, § 31) restricts the right of justices of the peace to issue warrants for bastardy to cases where the affidavit is made voluntarily by the mother, or upon certain grounds set forth by a county commissioner, just as the act of 1868 made it a condition precedent to the exercise of jurisdiction, in case of assault and battery, that it should appear by affidavit that there was no collusion between the complainant and defendant. But the superior court is a court of general jurisdiction, and, there being nothing upon the face of the record to oust its authority, must proceed to try, when a defendant is arraigned for an offense, and it appears from the indictment itself that a justice's court no longer has the exclusive right to take cognizance. The rule finds illustrations in those cases where a more serious assault is charged, and the proof sustains only a conviction for such an assault as is at the time within the exclusive ju-



isdiction of a justice. *State v. Cunningham*, 94 N. C. 824; *State v. Fesperman*, 108 N. C. 770, 18 S. E. 14; *State v. Speller*, 91 N. C. 526; *State v. Ray*, 89 N. C. 587; *State v. Russell*, 91 N. C. 624. The authority of a justice of the peace to take cognizance of criminal actions is special, conferred at the discretion of the legislature, under a well-defined power given in the constitution. Article 4, § 27; *State v. Jones*, 100 N. C. 438, 6 S. E. 655. There is a presumption in favor of the rightful authority of a court of general jurisdiction when upon the face of the record it appears to have cognizance. The authority of a justice of the peace, on the other hand, is not based upon any principle of the common or organic law delegating and fully defining it, but upon the discretionary exercise of a restricted power by the legislature. The consequence is that it must always appear affirmatively that the legislature has followed strictly its power of attorney in delegating judicial authority, and that the court upon which it is conferred has kept within the limits prescribed by the statute. Bastardy being a criminal offense, *prima facie*, therefore, the superior court has jurisdiction of it. If, by virtue of the constitution (article 4, § 27), the legislature has restricted for a time the authority of the higher court, and delegated a portion of it to the inferior jurisdiction, the latter must, like an attorney in fact, show that it has pursued the letter of its power, in order to establish its right to exercise it. Because the legislature has hedged the justice's authority about with conditions precedent, such as the making of a particular sort of affidavit by a specified person or officer, it does not follow that the higher court, which has, under the constitution, jurisdiction of all offenses except such as, for a time, have been placed under the control of an inferior tribunal by virtue of a restricted authority, shall not resume its constitutional power when the time for which the exclusive jurisdiction was delegated has expired. Under the express language of the statute (Code, § 32), authority is given the court to commit a defendant convicted of begetting a child "until he find surety" to a bond conditioned for the indemnity of the county, and to perform the order of the court. Though the general principle is, as stated by counsel, that conditional judgments are void, yet, if we should concede that the judgment here is conditional, it is just such a judgment as is authorized by statute. If the court had attempted to delegate its authority, as in the case of *Strickland v. Cox*, 102 N. C. 411, 9 S. E. 414, the order would have been unconstitutional and void, because there is no warrant in the constitution for delegating such power. It has been repeatedly held by this court that the enforcement of such a police regulation was not within the inhibition of the constitution in reference to imprisonment for debt.

*State v. Burton*, *supra*. So that there is no reason why the legislature should not modify a principle of the common law, if it has done so, in this case, provided it keeps within the purview of its own authority. We can conceive of but one question of practice, in cases of this kind, that is not fully settled by recent adjudications, and to anticipate that now would be to give an obiter opinion. There was no error, and the judgment is affirmed.

(116 N. C. 990)

## STATE v. WINSTON.

(Supreme Court of North Carolina. Feb. 26, 1895.)

## CRIMINAL LAW—CONFESSION—LOCATING STOLEN GOODS.

A constable may testify that, after he told defendant that if he knew anything about the stolen goods, it would be best for him to tell, defendant showed him where the goods were hidden.

Appeal from superior court, Nash county; Mebane, Judge.

Poss Winston, convicted of larceny, appeals. Affirmed.

The state offered the following testimony:

C. H. Murray found his store broken open on the 20th of last June, and some goods taken out. "Went across field, and found tracks of two persons,—men's tracks,—one of them No. 7, and the other made by an old shoe. Followed track back to where they came into the field. The defendant lived about a mile and a half from store. Followed track for about one-quarter of a mile. Track was coming towards store from where they lived. Only followed it from the back side of field, coming toward the store. They had traded some; could not tell how often. It was a double door, and they prized it open. Missed some snuff, tobacco, salt, baking powder, cloth, and other things. Poss Winston came up while I was eating breakfast, and asked me if I had any flour and meal, and commenced talking about some men breaking in an old woman's house. Walked after him, and measured his track, and it corresponded with the track in the field. We found some of the things where Poss, Mary, Lydia, and John lived. Found soap and baking powder. I knew it was mine by the mark that was on it. I put the mark on it. The constable arrested Poss, Mary, and Lydia, and sent after John. They all said that John was there at night. They said 'Search the premises.' No threats were offered to Poss by the constable, Brantley. John had new shoes at the trial. He had old ones when arrested. Constable Brantley, Cone, Murray, and others were with me. We went to the house. Cross-examined: Don't know who rents the house. About one and a half miles from my place. There is a path leading to mill and store. I did not track them from the store."

Brantley: "I am a constable. Murray gave me a list of the articles missed at the store. We went to house where defendants lived, and searched. I was in the house, when one of the men outside said, 'Arrest Poss.' He had found some of the things. Poss was arrested. There were found soap and baking powder and matches. I told Poss that if he knew about where other articles were, it would be best for him to tell." Counsel for Poss Winston objected to witness testifying to any statement made by Poss. The court allowed witness to testify as to what he did in consequence of said statements. Defendant Poss Winston excepted, and witness proceeded to testify that he "found all the articles that Murray had missed, except a piece of white cloth. Found them in the garden where defendants lived. They were buried in the ground, under some cabbage. He (Poss) pointed out where other articles were to be found. Poss requested to have this talk with me. Mary, Lydia, and John consented for Poss to go with me, and look for the goods. This occurred at the store. I told him, if we were going to find the goods, I wanted to carry a man to help bring them. He said, 'Get your man.' Cone went with us. Cross-examined: Started from the store down the road, and about one-half of a mile from Poss' house turned out of the road. Went to garden, and got goods. Poss walked straight to where goods were. Everything occurred after I told him it might be best for him to show where goods were."

George M. Cone: "They all lived there together. It was John's home. He went there on Sunday and called it 'home.'"

Mary Winston, one of the defendants, testified: "I don't know anything about it, except that when I went to bed, John and Poss were there, and when I got up next morning they were there. This was the night that Mr. Murray missed the goods. John rented the house, and we all lived there, and another man lived there. Cross-examined by the state: I sleep sound. Sleep in the same room with the boys. Didn't see any goods there next morning. Cross-examined by counsel for Poss Winston: John rented the house. Poss is no kin to me. I am thirty-five or forty years old."

John Winston, one of the defendants, testified: "All I know about it is, I went home on Tuesday night. Laid down early. Slept there that night. Went back to my work next morning. When we stopped for dinner, man arrested me. I told him I knew nothing about Murray's goods. Said I got snuff from Springhope. Told one man I knew nothing about goods, and he said it was best for me to tell. Cross-examined by the state: Poss went with Mr. Brantley to show goods, but I did not tell Mr. Brantley I was willing for him to go. Poss lived there with my mother. He was sick, and unable to work. Is my half brother,—we had the same father. Cross-examined by counsel for Poss Win-

ton: Poss had taken morphine, and slept at home all night."

The jury, for their verdict, say that John Winston and Poss Winston were guilty, and Mary Winston and Lydia Winston were not guilty. Motion by counsel for Poss Winston to set aside verdict as against the testimony. Motion overruled. Exceptions by defendants. Poss Winston alone appealed.

N. Y. Gulley, for appellant. The Attorney General, for the State.

FURCHES, J. This appeal presents but one question for our consideration, and that is as to the admissibility of the evidence of Brantley, a constable, who arrested the defendant. Brantley testified, under objection of the defendant, that: "Poss was arrested. There were found soap and baking powder and matches. I told Poss that if he knew about where other articles were, it would be better for him to tell." Counsel for Poss Winston objected to witness testifying to any statement made by Poss. The court allowed witness to testify as to what he did in consequence of said statements. Defendant, Poss Winston, excepted, and witness proceeded to testify that he "found all the articles that Murray had missed, except a piece of white cloth. Found them in the garden where defendant lived. They were buried in the ground under some cabbage. He (Poss) pointed out where other articles were to be found. Poss requested to have this talk with me." Was this testimony admissible, is the question? The general rule is that after threats or inducements held out to a defendant, as in this case, "it would be better for him to tell, if he knew, where other articles were," any admission made by him after that would be incompetent. But there are exceptions to this rule, and it seems to us that this case comes within the exceptions. This rule is not intended for the benefit of guilty defendants, but in the interest of truth. And it has been wisely held that simple declarations and admissions, made under such inducements, are so unreliable that the law will exclude them from the consideration of the jury. But it seems also to be well settled that any facts ascertained in consequence of such declarations or confessions are admissible in evidence. And the declarations, connected with and explaining such facts, being considered a part of the *res gestae*, are also admissible; as, in this case, the defendant's going with the officer, a distance of a half mile, and pointing out the articles stolen, and telling the officer where other articles were concealed, and the officer finding the articles, as stated by the defendant, are admissible in evidence. The reason of the rule for excluding such admissions as are induced by promises and hopes of favor ceases in such cases as this, as there can be no mistake as to the truth of the fact that the goods were found where he said they were, and where he pointed them out to

Brantley. This doctrine is well settled in this state. *State v. Garrett*, 71 N. C. 85; *State v. Lindsey*, 78 N. C. 499, and authorities there cited. These cases, especially *Lindsey's Case*, fully sustain the ruling of the court below, and we cannot sustain defendant's exception without overruling these cases, which we have no disposition to do, as, in our opinion, they are founded on just principles and sound reasoning. Affirmed.

(116 N. C. 64)

JOHNSON et al. v. GOOCH et al. (PEEBLES et al., Interveners).

(Supreme Court of North Carolina. Feb. 26, 1895.)

WILLS—SPENDTHRIFT TRUST—PAYMENT OF DEBTS—VESTING OF ABSOLUTE ESTATE—EVIDENCE.

1. Where a will devises property to J., to hold in trust for testatrix's husband, free from liability for certain debts due by him to third persons, but gives him the property absolutely in case he fully pays all such debts, the absolute title does not vest in him, unless payment of such debts is made during his life.

2. On an issue as to whether a decedent had, before his death, paid all his debts, the production of a note, signed by him, which was found uncanceled among the effects of another decedent, raises the presumption that the note had not been paid.

Appeal from superior court, Northampton county; Armfield, Judge.

Action by C. T. Johnson and others against J. T. Gooch and others. W. W. and R. B. Peebles intervened. From a judgment for plaintiffs, interveners appeal. Affirmed.

MacRae & Day and R. B. Peebles, for appellants. T. W. Mason, for appellees.

FAIRCLOTH, C. J. The defendants W. W. and R. B. Peebles claim the surplus money in the hands of defendant Gooch as administrator de bonis non c. t. a. of Virginia A. Johnson, by an alleged sale of the land devised in said Virginia's last will and testament, under an execution against her husband, James Johnson. The plaintiffs claim said surplus money, which arose from a sale of said devised lands, by a proper petition to raise assets to pay debts, and they claim it as devisees of Virginia A. Johnson, in whose will are the following clauses: "I devise and bequeath my whole estate to Catharine Johnson [the plaintiff], my sister-in-law, in trust to hold and preserve the same from all liability to the debts of my husband, James Johnson, which were contracted by him prior to our intermarriage." "Sixthly. In case the said James Johnson should fully pay off or discharge by any means all and every of the debts contracted by him, prior to my marriage with him, then, and in that case, I declare that he shall take and receive all my aforesaid estate, free and discharged from all the trusts in the premises declared, and shall hold the same absolutely for his own sole use and benefit."

James Johnson died March 16, 1876, and the note of said Johnson was dated July 31, 1858, which day was prior to said intermarriage. The important question presented is whether James Johnson fully paid or by any means discharged said note during his lifetime. The payment or discharge of this note during the life of James Johnson was a condition precedent to the vesting of the title to said land in James Johnson, and it could not vest unless the condition was performed in his lifetime. To create a condition, no particular form of words need be used, for, if a corresponding purpose be read in the will, that purpose takes effect. *Schouler, Wills*, 598. The possession of an unindorsed negotiable note or bond raises a presumption that the person producing it on the trial is the real and rightful owner, and this presumption is not repelled or altered by a denial of the defendant in his answer of such ownership. *Jackson v. Love*, 82 N. C. 405. It is prima facie evidence of ownership, and nothing short of fraud, not even gross negligence, is sufficient to overcome the presumption. *Commissioners v. Clark*, 94 U. S. 278. This is so between the holder and the maker, but not between the holder and the payee. *Holly v. Holly*, 94 N. C. 670. And the burden of proof to rebut this presumption is on him who alleges any defect in the title, unless proof of fraud or illegality be offered, and then the burden of proof is shifted to the holder, and he must show that he received it bona fide for value. *Pugh v. Grant*, 86 N. C. 39. This is not an action founded on the note for its collection. In the course of the trial, the question of payment, as before stated, was an independent and separate fact, to be ascertained without any regard to the principles of law, such as would apply in an action on the note between the payor and the payee and their representatives; and when the plaintiffs or defendant Gooch, as administrator of V. A. Johnson, the deviser, on the trial produced said note uncanceled, the presumption of ownership, and that the note had not been paid, at once arose, and, without other proof, it was proper, and it was the duty of his honor to instruct the jury to find the issue as they did. If the note had been in the possession of James Johnson or his representative, the presumption of payment or discharge would have been equally strong in favor of the defendants. The defendants excepted because the witness Gooch stated that Mr. Burton said he found the note among the papers of J. J. Long. This exception is without force, because without that statement it was the duty of the court, as above pointed out, to instruct the jury to answer the issue "Yes" on the production of the note uncanceled. This was so unless the defendants had shown something to avoid that conclusion. The statement of Burton's declaration was not useful to the jury, and could not have

influenced their verdict. It was the possession of the note uncanceled that entitled the plaintiffs to have the issue found in their favor, without regard to anything else, on this aspect of the case. The defendants did not offer any evidence of actual payment, but relied solely on the presumption of payment from the lapse of time, which presumption had not arisen at James Johnson's death. It is therefore immaterial when the statute began to run. We understood the defendants to abandon their exception to the competency of the witness Gooch to testify. There is no error, and the judgment is affirmed.

(95 Ga. 561)

### PRICE v. ROBINSON.

(Supreme Court of Georgia. Dec. 21, 1894.)

FRAUDULENT CONVEYANCE—HUSBAND AND WIFE—NEW TRIAL.

The issues presented by the bill of exceptions in this case involve only questions of fact; no error of law is alleged to have been committed; and the verdict is supported by the evidence. This court, therefore, will not control the discretion of the trial judge in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Johnson county; R. L. Gamble, Judge.

Proceedings in execution by W. B. Robinson against A. T. Linder, in which the property levied on was claimed by Jennie Price. Verdict for the execution plaintiff, and claimant brings error. Affirmed.

The following is the official report:

An execution in favor of Robinson, upon a judgment dated in September, 1892, for \$209.19, principal, with a credit of \$116, was levied upon a house and lot in the town of Wrightsville as the property of A. T. Linder, defendant in execution, which was claimed by Mrs. Jennie Price. There was a verdict finding the property subject, and, claimant's motion for new trial being overruled, she excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc.; and upon the further ground that the verdict was contrary to certain specified portions of the charge. Upon the trial, claimant introduced a deed to the property levied upon, from Linder to Mrs. Linder, December 3, 1891, recorded December 18, 1891; also, deed from Linder and his wife to Mrs. E. H. Price, April 4, 1892, recorded April 14, 1892; also, deed from Mrs. E. H. Price to claimant, October 16, 1892, recorded October 29, 1892. Linder testified: "The deed from myself to my wife was made in good faith, for the consideration therein expressed, and not to delay, defeat, or defraud my creditors. I owe her for property of hers given by her parents, the Huff place in Wrightsville, worth about \$1,000, the deed to which was made to me, and the rent of this place for about fourteen

years, valued at \$80 per year. The deed shown me covers the Huff place. I also got from her at one time \$1,500, to pay for plantation known as the 'Pool Place,' and at other times various sums amounting to \$700, which I used in buying property and paying my debts. This money she had made by keeping hotel, selling fruit, and other things, and by her own labor, all of which she did by my consent, with the agreement that all she could make belonged to her. She also clerked a great deal for me in the store, and rendered labor in every way to assist me in business and accumulate money for herself. She kept her money at the house separate from mine, and would lend to me when I called on her for it. She kept hotel for several years, and did most of the work herself, and had good patronage, by which she made money. The hotel was run in her name, but I paid the taxes, and took out license myself. I paid taxes on all the property in my own name, because I thought it was not necessary to give it in separately, so the taxes were paid. When I made this deed to her, I had property enough to pay my debts, but I lost heavily on cotton, and made bad collections, and could not pay all I owed. I owned 800 acres, worth \$7 per acre; 181½ acres in and adjoining the corporate limits of Wrightsville, worth \$25 per acre; the Rawles place, in Wrightsville, worth \$700; the Huff place, worth \$1,000; store and business lots in Wrightsville, worth \$6,000; stock of goods, worth \$5,000; and notes, accounts, and other property, worth about \$3,500. I executed mortgages on my lands to Dent, McAfee, Tanner, and Carter for about \$1,200, only about half of which I owed them, and they advanced cotton to me for the balance, at 7½ cents per pound, which I sold at 5 cents, and applied the proceeds to my debts. My stock of goods I sold to my creditors as they would come and buy from me on what I owed them, until it was reduced to about \$700; and I sold the remnant to Tanner on what I owed him for 50 cents on the dollar. I have concealed nothing from my creditors, and, if I can get the value of my property, it would pay my debts, but I am now unable to pay what I owe. I signed the deed to Mrs. Price with my wife, because Mrs. Price asked me to do so. The purchase money, as set forth in the deed, \$2,500, was actually paid, and my wife has used about \$1,500 of it in paying part of a debt I owed to the Savannah Guano Company. Mrs. Price did not know or have any grounds to suspect my financial embarrassment when she bought the place. She wrote my wife the letter [introduced in evidence] offering to buy the place, and my wife and I went to Lee county, where she lives, and sold her the place. We made the trade at her house, and she sent her son Julian with us to Albany, where he got the money for her, and paid my wife the \$2,500.

I don't know where he got the money. Jullan is the husband of my daughter; Mrs. Jennie Price. I knew nothing of Mrs. E. H. Price's making the deed to Mrs. Jennie Price until after it was drawn. We have been paying rent on the place since we sold it, at the rate of \$10 per month, and the note for \$90 in evidence is for rent to Mrs. E. H. Price, and has been paid. We have since paid the rent to Mrs. Jennie Price. Mr. A. F. Daly offered \$2,000 for the place, but my wife did not sell to him, because Mrs. Price offered more. The hotel was known as the 'Linder House,' but my wife was the owner of it. She paid for the supplies she got from me for the use of the hotel. We all lived together at the hotel." Mrs. Linder testified, corroborating her husband in various particulars, and, in addition, that she kept hotel several years, doing her own cooking, and had an average of as many as sixteen drummers and other customers a day; that the money made by the hotel business was hers, and she carried on business and paid the expenses of it herself; that she took no note from him for the money she let him have, because she trusted him as her husband, and believed he would do her right; that he had been under promise for a long time, even before they moved on the place, to make her a deed to this place, but kept putting it off up to the time the deed from him to her was drawn; and that she knew nothing of Mrs. E. H. Price giving the place to Mrs. Jennie Price until after it was done. Mrs. Outlaw testified: "My husband made the deed to the Huff place to Mrs. Linder in exchange for the place where Mr. Blount now lives. There was no money paid for either place, but it was a gift for the benefit of my daughter Mrs. Linder. I have seen her let her husband have money several times. Saw her give him the money to pay for the Poole place, \$300 I think, at one time, and other amounts at other times. She asked me not to say anything about it. She kept her money at the house separate from his. She made money by her own labor, and by keeping hotel." Mrs. Jennie Price testified that Mrs. E. H. Price gave her the place in question without any purpose of protecting it from Linder's debts, for his benefit; that her father and mother knew nothing about it until after it was done; that Mrs. E. H. Price paid \$2,500 for the place; that she had seen her mother let her father have money at various times; that her mother kept her money at the house, and her father kept his in his safe; that her father paid her rent, but she did not know how much it was, etc. Claimant put in evidence the letter from Mrs. E. H. Price to Mrs. Linder, dated March 12, 1892, in which it was stated that Mrs. Price had heard Mrs. Linder wanted to sell the place, and Mrs. Price wished to know her terms; that Mrs. P. fell in love with it when there the previous

summer; that, if Mrs. Linder agreed to sell at a reasonable price, to come and bring the deeds to the property, and assure Mrs. Price that the titles were all they should be to make Mrs. Price safe in the trade; also, the note for \$90 by Linder to Mrs. E. H. Price, dated April 4, 1892; and deed from Outlaw to Linder, dated July 10, 1887, the consideration stated being \$300. For plaintiff, the sheriff of the county testified: That he did not know whether Linder was solvent or insolvent December 3, 1891. That he had served several suits on him since that time, and Linder would tear up the copy served on him, and throw it down sometimes, and say that was all in the past or some such remark. That witness has several executions against him, which he has not been able to collect. That Linder owns 800 acres of land, worth about \$4,800; his old storehouse, worth about \$500; the Walker storehouse, about \$800; two other storehouses, a barber shop,—and livery stables, about \$1,300; town lots, about \$1,200; the Rawles place, \$700; the Huff place, about \$800; land near the corporate limits, about \$4,500. That he also had four mules, worth \$500, and a stock of goods, which might have been worth \$5,000, but witness could not say about this, and might have had other mules and horses. And that the land mentioned is under mortgage, and witness could not say what it would bring when sold. Plaintiff introduced other evidence, to the effect: Tanner bought the remnant of Linder's stock of goods at 50 cents on the dollar, paying therefor something over \$300, by crediting it on a mortgage Linder owed him. In December, 1891, Linder had a large stock of goods, but sold them out very fast, mostly to men he owed. People who had claims against him would go there, and haul goods off in wagons. A witness testified that he was satisfied Mrs. Linder never had an average of 16 customers a day at her hotel, nor near half that number; that witness had been living in Wrightsville a long time, and is acquainted with the travel to that place, and it would not warrant an average custom of that much; and that the house was known as "A. T. Linder's House." Plaintiff introduced mortgages on property of Linder, dated December 9, 1891, amounting to about \$12,000, upon which it was admitted credits were due of about ——— dollars. Also, various *fi. fas.* against Linder upon judgments of the September term, 1892, and March term, 1893, amounting, principal and interest, to about \$6,000. Upon one of them, the *fi. fa.* in favor of plaintiff, a credit of \$116 was admitted; and on another, that of the Savannah Guano Company, a credit of about \$1,600, and a transfer was made to Mrs. Linder, who paid the money. Also, the state and county tax books, showing no return by Mrs. Linder in 1891; returns by Linder that year, amounting to about \$19,-

400; returns by Linder for 1892, \$9,050; and returns by Linder as agent for his wife, the same year, \$3,190.

A. F. Daley, W. R. Daley, and Harris & Rawlings, for plaintiff in error. V. B. Robinson and Evans & Evans, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 540)

**CROCKETT v. CHATTAHOOCHEE  
BRICK CO.**

(Supreme Court of Georgia. Dec. 21, 1894.)

PRINCIPAL AND AGENT—POWERS OF ARCHITECT—  
PURCHASE OF MATERIALS—RATIFICATION.

1. Whether an architect who furnishes designs and undertakes to superintend the construction of a building is also such an agent of the owner as to bind him personally for material furnished by a contractor who undertakes to construct the building, depends upon the contract between the owner and the architect; but, whether originally so authorized or not, if the architect assumes to act as such agent, and purchases material upon the credit of the owner, with his full knowledge and assent, the latter thereby ratifies the assumed agency of the architect, and is bound for the price of the material thus purchased.

2. There was no error in the charges complained of; the requests to charge, so far as pertinent and legal, were covered by the general charge of the court; and, even if minor errors were committed in admitting evidence, the same were unimportant, because the illegal evidence was not such as to unduly influence the jury, or lead to a wrong result.

3. The verdict, upon the substantial merits of the case, was right, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. Clark, Judge.

Action by the Chattahoochee Brick Company against J. P. Crockett. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

The Chattahoochee Brick Company sued Crockett upon an account for brick, alleged to have been furnished him for use in the erection of certain buildings in Atlanta, and to foreclose a material man's lien on the premises. Plaintiff obtained a verdict for the amount sued for, and, defendant's motion for new trial being overruled, he accepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because J. W. English, the general manager of the Chattahoochee Brick Company, over the objection of defendant that the statements of Golucke & Foote, made to plaintiff at the time the bricks sued for were charged to the defendant, were without the authority of the defendant, and not binding upon him, and could not be given in evidence without showing that they were authorized by Crockett so to make them, was allowed to testify as follows: "That they desired to purchase some brick

as Mr. Crockett's agents, for Mr. Crockett's building, and that they desired these bricks to be charged to Mr. Riden. Our reply was that we didn't know Mr. Riden, but we would be very glad indeed to sell the brick to Mr. Crockett, and charge them to him; that we knew he was perfectly good, but, not knowing Mr. Riden, we could not sell him the brick on credit, unless Mr. Crockett would assure the payment therefor. Golucke & Foote replied that it would be all right with Mr. Crockett, and for us to charge the brick to him, which we did, and they were delivered, and the receipts accompanying show the above to be true." In connection with this ground of the motion, and with others to be hereafter stated, the following appears from the record: Golucke & Foote, architects in Atlanta, under contract with Crockett, made plans for the buildings in question, and were looking after the material that went into the buildings by request of one Riden, who authorized them to place orders for the material. The contract of Golucke & Foote with Crockett did not cover the purchase of the material, but simply drawing plans for the building, and seeing that proper material was used by the contractor. The money that was to be paid was to be on approved bills passing through the office of Golucke & Foote. Riden continued for some time the work of building, but became embarrassed, and finally gave up the job, and Crockett finished it for himself. The brick in question were furnished while Riden was still the contractor. There was evidence for the plaintiff that before any of the brick were delivered, and after the conversation above mentioned, testified about by English, Foote told Crockett the circumstances as to the purchase of the brick, and Crockett stated that it did not make any difference, that he had the brick to pay for anyhow, and it did not make any difference who he paid. Foote had already told the brick company that, unless he notified them, to consider the order placed; that, if Crockett did not agree to it, he would notify them at once; and so, after his conversation with Crockett, he did not give any further notice to the brick company. Selz was an employé in the office of Golucke & Foote, and testified that he heard the conversation between Foote and Crockett, and corroborated Foote and Golucke as to what they said in that conversation, and, in addition, testified that it was generally understood between Crockett and these parties that he was to pay for those brick from the brick company; that that was the way he (Selz) understood it; that he did not know how Crockett and the others understood it; and that he thought that all understood it the same way. Crockett denied that Golucke & Foote had any authority, further than to draw the plans, and see that the buildings were in accordance with the plans. Under his contract with Riden, Riden was

to furnish the material and the labor. Foote testified, among other things, as to the conversation above mentioned; that he did not remember anything said about the brick, except it may be that Foote might have told him they were buying them from the Chattahoochee Brick Company, but he never intimated to him (Crockett) that Crockett was to pay for them, or had anything to do with the paying; that he (Crockett) did not remember what he said to Foote, and, if Foote ever spoke to him about having an account with the brick company, he did not know anything about it; that Foote never told him anything about it, because he (Crockett) was not to pay anybody but Riden. Every check and all the money he was to pay was to go right into Riden's hands, and he (Crockett) had no authority to pay the brick company or anybody else. Because plaintiff was allowed to prove by English that the books of the plaintiff, which were in the safe of the company at its office in Atlanta, showed the account sued upon to be correct; that the copy attached to its declaration was a sworn copy from the books, and that he knew the books showed that that account was correct. Defendant objected to this evidence, because of the absence of the books, and that they were the best evidence of the charge of the account to the defendant. It appeared from the evidence of this witness that he was not the bookkeeper of the plaintiff, and that the books were in the safe of the plaintiff at its office in the city of Atlanta. In a note to this ground the judge below states that this evidence came out in answer to defendant's question about books, and "then objected to afterwards, which will be fully explained by reference to brief of evidence." It appears from the brief of evidence that the evidence as to what the books showed was in response to the question on cross-examination, "Do you know what your book shows as to accounts against Mr. Crockett?" Because the court allowed the plaintiff to prove by G. W. Foote that "he held some other bills that he wanted to take care of. These smaller people wanted their money most, and he would attend to them first. I will state to you that all his bills were approved, and usually paid right there in the office, but Mr. Golucke can tell you more about that. He attended to the office work inside. I was most of the time outside, but was in part of the day in the office. I was looking more to the construction of the buildings for various people outside. In this way he recognized our acts." The defendant objected to this evidence, on the ground that the payment of other bills, under those circumstances, was irrelevant, and could have nothing to do with the case on trial. In connection with this ground, there was evidence that the bill for the brick in question was brought into the office of Golucke & Foote, through which office bills were paid, and

the attention of Crockett was called to this bill, and "he (Crockett) had some other bills that he wanted to take care of; the smaller people wanted their money most, and he would attend to them first." Because the plaintiff was allowed to prove by G. W. Foote that at the time of the change of the contract between Riden and the defendant, Crockett, for building the house in question, the defendant, Crockett, "must have been owing not less than \$800 on account of the work done by Riden, and I think more for the material that had gone into the building." The defendant objected thereto, on the ground that any evidence showing the state of accounts between the contractor, Riden, and the defendant, Crockett, at the time Riden gave up the contract for building the house, was immaterial. Because, over the objection of defendant that the evidence was irrelevant, the plaintiff was allowed to prove by G. W. Foote, that there was no difference whatever between the contract with Austin & Boylston and the contract made with the Chattahoochee Brick Company, the evidence before them introduced showing that this contract with Austin & Boylston was one made by Riden, and upon which Crockett was garnished. In connection with this ground, it appears that Riden had a contract with Austin & Boylston and that the bill of Austin & Boylston was paid by Crockett after the garnishment was put upon the contractor. As to this, Crockett testified that he did not pay the account to Austin & Boylston; that they garnished him, and Riden could not get along unless he got the money; and that he (Crockett) gave Riden a check for \$400, and he reckoned Riden paid Austin & Boylston. It appears that the contract between Riden and Austin & Boylston was for lumber for the buildings, and Austin & Boylston did not require the material to be charged to Crockett, but it was charged to Riden. Foote testified, among other things, that it was understood that the bills would be approved through the office of Golucke & Foote, and, when they were, Crockett would settle them. Because the plaintiff was allowed to prove by E. C. Seiz that "it was generally understood between Mr. Crockett and these parties that he was to pay for those brick from the Chattahoochee Brick Company. That's the way I understood it. I don't know how Mr. Crockett and the others understood it. I thought they all understood it the same way." The defendant's objection thereto being that what was understood between the defendant and these other parties other than the Chattahoochee Brick Company was irrelevant and immaterial. Because certain receipts for brick delivered to the building being constructed by Riden, the contractor, referred to in the testimony of J. W. English, and signed by parties not shown to have been in any way connected with the

defendant, Crockett, were allowed to go in evidence. Defendant objected to them because they were not shown to have been signed by any person connected in any way with the defendant. Because two tickets, dated April 16 and 21, 1891, for brick delivered, each signed by W. E. De Groat, on the back of which the following note of writing was indorsed, were allowed in evidence: "The Crockett job has been stopped for want of brick since yesterday morning, on corner of Fair and Frasier. I wish you would kindly send me some at once, as I am compelled to get the story up to-morrow. 10,000 will finish it. Yours, resp't., for Crockett, W. E. De Groat." "I will need 4 M more brick to finish story. Please send them to me this a. m., and greatly oblige, yours, W. E. De Groat." The defendant objected to the note or writing on the back of these receipts, because there was no evidence to show that W. E. De Groat was the agent of the defendant, Crockett, or was authorized in any way to act for him. The evidence shows that De Groat was the workman employed in laying brick on the building. The signature by him to the receipts were made before Riden had thrown up the job. Other receipts mentioned above were signed by Golucke & Foote or by Golucke, some of them being signed by De Groat, some by Riden, some by "Breckwell," and several by "J. P. Crockett." These receipts were all printed on blanks, and the blanks filled in with pencil. Breckwell or Burchell was probably some one laying brick on the building. Crockett never really signed any of the receipts; did not know when they were signed, nor by whom; and testified that none of them were signed by his authority. Because the court repelled the evidence of the defendant, James P. Crockett, as to what passed between him and a young man in the office, who acted in the name of the Chattahoochee Brick Company, and receipted a check of the defendant to the Chattahoochee Brick Company for \$16, in payment for two thousand hard brick that the defendant had bought from the company during the contract, and for which the defendant had gone to the office and called for, and which check was afterwards collected by the Chattahoochee Brick Company, as follows: "I told him I wanted to settle my bill, and the looked up the account, and said it was \$16.00; and I wrote him out a check for it, and he took it, and he said, 'We have been selling some brick that went on some place of yours;' and I said, 'You have?' and he said, 'Yes,' and I said, 'I don't know anything about that; I reckon it was all right; it was done by contract;' and he said, 'Mr. Parrott said Mr. Foote was all right, and to sell him all he wanted.'" It appears that Crockett had ordered 2,000 hard brick, for which the check for \$16 was given, for some well curbing. Because the plaintiff was allowed to prove, on cross-examination of the

defendant by the plaintiff, that H. G. H. Miller, who completed the building after Riden, the contractor, gave up his contract, was not a building contractor, but had been a butcher, jailer, and a clerk in a grocery store. The defendant objected to this evidence, on the ground that it was immaterial and irrelevant.

Error in refusing to give in charge the following written requests of defendant: "The plaintiff is not entitled to recover in this case, unless the evidence shows that the material claimed to have been furnished the defendant was upon his contract, made directly by himself or his authorized agents. (2) If it appears from the evidence that the alleged contract of purchase was made by an agent appointed for a particular purpose, and that this act of purchase was not within the scope of that purpose, this contract would not be binding upon the defendant, unless it appears from the evidence that subsequently, with knowledge of all the material facts as to the acts or sayings of the alleged agent in making the contract, he adopted these acts or sayings. (3) In this case, before you would be authorized to find an adoption or ratification of these acts of the claimed agent by the defendant, you must believe from the evidence that the defendant was fully informed of all the facts connected with the alleged act of purchase. (4) Before there can be an adoption of the previous acts of an unauthorized agent, there must be evidence of knowledge on the part of the principal, the defendant, in this case, of all the material facts as to the act of the agent. If the material facts be either suppressed or unknown to the principal, the ratification is invalid."

Error in charging: "Now, if you shall believe from the evidence that M. Foote, by virtue of his being the architect and supervisor of the buildings, went to the Chattahoochee Brick Company to purchase these brick in the name of Mr. Riden, and that the Chattahoochee Brick Company refused to credit Mr. Riden, not knowing him, but, as Mr. Crockett was the owner of the property, they would be willing to credit Mr. Crockett; and then Mr. Foote told them to charge them to Mr. Crockett, unless Mr. Crockett refused to have it done; that he would inform him, and, if he did not send them word that Mr. Crockett had refused to carry out the contract that he had made,—refused to be liable for it,—then they might deliver the brick. Now, if you believe from the evidence, that Mr. Foote, before the delivery of any of the brick, informed Mr. Crockett of all the circumstances that occurred between him and the Chattahoochee Brick Company, and Mr. Crockett assented to that, and the bricks were afterwards delivered, that would make Mr. Crockett, in the law, the original contractor; that he contracted the debt originally himself; that that credit was extended to him. But if, on the other hand, you



do not believe there was a statement made of all the circumstances connected with it, of the manner in which this was brought about, to Mr. Crockett, or that Mr. Crockett did not assent to it,—did not assent to the arrangement which Mr. Foote had made,—then, of course, it would follow that he would not be liable. That is simply a question of evidence for you to decide, applying the law I have given you in charge to the evidence.” Alleged to be error because without evidence to authorize it.

Error in charging: “Now, there is a rule that the judge may give to the jury as to how they shall consider and treat the evidence. If the evidence in the case is conflicting, then the jury may found their verdict on what they believe to be a preponderance of the evidence. By the ‘preponderance’ is meant the ‘greater weight of the evidence’; hence, if the evidence is both ways,—that Mr. Crockett did assent to this arrangement on the one side, and that Mr. Crockett did not assent to this arrangement on the other side,—why then you are to come to your conclusion from the greater weight of the evidence, provided you cannot reconcile the evidence so as to make it all speak one way. It is the duty of the jury to reconcile the evidence, if they can, so as to make it all speak one way; but, if they cannot reconcile it, then the law allows them to find, as I have stated to you, upon the preponderance or greater weight of the evidence.” Alleged to be error because it limits the rule as to the greater weight of the evidence to a case where the evidence is conflicting on a particular point. Also because it confines the application of the rule to a particular portion of the testimony,—that as to the assent of Crockett to an arrangement made by another witness in the case on the other side, thereby intimating that there was a conflict of evidence on this question, and the finding of the jury should be as they should determine this question.

Candler & Thomson, for plaintiff in error.  
John S. Candler, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 460)

#### SMITH v. STATE.

(Supreme Court of Georgia. Dec. 21, 1894.)

#### LARCENY—EVIDENCE.

The charge being simple larceny, the evidence of guilt not being satisfactory, and there being no proof whatever as to value, a new trial is ordered.

(Syllabus by the Court.)

Error from city court of Floyd; W. T. Turnbull, Judge.

John Smith was convicted of larceny, and brings error. Reversed.

The following is the official report:

Smith was charged with the larceny of six poplar saw logs belonging to the Harris-

Hartshorn Lumber Company. He was found guilty, and, his motion for new trial being overruled, excepted. The motion was upon the grounds that the verdict was contrary to the evidence, without evidence to support it, decidedly and strongly against the weight of the evidence, and contrary to law and the principles of justice.

The evidence of the state was to the following effect: Some time prior to the 17th of June, 1893, Hartshorn discovered at Camp's sawmill, in Rome, Ga., a raft of logs claimed by defendant. In the raft he found six poplar logs which had the brand of the Harris-Hartshorn Lumber Company, which company began business before August, 1892. Several other logs appeared to have had a brand, but it could not be recognized. It seemed as though the brand had been obliterated by blows from something like an axe. Hartshorn had a brand-new hammer made and sent up to Murray county, where logs were being cut by the company. When trees were cut in Murray and other counties, they were sent down to Hartshorn, and sawed up into lumber. None of the logs were cut in Floyd county. The six logs which Hartshorn took from Smith's raft had been cut in Murray county, and not in Floyd. The logs were branded with a hammer made for the company with a special brand. Hartshorn recognized the brand as soon as he saw the logs. Some were under the water, and he could not see them. Logs were cut, and then drifted out into the river. Hartshorn called Printup, Brown, and others to look at the logs in defendant's raft at Camp's mill. Hartshorn had talked with defendant about the logs before Hartshorn took them, and defendant claimed they were his logs. Defendant seemed somewhat excited. Some time before this, Hartshorn had employed defendant to raft some logs for the Harris-Hartshorn Company, and knows defendant was familiar with the brand of the company. Printup and Brown testified corroborating Hartshorn as to the brands being those of the Harris-Hartshorn Company, and as to appearances indicating that an effort had been made to obliterate some of the brands. The sawyer of the Harris-Hartshorn Company saw the raft of logs in question, and identified six of the logs as belonging to the Harris-Hartshorn Lumber Company. They had the brands of the company on the end. He could not identify any more, but knows that all the logs belonged to the company. They were poplar logs. Some were under the water, and he could not see the ends. Camp testified: He is the owner of the sawmill. He saw the brand on the end of one of the logs, which was the brand of the Harris-Hartshorn Company. He could only identify one of the logs as belonging to the company. Defendant had brought witness a raft of 12 logs in April, 1893. When witness saw this log with the brand on it, he told defendant the logs belonged to the Harris-Hartshorn Company,

and refused to buy them. Defendant claimed the logs. Witness saw only one log the day Hartshorn came to him and claimed the logs, as they were under the water, but, as the water receded, he saw others, and saw the same brand on them. It further appeared that some time in the spring of 1893 defendant told one Biggers he would give him five cents apiece for any logs he might catch in the river that were not marked.

For the defendant the evidence was to the following effect: One Morrison bought 18 logs for defendant from Joe Harris in the spring of 1893, and 5 from Green Butler. Defendant had 4 logs on Armuchee creek. One of the 18 logs bought of Harris was not used. This left 26 logs, which Morrison rafted in May, 1893, and brought down to Camp's mill for defendant. Morrison did not see any brands on any of those logs. Defendant had notified him that he had some logs up Armuchee creek, and to look out for them in time of freshets. Morrison let defendant have a boat to go up Armuchee creek and get more logs. The logs which Morrison bought of Harris came off of Harris' place, and were carried up the creek in April. They lay on the bank for some time. Those logs were poplar and gum. In the spring of 1893 defendant had three logs lodged on Armuchee creek against the farm of one Staten, and Staten saw defendant go after them. In the latter part of 1892 defendant had about three logs on Armuchee creek, and tried to hire one Belman to bring them down. One Smith helped push out two or three of these logs from the bank, and start them down, in the last part of 1893. Defendant stated that he was not guilty of stealing any logs from the Harris-Hartshorn Company; that he did not see any brands on any logs which were bought for him by Morrison; that all the logs in that raft were his logs; that Morrison bought 18 for him from Harris, 1 of which was too short and only 17 were put in the raft; bought 5 from Green Butler, and the other 4 defendant owned.

Max Meyerhardt and Geo. A. H. Harris, for plaintiff in error. W. J. Nunnally, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(95 Ga. 564)

WHITNEY v. GIBSON et al.

(Supreme Court of Georgia. Dec. 21, 1894.)

CONFLICTING EVIDENCE—NEW TRIAL.

The evidence was conflicting, but that introduced for the defendants was sufficient to sustain the verdict. There was no material error of law, and the newly-discovered evidence, in view of the counter showing, would not probably change the result. This court will not, therefore, overrule the discretion of the presiding judge, who was satisfied with the verdict, in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Newton county; R. H. Clark, Judge.

Action by S. N. Whitney against William L. Gibson and others. Verdict for defendants, and plaintiff brings error. Affirmed.

The following is the official report:

Whitney, as transferee of Kelly Bros. & Porter, sued W. L. Gibson and R. C. Patrick, agent for his wife, upon an account, the balance due being claimed to be \$333.48. Upon the account there was a credit for sawing of \$273.20. Defendants pleaded "not indebted"; that the matters charged on the account were taken up and bought by them in payment of money due them by Kelly Bros. & Porter for sawing lumber for Kelly Bros. & Porter, and the account was thus fully paid off before the same was transferred to plaintiff; and that Kelly Bros. & Porter were indebted to them when the account was transferred, and are still so indebted, \$354.55 for sawing lumber. There was a verdict for the defendants, and, plaintiff's motion for a new trial being overruled, he excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the verdict was contrary to a certain portion of the charge specified. Because the court erred in charging that, if the jury believed from the testimony that Kirkpatrick, the assistant bookkeeper of Kelly Bros. & Porter, paid the amount which is credited upon the account (for sawing) out of the money that Kelly Bros. & Porter owed him as bookkeeper, that fact would be a circumstance going to charge notice to Porter, the surviving partner, of the existence of the defendants' account against Kelly Bros. & Porter. Alleged to be error, because the evidence did not authorize this charge. Because the court failed to charge that, if Kirkpatrick had money on deposit with Kelly Bros. & Porter, and took that money at the suggestion of defendants, and paid it on defendants' account, that would not have been notice to Porter, the surviving partner. In connection with this ground and the ground last above, the evidence showed that Kelly Bros. & Porter and W. A. Kelly & Bro. were two distinct firms, the former owning no land, and being engaged exclusively in merchandising, and the latter owning, in addition to their merchandise business, some land on which the sawmill of defendants was located. There was evidence for plaintiff that defendants never sawed any lumber for the former firm, for it had no use for lumber, but that the latter firm had erected on its land several houses; that defendants traded with Kelly Bros. & Porter, and what they got was charged to them (defendants), but not on any sawmill account; and that Kelly, one of the firm of Kelly Bros. & Porter, is dead. Kirkpatrick testified for plaintiff, among other things, that the amount credited on the account for sawing was for sawing done by defendants for him on his

land, after they had done the sawing for Kelly & Bro.; and that Kelly Bros. & Porter paid the amount to defendants out of their store for him. Defendants contended that they were entitled to a further credit for sawing lumber, and introduced their book of original entries, showing the account for sawing charged to Kelly Bros. & Porter. Gibson, one of defendants, testified, among other things, that he bought a good many of the goods from Porter, and told him to charge them to Gibson & Patrick sawmill account. Patrick testified that he bought a good many of the articles from Porter, and had them charged to Gibson & Patrick, but did not say anything to Porter about any sawmill account. In rebuttal, Porter testified that he was not interested in the sawmill, and had no recollection whatever of Gibson telling him to charge any of the goods to defendants' sawmill account, for they had none that he knew anything about. One Sheppard also testified for plaintiff that he called on Gibson to settle the account now in suit, and Gibson told him defendants owed the account to Kelly Bros. & Porter, but the defendants had a sawmill account against Kelly & Bro. that he wanted to work in in some way if he could, and for witness to see if he could not work it in in a settlement for them. This was soon after the failure of the firm of Kelly Bros. & Porter. Gibson gave a different version of this matter, claiming that he told Sheppard that Kelly Bros. & Porter owed defendants a bill for sawing lumber which paid off this account. Other grounds of the motion for new trial were because of newly-discovered testimony. In support of these grounds plaintiff produced the affidavit of Sheppard that, after the verdict, Gibson told him that he (Gibson) had changed the book of original entries of defendants, after the suit was brought, from W. A. Kelly & Bro. to Kelly Bros. & Porter. Also the affidavit of Kirkpatrick that Gibson came to him after the suit was brought, and asked him, as assistant bookkeeper of Kelly Bros. & Porter, to credit the books of Kelly Bros. & Porter, and give him (Gibson) a receipt in full of the account sued on. Also affidavits as to the ignorance of plaintiff and his counsel of the facts in the above affidavits until after the trial, and their diligence in preparing for trial. By way of counter showing defendants produced the affidavit of Gibson that he did ask Kirkpatrick to receipt him against the account, but it was before the suit was brought, though after suit had been threatened; that the reason he did so was that in the winter before Kelly Bros. & Porter failed he called on them for a settlement, and W. A. Kelly, the leading and managing partner, told Kirkpatrick, the bookkeeper, to mark the account now sued on settled in full on the books of Kelly Bros. & Porter, and deponent thought the bookkeeper did so, and that business was settled, so far as said account was concerned, and knew no

better till after the failure of Kelly Bros. & Porter, when he was asked to pay the account; that he then ascertained that Kirkpatrick had neglected to settle that account on the books, and then it was he reminded Kirkpatrick of what Kelly had instructed him to do, and of his neglect, and asked him if he still could not do so, and give deponent a receipt against the account, which Kirkpatrick refused, saying the books had gone into the hands of Whitney; that no such conversation occurred with Sheppard as stated in Sheppard's affidavit, and that he had had only one conversation with Sheppard since the case was tried, which was in the presence of deponent's counsel and others, and nothing was said which could be construed to mean any such thing. The plaintiff objected to the reception of so much of the affidavit of Gibson as referred to any of the declarations made by Kelly. The objection was overruled, and to this ruling also plaintiff excepted. The bill of exceptions does not state what was the objection made. Defendants also produced the affidavit of R. C. Patrick that some time in the fall of the failure of Kelly Bros. & Porter he and Gibson called on that firm for a settlement of the sawmill account, and upon running up the accounts it was seen that Kelly Bros. & Porter owed Gibson & Patrick for sawing lumber for themselves and Kirkpatrick a little more than Gibson & Patrick owed said firm; that Kelly instructed Kirkpatrick to settle the books, and at the same time instructed him to credit the account with the lumber sawed for Kirkpatrick, which he did, but did not settle the balance of the account; and that deponent did not know, till long after the failure, that the books were still open. Plaintiff objected to the reception of this affidavit, on the ground that deponent was acting as the agent of his wife, one of defendants, and was therefore incompetent to swear to any declarations made by Kelly in reference to settlement of the account, Kelly being dead; and further because the affidavit was not in rebuttal of plaintiff's affidavit. The objection was overruled, and to this also plaintiff excepted. Defendants also produced the affidavit of W. T. Patrick that he heard W. A. Kelly tell Gibson that the account now sued on had been paid, and not to pay it again, and that he (Kelly) would see to it that defendants should not pay it again; that this conversation occurred long after the failure of Kelly Bros. & Porter; and Kelly further said that the books were not then in his control, but he would get them soon, and straighten them up, and mark the account settled on the books. To the reception of this affidavit plaintiff objected, on the ground that deponent had been rejected as an incompetent witness on the trial, because he swore that he was acting as the agent of defendant in making the original contract for sawing this lumber with W. A. Kelly, one of the firm of

Kelly Bros. & Porter, Kelly being dead, and Patrick was therefore incompetent to make this affidavit. Further, because the affidavit related solely to the sayings of Kelly in regard to the payment of this account, long before suit was brought, and was therefore not in rebuttal of plaintiff's affidavits. This objection was overruled, and to this also plaintiff excepted.

T. Spearman and E. F. Edwards, for plaintiff in error. J. F. Rogers and L. L. Middlebrook, for defendants in error.

PER CURIAM. Judgment affirmed.

(93 Ga. 462)

ATLANTA ST. R. CO. v. WALKER.

(Supreme Court of Georgia. Oct. 30, 1893.)

RES GESTAE — NEGLIGENCE NOT DECLARED ON — OPINION EVIDENCE — PERMANENCY OF INJURIES — RULE OF ROAD — VIOLATION — EFFECT AS CONTRIBUTORY NEGLIGENCE.

1. Evidence tending to show acts of negligence not declared upon is admissible as a part of the res gestae of the occurrence under investigation, to explain the conduct of the parties engaged in it. Being admitted, the court should charge the jury that any negligence shown by this evidence cannot be considered as a direct and substantive basis of recovery; but it might be misleading to instruct them, in general terms, that they would "have no right to find anything against defendant because of" the same.

2. It is not competent for a party who, as a witness, testifies to his feelings, pains, and symptoms, to state his opinion that the injuries which caused the same are permanent. Nor is it, since the change in the law allowing parties to testify in their own behalf, competent for a plaintiff suing for physical injuries to prove by his wife that subsequently to their infliction he frequently complained to her of pains and hurts resulting therefrom, and stated that he suffered a great deal.

3. "The rule of the road," in this state requires travelers with vehicles, when meeting, to each turn to the right. One may, from motives of courtesy, or for other reasons, waive his right to have another observe this rule, but is not bound to do so. The fact that one does waive this right, and in so doing drives into a dangerous place in the highway, and is thereby injured, affords no excuse to a wrongdoer who caused the dangerous place to exist, and will not prevent a recovery against the wrongdoer by the person so injured, if free from negligence, and otherwise entitled to recover.

(Syllabus by the Court.)

Error from superior court, Fulton county; Marshall J. Clarke, Judge.

Action by Jim Walker against the Atlanta Street-Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

N. J. & T. A. Hammond, for plaintiff in error. F. R. & J. G. Walker, for defendant in error.

BLECKLEY, C. J. 1. The negligence alleged in the declaration against the defendant, the street-railroad company, was in not properly paving and keeping in repair the interior portions of its street-railroad track;

in allowing and permitting great ruts and holes therein, near the iron railings thereof; and in maintaining and allowing the said iron railing greatly above the adjoining interior of said track, whereby the rear wheels of plaintiff's dray were thrown around, and he greatly injured and damaged. The court admitted evidence, the plaintiff himself being the witness, that "the street-car man was whipping the horses, and coming pushing me; coming across that place, one of the hind wheels crossing from the left-hand side," etc. This testimony was objected to because there was no pleading to warrant it. In admitting it, the court stated to the jury that it was not admitted as a basis for recovery by the plaintiff against the defendant, but as explanatory of the circumstances under which the injury occurred. In this there was no error. Whether whipping the horses was or was not negligence, it was a part of the res gestae of the occurrence under investigation, and was relevant to explain the conduct of those engaged in it. Nor was there any error in declining to charge, as requested, that "the jury have no right to find anything against the defendant because of the running or movement of cars, there being no allegation that their running was in any way wrong." The court sufficiently guarded the jury against treating the manner of running the cars as a direct and substantive basis of recovery, and this was enough. Had the charge been given in the terms requested, the jury may have understood that in making up their verdict they had no right to consider the conduct of the driver of the car, even as explanatory of the plaintiff's conduct on the occasion. It is not necessary to allege the whole environment and res gestae of the transaction, in order to admit evidence of the same, or to authorize the jury to consider and give proper weight to each relevant fact and circumstance. When negligence, which, together with the injuries sustained from it, constitutes a cause of action, is properly alleged, acts of defendant, or indeed of any one else, which tend to show why and how such negligence produced injury to the plaintiff, may be presented to the jury. It often happens that one set of acts, in themselves lawful and right, contribute materially to the production of injury by another set of acts, in themselves negligent or wrongful.

2. The plaintiff, testifying as a witness in his own behalf, after stating that he had suffered pain ever since the injury, and was still suffering; that he could not lift as well as he did; and that, in lifting anything heavy, he suffered at night from it; that he suffered more in cloudy than in fair weather; that there was pain in his ankle; his leg bone ached; and that his back hurt him every time he lifted any little thing,—was allowed to give his opinion that he would feel the injury as long as he lived; that his

pain and suffering would be permanent. The view of the court was that, as the question of permanency was one of opinion, the plaintiff, although no expert, was competent to give an opinion in connection with his reasons for it. In this, we think, the court was mistaken. Whether the injuries and their effects were permanent or temporary was certainly matter of opinion; but the jury, in so far as they were unaided by expert evidence, should have been allowed to form their own opinion, not from that of nonexperts, but from the facts as proved by the witnesses. The plaintiff was competent to testify to his feelings, pain, and symptoms, as well as to all the characteristics of the injury, external and internal. This was the limit of his competency, and any opinion legitimately arising out of the facts could be more safely formed by the jury than by him. Scarcely anything is less reliable than a sick plaintiff's opinion of his own case, when he is in pursuit of damages. True, the Code, in section 3867, declares that "where the question under examination and to be decided by the jury, is one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor." The class of questions here referred to must be such as lie within the range of common opinion, although they may be somewhat within the province of scientific opinion, also. A fair illustration would be the question of sanity or insanity. Any witness may give his opinion upon such questions, after stating the facts on which it is founded. But suppose the question were whether, in a given case, insanity was permanent or temporary. This would be a question for scientific experts; and no court would think of taking the opinion of an ordinary witness upon it, with or without the facts on which the opinion was founded. Such a witness would be competent, upon stating the facts, to testify to his belief of the sickness or health of any one, or that he suffered pain. But this is a very different matter from taking his opinion upon the question of when and how sickness would terminate, or whether a state of pain would be temporary or permanent. Nonexpert opinion might be relied on to take the step from observed facts to a present state or condition, but to pass upon these same facts, the present state and condition included, to a probable future state and condition, might be within the competency of expert opinion only. We think this is so, in such a case as the present more especially, where a part of the facts are not objective, but wholly subjective, consisting of the feelings and sensations of the witness himself, and being accessible to no other witness. How could such testimony be answered? How could the opinion of this nonexpert be met by a conflicting opinion of another witness of his own class? No other witness could possibly know what his sufferings are or have been,

so as to make them a basis of belief or non-belief as to their permanent character, or as to whether they would be only temporary. The Code surely does not intend that internal facts—facts of mere individual consciousness—shall be used as a basis of the opinion which it contemplates as being admissible in evidence, where the question is one of opinion. Both for this reason, and because the question on which the witness in this case was permitted to give his opinion was a scientific question, we think the evidence should have been excluded. The plaintiff's wife was permitted to testify to his complaints made in her hearing. She said he complained of his side a great deal, and, being told to state all of his complaints, she said his head hurt him, and his side and his leg; he suffered a great deal. Such evidence as this, by a witness other than the wife of a party, was competent and admissible, so long as the law excluded parties from being witnesses in their own behalf; but now that they are, by statute, competent to testify, and where, as in this case, the testimony is heard from the plaintiff himself, who knew the facts of pain and suffering, his wife, whose knowledge of them was derived from hearsay, was not competent to prove complaints which were no part of the *res gestae* of the injury. The ground on which such evidence was formerly deemed competent was the ground of necessity. That necessity no longer exists. The higher and better evidence is that of the person who has actual knowledge of the truth of the pains and other feelings to which the complaints relate. This view is taken by the court of appeals of New York in the case of *Roche v. Railroad Co.*, 105 N. Y. 204, 11 N. E. 630. The reasoning of that case is entirely satisfactory, and applies as forcibly in Georgia as it does in New York. Indeed, before parties were made competent witnesses, the wife of the plaintiff could not be heard to testify at all in favor of her husband. The same statute which rendered her competent to testify for him rendered him competent to testify for himself. Code, § 3854. From the two errors in admitting evidence which we have discovered and discussed, a new trial results.

3. We wholly disagree with the counsel for the railroad company as to the effect of the plaintiff's deviation from "the rule of the road." That rule exists for the benefit of travelers, and not for the behoof of one who has wrongfully caused a bad condition of the road or street. The wrongdoer has no right to say that, "If you had not waived, in favor of another traveler, the place which was your due, the other might have been hurt, but you certainly would not." Such a waiver, whether from courtesy or for any other reason, was not negligence on the part of the plaintiff, relatively to the defendant, and could not prevent him from recovering, if he was otherwise free from negligence.

The rule which requires travelers, on meeting, to pass to the right, applies between traveler and traveler; that is, between those who use the road, and not between them and those charged with making the road, or keeping it in repair. 12 Am. & Eng. Enc. Law, 957 et seq.; Elliott, Roads & S. 618 et seq. There was no error in declining to charge the jury as requested in writing by counsel for the company, as set out in the fourth and fifth grounds of the motion for a new trial. Judgment reversed.

(93 Ga. 482)

**GILMORE v. GEORGIA RAILROAD & BANKING CO.**

(Supreme Court of Georgia. Nov. 27, 1893.)

**ABATEMENT—ANOTHER ACTION PENDING.**

Where, after a judgment of nonsuit in the superior court, and after the plaintiff had carried the same to the supreme court by writ of error, he brought another action for the same cause in the superior court, while the writ of error was pending, the defendant could not, after the plaintiff had withdrawn the writ of error, urge these facts successfully by plea in abatement to the second action. By withdrawing his writ of error the plaintiff conclusively admitted that there could be no recovery thereon in his favor, and the affirmance of the judgment excepted to was a necessary legal result. The admission in this instance was in accordance with the fact, for the writ of error was so defective that it could not have withstood a motion by the defendant in error to dismiss it.

(Syllabus by the Court.)

Error from superior court, Columbia county; H. C. Roney, Judge.

Action by Prince Gilmore against the Georgia Railroad & Banking Company. Judgment for defendant, and plaintiff brings error. Reversed.

John T. West, for plaintiff in error. Jos. B. Cumming and Bryan Cumming, for defendant in error.

**BLECKLEY, C. J.** The first suit was terminated by a judgment of nonsuit in the court below, before the second was brought. That judgment was final in its nature, and the writ of error which was pending when the second suit was commenced was so defective that no reversal upon it could possibly have been had without an express or implied waiver of the defects by the defendant in error. *Pendley v. State*, 87 Ga. 186, 13 S. E. 443. No such waiver took place while the writ of error was pending. Consequently, at no time previous to its withdrawal could any judgment have been rendered upon it except one of affirmance, —the pro forma judgment always rendered when a writ of error is either dismissed or withdrawn. In point of fact, this writ of error was withdrawn, and such a judgment rendered on the day after the second action was brought and before the plea in abatement was filed. By withdrawing it, the plaintiff in error conclusively admitted that

no recovery upon it could be had. The judgment of affirmance, consequent upon the withdrawal, took effect, not from its own date, but from the date of the judgment below, which was the subject of the affirmance. It results that, in adjudicating upon the plea in abatement, the court should have treated the first action as terminated before the second was brought. The writ of error was too defective to create any legal extension in its term of existence. Applying to the writ of error the principle of section 3476 of the Code, it was no obstacle to the second suit; that section declaring that, "If the first action is so defective, that no recovery can be possibly had, the pendency of the former suit will not abate the action." The court erred in sustaining the plea and dismissing the action. Judgment reversed.

(93 Ga. 484)

**JONES v. GLOVER.**

(Supreme Court of Georgia. Dec. 18, 1893.)

**GARNISHMENT—ASSIGNMENT OF FUND—REVIEW OF EVIDENCE.**

1. In order to defeat a garnishment on the ground that the debtor had made an equitable assignment of the fund before the garnishment was served, facts or circumstances must appear from which it could rightly be inferred by a jury both that a complete equity had arisen between the assignor and the assignee which would support an assignment, and that these two parties contemplated an immediate change of ownership with respect to the particular fund in question.

2. Irrespective of any error in the charge of the court or in its refusal to charge as requested, the case had a right result. The evidence was wholly insufficient to warrant any verdict except that rendered by the jury, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Garnishment by F. W. Glover, receiver, against Warren & Axson. M. L. Jones intervened. From a judgment for the receiver, Jones brings error. Affirmed.

Gignilliat & Stubbs and Calhoun, King & Spalding, for plaintiff in error. Denmark & Adams, for defendant in error.

**BLECKLEY, C. J.** 1. The question on the merits was whether the fund garnished in the hands of Warren & Axson was the property of Maddox at the time the garnishment was served, or whether it was the property of Jones, by reason of the draft previously drawn by Maddox, payable to the order of Jones, upon Warren & Axson, and indorsed by Jones to Baldwin & Co. Notice that the draft would be drawn was communicated to the drawees by a letter from Maddox, which they received before they were served with the garnishment; but this letter, although it stated that a trade had been made with Jones, said nothing expressly of any assignment of the fund to him, but, on the contrary,

urged payment of the draft, because it would be unjust to keep him (Maddox) out of the use of the money when he needed it. Except the mere say-so of Maddox in the letter, there was no evidence whatever of any actual trade between him and Jones. So far as appears, the drawing and indorsement of the draft might have been for the mere purpose of collection for the benefit of Maddox. When an action is brought upon negotiable paper in favor of a payee or indorsee, the presumption is that the plaintiff is a holder for value. But here there is no action on the draft itself or on the indorsement; but the draft is sought to be used, not as evidence of title to the paper, but as evidence of ownership, legal or equitable, of the fund in controversy. The draft was not drawn expressly on this fund or any other, but purported to be for value received, and directed the amount to be charged to account of the drawer. In form and effect, it was a bill of exchange by Maddox upon Warren & Axson, and in itself did not operate as an assignment of the fund. *Baer v. English*, 84 Ga. 403, 11 S. E. 453, and cases cited; *Haas v. Bank*, 91 Ga. 307, 18 S. E. 188. It was evidence tending to show an equitable assignment, and, together with the letter, had there been evidence that some actual trade had been made between Maddox and Jones embracing a change of beneficial ownership in this fund, would have been sufficient to establish such an assignment. But, as the case stood before the jury, one of the material elements of an equitable assignment—namely, a consideration passing from Jones to Maddox—was wanting. There was nothing for the jury to look to as evidence of any consideration except what Maddox affirmed in the draft and in the letter,—in the draft, that it was drawn for value received; and in the letter, that he had made a trade with Jones. Had these same expressions been used in an express assignment of the fund, or if such an assignment had been connected with them in the draft or the letter, they could and would have been taken as *prima facie* true, for in that case an intention to assign the fund would have appeared otherwise than by inference. When the intention to assign is to be inferred from other facts, all the facts requisite to form a basis for the inference must be proved. None of them can be taken as true merely because they are recited in documents which might have been concocted by a debtor for the sole purpose of withdrawing his money from a custody in which it was exposed to the reach of his creditor by means of garnishment. In order to infer an equitable assignment, such facts or circumstances must appear as would not only raise an equity between the assignor and assignee, but show that the parties contemplated an immediate change of ownership with respect to the particular fund in question; not a change of ownership when the fund should be collected or realized, but at the time of the transac-

tion relied upon to constitute the assignment. Had there been proof of an actual consideration paid or promised by Jones for the draft, a jury could well have made the inference from that and the other facts that an intention existed when the draft was drawn to make Jones the owner of the fund, and to divest Maddox of the substantial ownership of the same, though his legal title would still have been intact. It appears from the bill of exceptions that Maddox and Jones were both in court when the case was tried, but neither of them testified. Their silence was strongly corroborative of the theory that the draft was without consideration; that no assignment of the fund was actually intended; and that the collection attempted was for the benefit of Maddox.

2. The verdict of the jury was correct; the evidence was insufficient to warrant any other; and, whether the court ought to have charged more or less than he did, there was no error in denying a new trial. Judgment affirmed.

(93 Ga. 543)

#### WESTERN UNION TEL. CO. v. POWER.

(Supreme Court of Georgia. Feb. 26, 1894.)

#### TELEGRAPH COMPANIES—PAYMENT FOR SERVICE MESSAGE.

1. Where the sender of a telegraphic message tenders prepayment, and then withdraws the tender, and takes the money off with him, saying the message ought to be paid for by the sender, the tender counts for nothing.

2. Payment for a "service message" is not payment for another message previously sent. Payment to a "message boy," who presents a bill, will be payment to the company if the bill relates to a message delivered with the bill; but, if it relates to some other message, there ought to be evidence of the boy's authority to collect.

(Syllabus by the Court.)

Error from superior court, Cobb county; G. F. Gober, Judge.

Action by T. D. Power against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dorsey, Brewster & Howell and Clay & Blair, for plaintiff in error. W. R. Power, for defendant in error.

SIMMONS, J. The plaintiff in the court below recovered against the telegraph company the statutory penalty for failure to transmit and deliver a dispatch with due diligence. The defendant made a motion for a new trial, which was overruled, and it excepted.

Under the statute upon which this action is based, no recovery of the penalty can be had for any act or omission of the telegraph company which precedes payment or tender of the usual charge for transmission and delivery. Until such payment is made or tendered, no liability to the penalty arises under the statute; and this condition is not dis-

pensed with by the company's undertaking to render the service without prepayment, or by receiving payment upon its delivery of the message. *Langley v. Telegraph Co.*, 88 Ga. 777, 15 S. E. 291. The evidence in the record failed to establish compliance with this requirement of the statute. The dispatch was sent as a "collect message," and was paid for by the sendee when the company delivered it. The sender's offer of the money to pay this charge when he presented the message to the company's agent for transmission counts for nothing as a tender, as he withdrew the offer upon the agent's consenting to send the message without prepayment. His evidence on this point was that when he handed the message to the agent, and was told that the charge was 25 cents, he placed that amount on the desk, and remarked that the person to whom the message was addressed ought to pay it, and the agent said, "All right," and gave him back the money. His taking back the money, under these circumstances, was clearly a withdrawal of the tender. It was argued that the evidence shows that he paid this charge afterwards, on the day preceding that on which the message was delivered to the sendee. His testimony as to the payment made then is as follows: "On the next day [after the company received the message] the message boy of defendant came to me with a service message, and presented a bill for twenty-five cents. I paid it. He took the twenty-five cents, and went back into the office. I sent no other telegram, and no other telegram was sent to me. I do not know that the defendant received the twenty-five cents." There is nothing else in the record to show that this bill came from the defendant, or what it was for. If the payment related to the message which the plaintiff delivered to the defendant on the day before, that fact ought to have appeared distinctly, but the evidence fails to show that the payment had anything to do with that message; indeed, there is more reason for supposing that it related to the "service message" with which the bill was presented. But, if it did relate to the message of the day before, there was no evidence, so far as appears from the record, of any authority on the part of the boy to collect for the message. Of course, where one who is employed by a telegraph company to deliver messages presents a bill from the company for the charges claimed to be due upon a message which he delivers with the bill, it will be implied that the company authorized him to receive payment, if nothing appears to the contrary; but, if the bill relates to some other message, there ought to be evidence of such authority. The mere fact that he is an employé of the company, authorized to collect charges due on messages which are intrusted to him for delivery, does not warrant the inference that he is authorized to collect for other messages. His presentation of a bill purporting

to come from the company would prove nothing, in the absence of other evidence showing that it was a genuine bill of the company. Indeed, it has been held that the presentation by an employé of a genuine bill of his employer is insufficient, without more, to show that he is authorized to receive payment. *Mechem*, Ag. § 337. In the case of *Luckie v. Johnston*, 89 Ga. 321, 15 S. E. 459, other circumstances besides these were shown. We are of the opinion, therefore, that the evidence in this case does not warrant the verdict, and a new trial should be granted. Judgment reversed.

(33 Ga. 490)

**MILLER v. WESTERN & A. R. CO.**

(Supreme Court of Georgia. Nov. 6, 1893.)

WITNESS—EVIDENCE OF CHARACTER—REVIEW ON APPEAL.

1. A witness who is not impeached otherwise than by disproving the truth of his evidence, or by testimony tending to disprove it, cannot be supported by proof of his general good character.

2. The evidence being conflicting, and no error of law committed, there was no abuse of discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by Frank Miller against the Western & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Bigby, Reed, Berry & Foote, for plaintiff in error. Payne & Tye, for defendant in error.

BLECKLEY, C. J. Reading section 3874 of the Code alone, it might be thought that a witness impeached by any means could be sustained by proof of character, for the language is: "The witness may be sustained by similar proof of character." But it is obvious that this section is to be read in connection with the preceding one, and, by reading that, we ascertain what sort of a witness is referred to. The language of the section is: "To prove general bad character, the impeaching witness should be first asked as to his knowledge of the general character of the witness, and next as to what that character is, and lastly, he may be asked if, from that character, he would believe him on his oath." Thus, it appears that "the witness" referred to in section 3874 is not any witness whatever, but some witness who has been impeached by proof of general bad character. This construction is upheld by the provisions of the next succeeding section, which says: "A witness impeached by proof of contradictory statements may be sustained by proof of general good character." This provision would be wholly unnecessary and superfluous if it was the intention of section 3874 to allow any witness whatever, when



impeached, to be sustained by proof of character. Whatever authorities elsewhere may say on this subject, in Georgia it has never, so far as we are aware, been considered as law that a witness impeached by disproving the truth of his evidence, but not otherwise, could be sustained by evidence of his good character. It would certainly multiply witnesses enormously, and greatly lengthen out trials, if, upon every occurrence of material conflict in testimony, the general character of all the conflicting witnesses, without any direct attack upon character, should be treated as involved, and open to vindication. What might be done on one side of the conflict might also be done on the other, for it could not be known beforehand which set of conflicting witnesses would be believed by the jury, and one set would apparently be as much impeached by the conflict as the other. The consequence would be that when one witness said "No," and another "Yes," touching the same matter, each of them could be supported by evidence of good character, and the result of such support would leave their credit just where it stood before. The trial court was correct in rejecting the evidence sought to be introduced. In *McEwen v. Springfield*, 64 Ga. 159, and *Pulliam v. Cantrell*, 77 Ga. 563, 3 S. E. 280, the supporting evidence was admissible because in reply to evidence of contradictory statements. In *Dowling v. Feeley*, 72 Ga. 557(6), the facts are not reported.

2. The rest of the case is mere matter of fact, and the jury have settled it. Judgment affirmed.

(93 Ga. 414)

**WANDO PHOSPHATE CO. et al. v. PARKER.**

(Supreme Court of Georgia. Nov. 20, 1893.)

**AGENT—RIGHT TO DISPUTE PRINCIPAL'S TITLE—CONVERSION OF NOTE.**

1. Under the Code (section 2188), an agent cannot dispute his principal's title except in such cases where legal proceedings at the instance of others have been commenced against him. It follows that one in possession of a promissory note as agent for another is not cut off from restoring the note to his principal, though a demand upon him for the note has been made by another claimant. Even if the latter turns out to be the true owner, it is no conversion of the note by the agent for him to decline compliance with the demand on the ground that he is a mere agent, and for the sole purpose of restoring the note to his principal, which purpose he executes before any action is brought against him. If one innocently, and in ignorance of the true ownership, gets possession of a mere chose in action, not claiming for himself any interest therein, he does no wrong to the real owner by surrendering possession to the person from whom he derived it, provided he acts promptly and before any suit had been brought against him, so as to make it obligatory upon him to contest the title or right to possession.

2. Where a case has certainly had a right result on the merits, any misdirection by the court is no cause for a new trial.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. Clark, Judge.

Writ of error by the Wando Phosphate Company and others from a judgment in favor of W. B. Parker. Affirmed.

J. N. Glenn, for plaintiffs in error. Jno. B. Steward, for defendant in error.

PER CURIAM. Judgment affirmed.

(93 Ga. 418)

**FINCANNON v. STATE.**

(Supreme Court of Georgia. Dec. 8, 1893.)

**INTOXICATING LIQUORS—FAILURE TO PAY SPECIAL TAX.**

Since the passage of the act of December 24, 1890 (1 Acts 1890-91, p. 128), rendering it unlawful to sell spirituous liquors in any quantity whatever without first obtaining a license, the phrase "dealers in spirituous liquors," when used in a statute, comprehends all persons who sell such liquors in any quantity. Consequently, the fifteenth clause of the second section of the general tax act of 1892 is to be construed as imposing the tax therein specified upon dealers who sell by wholesale, in the original packages, corn whisky of their own manufacture in this state, the same as upon other dealers in such liquors.

(Syllabus by the Court.)

Error from superior court, Coweta county; S. W. Harris, Judge.

C. S. Fincannon was convicted for failing to register and pay the special tax as liquor dealer, and brings error. Affirmed.

The following is the official report:

The plaintiff in error was indicted for failing to register with the ordinary of Coweta county, and to pay the special tax required by law of a dealer in spirituous and malt liquors. The court charged the jury that, under the facts as agreed on, the defendant was a dealer under the statute, and, as such, was guilty. A new trial was moved for and denied, and the defendant excepted. The agreed facts are: "Defendant has given bond as required of distillers by United States law; sells only distilled liquors of his own production, at the place of manufacture, in the original packages, to which tax stamps are fixed; sells from government warehouse only, and has no place of business for carrying on business of a dealer in spirituous liquors, but sells to various dealers directly from his distillery; delivers it at depot or place of business of local dealers; sells only in original packages of ten gallons and upward; distillery in Coweta county; has failed to register name and place of business with ordinary of Coweta county, and failed to pay tax required of dealers; whisky made of corn." The case was not brought to the supreme court in the manner prescribed by the act of 1889, but according to the law in force before that act.

Atkinson & Hall, for plaintiff in error. T. A. Atkinson, Sol. Gen., and J. M. Terrell, for the State.

PER CURIAM. Judgment affirmed.

(93 Ga. 531)

**GORDON v. STATE.**

(Supreme Court of Georgia. Dec. 18, 1893.)

**RAPE—CAPACITY TO COMMIT—PRESUMPTIONS.**

1. Presumptively, a boy under the age of 14 years is physically incapable of committing the crime of rape, and hence it is incumbent upon the state to prove his capacity, in order to warrant a conviction for the offense of assault with intent to commit a rape.

2. Upon the trial of a boy between the ages of 10 and 14 years for any offense it is not error to give in charge to the jury section 4294 of the Code. That section relates alone to mental capacity.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Dick Gordon was convicted of assault with intent to rape, and brings error. Reversed.

Geo. A. H. Harris, for plaintiff in error.  
W. J. Nunnally, Sol. Gen., for defendant in error.

**SIMMONS, J.** By the common law of England, a boy under 14 years of age cannot be convicted of rape. In Hale's Pleas of the Crown it is said that an infant under that age "is presumed in law to be unable to commit a rape, and therefore, it seems, cannot be guilty of it; and though, in other felonies, malitia supplet aetatem in some cases, \* \* \* yet it seems, as to this fact, the law presumes him impotent, as well as wanting in discretion." Volume 1, p. 620. This presumption of physical incapacity is based upon the fact that in England puberty is very seldom attained, among males, under that age. The age of puberty, however, is governed to a great extent by race and climate, and it is well known that in this country, and especially in the southern part of it, instances of puberty among boys under 14 years of age are not uncommon. If the common-law rule on this subject were adhered to in this state to the extent of treating the presumption as conclusive, it would afford immunity to a large number of persons capable of committing rape, or who have actually committed it, and thus in many instances defeat the ends of justice. The common law was adopted in this state so far only as applicable to the conditions existing here (see *Turner v. Thompson*, 58 Ga. 271), and, there being no statute of Georgia establishing any presumption of this kind, the rule in question, in so far as it treats the presumption as conclusive, cannot be regarded as a part of the law of this state. The rule has to this extent been held inapplicable in other states. *People v. Randolph*, 2 Park. Cr. R. 174; *Heilman v. Com.*, 84 Ky. 457, 1 S. W. 731; *Williams v. State*, 14 Ohio, 222; *Wagoner v. State*, 5 Lea, 352; and see *McKinny v. State*, 29 Fla. 505, 10 South. 732. In none of the states, however, except Louisiana, so far as we have been able to ascertain, has it been held that there is no presumption at all as to the incapacity of boys under that age;

and the reason assigned for so holding in Louisiana is that in that state "a large majority of youths attain puberty before the age of fourteen years." *State v. Jones*, 39 La. Ann. 985, 3 South. 57. It cannot be said that this is so in Georgia; on the contrary, it is quite probable that a large majority of youths in this state do not attain puberty until after that age. We think the proper rule, as applicable to the conditions existing in this state, is that announced by the courts of other states in the decisions above referred to, namely, that there is a presumption of physical incapacity as to all boys under the age of 14; but that this is merely a prima facie presumption, subject to be rebutted by proof. Thus modified, we think the presumption is just and reasonable; certainly not less so than the presumption recognized by our law as to the mental incapacity of boys under that age. There has been some question as to whether this rule applies also to assault with intent to rape, but we think the better opinion is that it applies to both offenses. See discussion of this question in *People v. Randolph*, 2 Park. Cr. R. 213. See, also, *Rex v. Groombridge*, 7 Car. & P. 582; *Rex v. Eldershaw*, 3 Car. & P. 396; *Reg. v. Phillips*, 8 Car. & P. 736; *Williams v. State*, 14 Ohio, 222; 1 Bish. Cr. Law (Ed. 1892) § 746(2). The evidence in this case being uncontradicted that the accused was under 14 years of age at the time the offense was alleged to have been committed, we think the court ought to have given in charge the instruction requested on this subject, as set out in the fourth ground of the motion for a new trial. There being no proof of actual capacity, and there being room for doubt, under the evidence, as to whether the accused intended or was attempting to commit rape, this error requires a reversal of the judgment denying a new trial.

2. Upon the trial of a boy between the ages of 10 and 14 years for any offense it is not error to give in charge to the jury section 4294 of the Code. That section relates alone to mental capacity. Judgment reversed.

(94 Ga. 393)

**DUKES v. STATE.**

(Supreme Court of Georgia. March 5, 1894.)

**FORGERY—INDICTMENT—INTENT.**

An indictment for forgery which does not allege the making or fabrication of anything, but which sets out the fraudulent uttering of a forged bank check in the terms of section 4447 of the Code, is founded upon that section, and need not allege an intent to defraud any particular person. If any holding to the contrary is deducible from the case of *Williams v. State*, 51 Ga. 535,—a decision by two judges only,—such holding is unsound, and will not be followed.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. M. Griggs, Judge.

Columbus Dukes was convicted of forgery, and brings error. Affirmed.

The following is the official report:

Columbus Dukes was indicted for forgery, and was convicted. He moved in arrest of judgment. The motion was overruled, and he excepted. The indictment alleges "that the said Columbus Dukes, on the 3d day of July, in the year eighteen hundred and ninety-three, \* \* \* did then and there, unlawfully, falsely, and fraudulently, pass, pay, and tender in payment, utter and publish as true and genuine, to A. Greenwood, a certain false, forged, and counterfeited check on the 1st National Bank of Macon, Georgia, he, the said Columbus Dukes, at the time well knowing said check to have been falsely and fraudulently made, forged, and counterfeited, and that the same was not made and signed by said L. R. Wright, nor by any for him by his authority; said check being, in word and figure, as follows: 'Macon, Georgia, July 3rd, 1893. First National Bank of Macon, Georgia. Pay to bearer or bearer seventeen (\$17.00) dollars. [Signed] L. R. Wright.'" The grounds of the motion in arrest are: (1) The offense charged is forgery, but the offense attempted to be described is that of uttering a forged bank check. (2) The indictment is insufficient as an indictment for uttering a forged check, because no intent to defraud any given person is given thereon.

Orville A. Park and J. L. Gerdine, for plaintiff in error. W. H. Felton, Sol. Gen., for defendant in error.

PER CURIAM. Judgment affirmed.

(98 Ga. 508)

**MERCHANTS' NAT. BANK v. GUILMARTIN.**

(Supreme Court of Georgia. Dec. 18, 1893.)

GRATUITOUS BAILEE — LIABILITIES — DEPOSIT OF BONDS WITH BANK — LARCENY BY CASHIER.

The court committed no substantial error in admitting evidence, or in charging the jury, or in refusing to charge as requested. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by L. J. Guilmartin against the Merchants' National Bank of Savannah. Verdict for plaintiff, and defendant brings error. Affirmed.

Erwin, Du Bignon & Chisholm and Barrow & Osborne, for plaintiff in error. C. N. West and J. R. Saussy, for defendant in error.

SIMMONS, J. Guilmartin sued the Merchants' National Bank, alleging that it was indebted to him \$20,000, in that on March 7, 1887, he had intrusted to and bailed, as a special deposit in the charge and custody of the defendant, which was then engaged in the business of banking, certain bonds, for which the bank gave him receipts of that

date, specifying that the securities therein described were "to be held subject to his order," and signed by the cashier of the bank (Gadsden), as such. On April 18, 1891, at the defendant's banking house, he demanded the bonds, but it failed and refused to deliver them, etc. The defendant pleaded that it had exercised all due care in keeping the bonds, but, before the demand for them was made, they were, without fault on its part, feloniously taken and stolen. The plaintiff obtained a verdict, and, the defendant's motion for a new trial being overruled, it excepted, and brought the case to this court, and the decision of the court below was reversed. 88 Ga. 797, 15 S. E. 831. Upon the second trial of the case, the plaintiff again obtained a verdict, and the defendant made a motion for a new trial, which was overruled, and it excepted.

The evidence warranted the verdict, and no error requiring a new trial was committed by the court below in admitting evidence, or in charging the jury, or in refusing to charge as requested. It appears that the bank received the bonds sued for from the plaintiff as a gratuitous special deposit, and that its cashier, Gadsden, fraudulently took them from the bank, and converted them to his own use; and the main question in the case was whether or not the defendant exercised due diligence in retaining Gadsden as cashier and custodian of this property, under the circumstances shown by the evidence. It appears from the evidence that during the time the bonds were in the bank, and in Gadsden's keeping, as cashier, he was engaged, on his own account, in numerous and large speculations in stocks and bonds, on "margins," and there was evidence that the president of the bank knew something of this. A broker with whom Gadsden dealt in these speculations testified that their dealings extended continuously through a period of about two years preceding the conversion of the bonds, and that the transactions between them were conducted by interviews at the cashier's desk in the bank, where they were frequently seen by the president of the bank; that the president knew Gadsden was speculating, for he often approached the witness during these visits to the bank, and inquired if Gadsden was making much money; that he stated to the witness that he knew the witness was "doing business with folks there at the bank"; and on one occasion, in the hearing of the witness, and just after he and Gadsden had been consulting about certain New York & New England stocks, of which Gadsden then had 200 shares, and which were rapidly fluctuating in value, told Gadsden to buy him a hundred, and Gadsden thereupon directed the witness to buy another hundred in his (Gadsden's) name. The evidence on this subject was not met by any contradiction or explanation on the part of the defendant. The burden was upon the

defendant to show that it exercised proper diligence (Code, § 2064); and this burden was not removed, nor the burden of showing the contrary cast upon the plaintiff, as was contended on the part of the defendant, by showing that Gadsden was intrusted with the property of the bank of a similar nature, or that the officers of the bank gave the same degree of supervision to the plaintiff's property as to that of the bank. The law prescribes a certain standard of care as to bailments of this kind, and that standard is not the conduct of the bailee in the particular case with reference to his own property, but the general conduct of a class,—the conduct of men of common sense, as a class, in the care of their own property (Id. § 2063); and there is no presumption that the conduct of the bailee in the particular case conformed to that standard. Section 2064 of the Code, above cited, declares that "in all cases of bailments after proof of loss, the burden of proof is on the bailee to show proper diligence"; and such diligence is not established by showing merely that the officers of the bank treated the bailor's property in the same manner in which they treated the property of the bank. The conduct of the bailee as to his own property may fall short of the standard of diligence prescribed as to property intrusted to his care, and nothing less than actual proof of such diligence will satisfy the requirement of the statute. Under the evidence before them, the jury were authorized to find, as they did, that the defendant failed to show such diligence.

The law applicable to the case is so clearly stated in the charge of the court below that we give, in substance, the principal portions of the charge, adopting the same as a part of this opinion:

All bailees are required to exercise care and diligence in protecting and keeping safely the thing bailed. Different degrees of diligence are required, according to the nature of the bailment. It being conceded that the bank, in accepting the plaintiff's bonds on special deposit, did so gratuitously, and without any stipulation or agreement that it was to receive, or have the right to demand, any reward or compensation for so doing, in its duty of protecting and keeping safely the bonds so deposited it was bound to exercise only slight care and diligence,— "that care which every man of common sense, how inattentive soever he may be, takes of his own property." It would be liable only in the event it was guilty of a want of that degree of care and diligence which is termed "gross negligence," and the bonds were lost because of that gross negligence. If, after this deposit was made with the bank, the plaintiff, by his agent, demanded the return of his bonds by the bank, and the bank failed to return them, this would constitute sufficient proof of loss, and put upon the bank the burden of showing that its failure or inability to return them

was not due to any failure on its part to exercise due diligence,—that degree of care which the law requires of it in keeping and protecting bonds so deposited, namely, slight care. The burden would not then be on the plaintiff to show that the bank was grossly negligent. The burden would be on the bank to show that it had exercised slight diligence in the matter. If the bank showed it had done so, it would be acquitted of all further accountability for the bonds. If it failed to show this, it would be liable. If, while the bonds were in the custody of the bank, on special deposit, they were stolen by its cashier, Gadsden, the first question would then be, was Gadsden, at the time he was originally selected and employed as its cashier, a fit, proper, and trustworthy person for such position, so far as the bank, in the exercise of slight diligence, could ascertain and determine? If he was, the next inquiry would be, did the bank, at any time before he stole the bonds, know or have cause to suspect he had become, or was likely to become, untrustworthy? The bank was bound to exercise slight diligence all along, during the time of his employment. If it knew he had become untrustworthy, or if, in the exercise of slight diligence, it could have ascertained that he was dishonest and unfit for his position, it would have been the duty of the bank to have taken such action as would have protected the deposit from danger of theft. If any indications of his dishonesty, which ought to have aroused suspicion and investigation, came to its knowledge, and it disregarded them, and was guilty of gross negligence in so disregarding them, it would be liable. If, on the other hand, no such indications came to its knowledge, and it exercised the slight diligence which alone it was bound to exercise, it would not be liable.

Whatever was notice enough to excite attention, and put the bank on its guard, and call for inquiry, was also notice of everything to a knowledge of which it is afterwards found that such inquiry, in the exercise of slight diligence, might have led, although all was unknown for want of investigation; that is, where it had sufficient information to so lead it to the knowledge of Gadsden's dishonesty and unfitness, it would be deemed to be cognizant of it. If it was negligent—grossly negligent—in being ignorant under such circumstances, this would be equivalent to actual knowledge on its part. If at a time when the president, Hammond, was in the bank, and engaged in its business, it came to his knowledge that the cashier, Gadsden, was engaged, or about to engage, in speculating in stocks, his knowledge would be the knowledge of the bank as to such fact. If the bank had no knowledge or notice of it, the fact that Gadsden was a speculator, if that be a fact, could not figure, in this case, to make the bank liable. It would be for the jury to determine wheth-

er or not the matter of speculating in stocks on the part of a bank cashier was a thing which rendered him, or tended to render him, an unfit and untrustworthy person to fill such a position, and whether, if knowledge of any such fact came to the bank, it would be such an indication of dishonesty or trustworthiness as, in the exercise of slight diligence, would call for action on the part of the bank to protect the plaintiff's deposit; and it would be for the jury to say, under such circumstances, what action the bank ought to take, and whether or not the bank did take such action.

The purchase or sale of stock by the cashier of a bank would not, of itself, be proof of dishonesty, while the buying and selling of stock beyond his evident means might be. This is entirely a matter for the jury. It is for them to determine whether or not speculation on his part is such a circumstance as would render him unfit to hold his position as cashier. If the cashier had been a speculator for a long time previous to the loss of this property, and the president of the bank knew that he was a speculator, or knew of such circumstances in regard to him as would have put any man in the exercise of slight diligence on inquiry as to the transactions of the cashier, and if such inquiry would have developed that he was a speculator, and no such inquiry was made, and by reason of the failure to make such inquiry he was left in charge of the plaintiff's property, with the opportunity to steal it, and did steal it, the jury could consider all these facts in arriving at a conclusion as to whether or not the defendant was guilty of gross negligence, and liable for the plaintiff's property. Notice to the president of a bank concerning the unworthiness of the cashier of the bank is notice to the bank, unless the president is an accomplice of the cashier. When the bank does its full duty in selecting a proper person, and in not disregarding indications of dishonesty which ought to arouse suspicion and investigation, it is not responsible to one who has obtained from it the favor of barely keeping specific property without recompense, though the cashier steal the property so put in his charge.

There was no undertaking on the part of the bank to the plaintiff that an officer of the bank should not steal. The case does not rest on any such warranty or undertaking, but on gross negligence in care-taking. Nothing short of a knowledge of the true character of Gadsden before he stole the plaintiff's bonds, or reasonable grounds to suspect his integrity, followed by neglect to remove him, would amount to gross negligence.

If the plaintiff knew, from his own personal experience, that as to securities received, such as the bonds here sued for were, the directors of the bank neither examined nor looked to their custody, but that they were

left entirely in the charge and control of the cashier, and that the only guaranty to parties leaving bonds under such circumstances was the integrity and fidelity of the cashier, and if, with this knowledge, he left the bonds with the cashier, who afterwards stole them, without gross negligence on the part of any of the other officers of the bank, he could not recover from the bank for such loss. If the plaintiff was a director of the bank for several years, and during that time made special deposits of bonds or other property, and intrusted them solely to the cashier, Gadsden, and never had them examined by the board of directors, or other officer of the bank, and if the same course was pursued by the bank with reference to the bonds sued for by the plaintiff, and there were no facts known to the directors of the bank, or to its officers, other than Gadsden, which would have put a man of common sense on notice that Gadsden was an improper man to be retained as cashier, then, if the bonds were stolen, the plaintiff could not require of the bank any greater degree of care in the supervision of his property by the directors than he himself exercised while he was director.

In giving this abstract from the charge, of course, much of the language, especially as to formal matters, is omitted. Judgment affirmed.

(94 Ga. 632)

SAVANNAH, T. & I. OF H. RY. v. BRYAN.

(Supreme Court of Georgia. July 16, 1894.)

COLLISION WITH STREET CAR—NEGLIGENCE OF MOTORMAN.

There being evidence to warrant the jury in finding that the defendant's motorman, after seeing that there might be a collision with the wagon in which the plaintiff and his driver were riding, negligently approached the crossing without having his car under complete control, and also in finding that there was some negligence on the part of the plaintiff or his driver in going upon the crossing, but that, after getting upon the same, they could not then, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, and the recovery being manifestly for a less amount than that to which the plaintiff would have been entitled had there been no fault with which he was chargeable, the verdict, after its approval by the trial judge, will not be disturbed.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Henry Bryan against the Savannah, Thunderbolt & Isle of Hope Railway. Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

Bryan sued the railway company for damages from injuries to his horse and wagon, caused by a collision between them and a car of defendant at the intersection of the railway and the Skidaway shell road. The declaration alleged that the cause of the collision was the running of the car by defend-

ant's servants negligently, and too rapidly. There was a verdict for plaintiff for \$100, and, defendant's motion for new trial being overruled, it excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Briefly stated, the evidence for plaintiff was: On the night of March 11, 1893, plaintiff and one Beasley were in a wagon, traveling along the Skidaway shell road. Beasley was driving the wagon. It was dark and raining, and plaintiff wanted to travel fast. When he was approaching the crossing, he looked before he came to a fence and house which were near the crossing, and did not see any car coming. The house and fence cut off his view. When the horse was about to cross, the car was right on top of him, and he could not pull the horse back nor go over before the car took possession of him. Just as the headlight came, it shone so much he could not do anything. The horse was in a fast walk. When he got to the point where he could see the car, he did not see any car at all; and, when he was in position to see the car, it was into him. He did not know the schedule of the car. The car was going at good speed, about four times as fast as the wagon, and did not slow up. The car struck the wagon, and carried it five feet beyond the shell road, knocked the horse down, broke two wheels, bent two axles, and broke shaft and part of harness. Could not have seen the car at a distance of more than 20 feet from the crossing. There is no value to the wagon as it now stands, except to have it fixed over new, and would rather buy a new one. It was nearly new. He had had it about four weeks, and it cost \$35. Harness cost \$15; a new harness. Does not know how much it would cost to put wagon and harness in as good condition as it was at the time of the accident. Knew cars passed there. Does not know whether it would be cheaper to buy a new wagon or have the old one repaired. The horse was perfectly healthy before the accident, and the accident caused his death. He died the next day. Plaintiff traded for him the January before, giving a Texas pony and \$15, and had given \$125 for the Texas pony about three years before. The horse was worth \$150. Plaintiff would not have taken that for him. Plaintiff heard no gong, nor ringing, nor noise, and would have heard it if it had sounded. Beasley, who was driving the wagon, kept listening and looking until he got to the fence. He got right on the track, and the car hit him. He looked both sides when he got to the corner of the house near the crossing, and looked in front of him, and kept looking until he crossed. He heard no gong, and could have heard it if it had sounded. The fence inclosing the house comes up to within 4 or 5 feet of the car track, and is between 9 and 10 feet tall. No brakes were put on until after the collision. He was listening for the gong.

From the corner of the house to where he was struck was from 20 to 30 feet. He got past the fence, and could not see the car. Would have to be right on the track to see car. Could not stand 10 or 15 feet back from track and see car at all. Suppose a good headlight in a place like that would throw the light not more than 10 feet. He did not see any headlight before the car struck him. The evidence for the defendant was to the effect that the car was going about four miles an hour approaching the crossing; that it was not until the car passed the corner of the fence that the headlight threw the light to the side; that then the motorman saw something on the road, but could not tell at first what it was, though he soon discovered it was a wagon approaching the crossing; that it appeared to him it had stopped, or was about to stop, and, as soon as he found it was not going to stop, he shut off the current, applied the brake, and reversed the car; that there was nothing he could have done which was not done to avoid the collision; that the headlight was on the dashboard, was burning brightly, and would throw reflection a couple of hundred feet, though the motorman could not distinguish an object more than about seventy-five feet; that the gong was rung; that the car was about eight or ten feet from the vehicle when the motorman saw it was going to cross; that the horse was not knocked down, and the wagon was not pushed more than three feet; that the motorman had his brakes on, and the car well under control, before reaching the crossing; that the car could be seen to a point one hundred yards from the crossing before a party got on the track; that the car did not strike the horse, but struck the wagon about the rear wheel; that the headlight was not broken, only the glass cracked; that the fence is eight or nine feet from the edge of the ties, and the house fifteen or twenty feet from the edge of the fence. The above testimony, which was that of the motorman, was corroborated by the testimony of a passenger. He, the passenger, would not swear that the bell was ringing, but was under the impression that it was ringing almost continuously. It seemed to him that the motorman was running very cautiously, as it was dark and raining. When the collision occurred, there was nothing in the way of jolting or concussion that attracted his attention, but the car merely stopped and backed, which attracted his attention, and he went forward to see what was the matter, and found there had been a collision with a wagon. The headlight was a kerosene lamp, etc. The motorman also testified: "My opinion now is the horse was stalled on the track when they started across." In rebuttal, two passengers testified that the car was running pretty fast; that they felt the jolt when the collision occurred; that they did not feel the motion of the brake until after the accident,

or hear the gong; and that they would have heard it if it had rung. Plaintiff also testified, in rebuttal, among other things, that he did not have time to get across or back off; that, just before starting across, he looked to see if the car was coming; that, as soon as he could see a good view of the car, the light was in his face; that he could not discover it; that, when he saw the car light, he thinks it was about 10 feet from him; that he never stopped his horse at all until he was struck; that the motorman asked him if he did not see him, but said nothing to him about ringing the bell. The jury inspected the scene of the accident.

Saussy & Saussy, for plaintiff in error.  
McAlpin & La Roche, for defendant in error.

PER CURIAM. Judgment affirmed.

(93 Ga. 438)

### MONTGOMERY v. HUNT.

(Supreme Court of Georgia. Jan. 27, 1894.)

ACTION ON NOTE—BURDEN OF PROOF—FAILURE OF CONSIDERATION—PURCHASER WITH NOTICE.

1. Where suit was brought by the holder of a promissory note payable to the order of a named person, and indorsed by the payee in blank, and the defendant, in his plea, admits the execution of the note and the ownership of it by the plaintiff, a prima facie case for the latter is made out. The burden of proof to establish his defense is upon the defendant, and consequently he is entitled to open and conclude.

2. Where a promissory note is given contemporaneously with a written agreement between the same parties which states the consideration of the note, the two instruments constitute one contract, and are to be construed together; and the maker of the note, when sued thereon by one who purchased it before maturity, for value, may plead the failure of consideration, and also that, when the plaintiff purchased, he knew what the consideration was and that it had failed, or had sufficient notice to put him upon inquiry which would lead to a knowledge of these facts.

(Syllabus by the Court.)

Error from city court, Hall county; M. L. Smith, Judge.

Action by J. H. Hunt against T. B. Montgomery. Verdict for plaintiff, and defendant brings error. Reversed.

The following is the official report:

J. H. Hunt sued T. B. Montgomery on a promissory note payable to the order of Magee, Fletcher & Co., and indorsed by them. The jury found for the plaintiff, and the defendant excepted to the refusal of a new trial. The pleas of the defendant set up that the note was without consideration, and that the plaintiff was not a bona fide holder without notice. The defendant testified that the note was signed in connection with and at the same time with a written contract in evidence, between Magee, Fletcher & Co., of the first part, and the defendant, of the second part, reciting that "the parties of the first part, having established a permanent industry in Gainesville for the purpose of manufacturing

and selling the Champion combination slat and wire fence, do hereby make and constitute the party of the second part a lawful agent, with power to contract or sell the manufactured fence in" a certain district of that county, the manufactured fence to be kept in stock by the manufacturing agent, D. E. Evans, at Gainesville, and at all times to be furnished to the second party at certain stated prices; that the manufacturing agent has also bound himself "to use his endeavor to sell the fence, and that on all sales made by him or at the factory to credit the precinct agent wherein the fence goes with twenty-five cents per rod; that the party of the second part, in consideration of the rights and privileges herein granted, agrees to use his endeavors to sell the fence in the territory named, and pay the first parties five cents per rod of the commissions after he has sold 1,000 rods of fence, and received all the commissions, \$250, as he has this day secured to be paid \$125 by execution of his note, being one-half of the commission on the first 1,000 rods sold; and, if 500 rods of fence have not been sold at the end of six months by the said second party, then the said company or their authorized representatives are fully empowered to cancel the agency, and appoint another agent in his stead, but if they decide to cancel said agency, which shall be at their option, they shall surrender said note after first being paid one-half of the commissions on the fence sold during the said six months," etc. This agreement and the note were each dated March 21, 1892. There was testimony by the defendant and his son that, six days after the note was signed, defendant received from one Bearden a letter asking if the note was all right, and if it was safe to buy it, to which defendant replied that he supposed he signed the note, but did not expect to have to pay it on the conditions upon which he signed it. He did not expect to have much, if anything, to pay on it, as he did not think the fence would sell in his district, and he had signed the note on these conditions. On the first Tuesday in April he met the plaintiff, who asked him: "How are you getting along selling fences?" "Not very well," replied the defendant. Said plaintiff: "Well, I have bought your note." Defendant said: "I did not think you would have bought that note." Plaintiff replied: "I saw your letter to Bearden about the note, but, when I saw the note was payable to order, I bought it. I will buy all such notes as that, especially with your name on them." On this point the plaintiff testified that he purchased the note from Magee a few days after it was given, paying value for it; knew of nothing to make it defective, and had no knowledge or notice of anything making it invalid; never saw defendant's letter to Bearden about the note, and did not tell defendant he had seen it; never knew anything about that letter to Bearden. Magee was a stranger at this place. Plaintiff did not know him. Plaintiff only

knew he was going about in the country selling a patent fence, or rights to it, and taking notes. Plaintiff bought three notes from him, and this is one of them. Martin and plaintiff afterwards bought four more. Plaintiff did not know when he bought what the note sued on was given for. He knew they were dealing in fences. He made no inquiry about it; supposed it was something about the fence; did not ask Magee how defendant came to make him the note, or anything else; did not know anything about Magee, Fletcher & Co., or their solvency, and knew nothing about the contract. T. M. Bell testified that he was interested with Bearden, and wrote to Montgomery the letter mentioned. At that time Magee had the note. When the answer to the letter came, it was read by witness and Bearden. Witness thought there was enough in the letter to keep him from buying the note, and in five minutes tore up the letter. No one saw it but him and Bearden. Hunt did not see it, nor did witness tell Hunt about it. The letter stated that defendant did not expect to have much, if anything, to pay on the note, which was signed on conditions, but did not state the conditions. The defendant gave the following testimony as to the circumstances under which the note was signed, etc.: "A man representing himself to be a Mr. Magee came up the road in a buggy, and, getting out, came to see me, and said he wanted me to act as agent to sell a patent wire fence. He said Jack Thompson and William Byers had consented to become agents in their districts, and he wanted a good man in my district; that, if I did not make anything, I could not lose anything. He said I would have the exclusive right to sell in my district, and would only have to pay a certain commission on what fence I actually sold. He then read me the contract in evidence, and the note, but in reading the note I do not think he read the words 'or order of.' I hesitated about signing the note. He said that the contract was that the note was only given as security for what commissions would be due them or their part of the commissions if I sold any fence, and I would not have anything to pay on the note unless I sold some of the fence, and then only their part of the commissions. He said the note was only given as security, and that it would not and could not be traded; that it was more than they dare do to trade the note; that the notes taken by them would be filed away in their office to secure payment. I can read, but not without glasses. I did not have my glasses with me, and could not read the contract or note, and he read them to me. He said he would send to my post office, Murfreesville, samples of the fence in two or three days. I signed the contract and note upon these statements and the reading of the same by him. He was a stranger to me. I never saw anything more of him. I have never sold a foot of the fence. He did not send the samples, as promised. I never had any

sample with which to try to sell. I have been a member of the legislature. I never tried to sell the fence, because I never received the sample. I never applied to D. E. Evans, in Gainesville, for any of the fence. [Counsel read over to witness that part of the plea in reference to the establishment of a factory in Gainesville. Witness testified that he did swear to that plea that no factory had been established in Gainesville.] I did not know whether Mr. Evans had one here or not. I never asked him about it. I knew he was to be the manufacturing agent. My information was that they had gone off a short time after I gave the note, and carried their factory with them." D. E. Evans testified, among other things, that he was appointed agent to manufacture the fence, and contracted with Magee, Fletcher & Co., to manufacture it and put up a factory; that they brought a machine to Gainesville to make it, and witness always had the fence for sale, and made and still makes it; and that defendant never applied to him for any of the fence. The fence is good. Witness sold lots of it. Magee, Fletcher & Co. put up the factory, which is still there. On cross-examination the witness testified that the machine had not been used in a month; that Magee, Fletcher & Co. never bought any land or built any house, and there was no sign showing a factory was there, etc. The defendant introduced the letter received by him from Bearden, on the back of which he wrote the following, and sent it to his son-in-law, an attorney: "Since I left town I have been studying some about the troublesome note. I have come to the conclusion that I could convict the man. So I want you to see Judge Smith at once, and, if you think so, send some one up after me, and I will come down and bring Jack Thompson for my witness. Now, with all the lies he told me, I still refused to sign the note until he told me Jack Thompson had taken the agency for Whelchel's district, and gave him his note, and he had it filed away. So you see I gave him my note by him making these false statements. Jack Thompson has not given his note. So you see how he lied me into it. Will this convict him before Judge Smith?"

The motion for new trial alleges that the verdict is contrary to law and evidence, and that the court erred in refusing to allow the counsel for defendant to open and conclude the argument. The motion also contains the following special grounds: (6) Error in charging: "The defendant sets up as defense that he gave the note sued on only as collateral security for the commissions which might be due Magee, Fletcher & Co., and that nothing was to be due them only the commissions on sales when they should be made. As to this, I charge you that the note is unconditional, and is payable at the time stated in it. The agreement in evidence does not annex any condition to it, and the failure of the defendant to sell the fence would not pre-



vent a recovery by the plaintiff, even if he had notice of that fact. The fact that the defendant did not sell the fence, or that he did not realize anything from the sale of it, would be no defense to a suit by the plaintiff or any one else on the note." This was all the charge on this defense. (7) The defendant's position before the court was that the note was given simply as collateral to secure the payment to Magee, Fletcher & Co. of their part of the commissions of what fence would be sold, and that no fence had been sold; and that plaintiff had notice of the nature of the transaction at the time he purchased the note, or of circumstances sufficient to put a prudent man on his guard; and that, therefore, he could not recover. The court erred in not charging the jury that, if they found that these facts were established by the evidence, then they should find for the defendant; and the court did not charge this to be the law, but did charge, as before stated, that the fact that defendant realized nothing from the sale of the fence would be no defense to a suit by the plaintiff or any one else on the note, which defendant says was error. The court erred in not charging the jury that, under the written agreement between the defendant and Magee, Fletcher & Co., the note was given merely as collateral to secure one-half the commissions on the first 1,000 rods sold. This construction was insisted upon by defendant's counsel, but the court charged, in effect, that no such stipulation was in the contract, which defendant says was error. (8) Counsel for defendant contended that if the agreement did not, in the opinion of the court, show that the note was given simply to secure the payment of such commissions as might be due by defendant, it was ambiguous, and was capable of that construction contended for by defendant's counsel, and that the court should submit it to the jury, and charge the jury that if they found from the evidence that the contract was represented by Magee to the defendant, at the time he signed it, to mean that the note was merely given as security for the payment of Magee, Fletcher & Co.'s part of the commissions on the fence actually sold, and that nothing would be due by defendant unless he did realize from the sale of the fence, and this was the defendant's understanding of the meaning of the agreement when he signed it, the jury should put that construction upon it. But the court did not submit the agreement to the jury for their construction, to be construed by them instead of being construed by the court, and charge them as requested by counsel, and defendant says this was error. (9) Refusal to charge, as requested in writing: "The contract in evidence between defendant, T. B. Montgomery, and Magee, Fletcher & Co., the payee of the note, should be construed according to the sense put upon it by the parties at the time of the execution of the contract. If you

should find from the evidence that Magee or Fletcher, at the time of the execution of the note or contract, said its effect would be that the note would be only collateral or security for the amount which would be due them by Montgomery as their part of the commissions on the fence sold by him (Montgomery), and that he would not have anything to pay on said note unless he should succeed in selling some of the fence, and if you find that Montgomery understood this to be the meaning of the contract at the time, then the contract will be construed according to and as having that meaning." (10) Counsel for defendant contended that, if the written agreement in evidence did not set forth that the note was given as security for the payment of Magee, Fletcher & Co.'s part of the commissions on the fence actually sold, still the evidence showed that it was given for that purpose alone, and the court should have charged the jury that if they found from the evidence that the note was given merely as collateral security for the payment of Magee, Fletcher & Co.'s half of the commissions on the first 1,000 rods of fence sold, and that no fence had been sold, and that plaintiff purchased the note with notice that the note was given for that purpose, or with notice of circumstances which would put a prudent man on inquiry, he would take subject to the equities between the original parties to the note. But the court did not so charge the jury, and movant says this failure to charge was error. (11) Counsel for defendant contended in argument that, unless the note was given as collateral for the payment of Magee, Fletcher & Co.'s part of the commission, then the facts showed there was no consideration whatever, that defendant received nothing as value for the note, and was not indebted to the payee anything. On the subject of what would constitute a consideration, the only charge of the court was as follows: "A consideration is valid if any benefit accrues to him who makes the promise, or any injury to him who receives the promise; and if Magee, Fletcher & Co. and the defendant made an agreement, each contracting with the other to do certain things, the contract and the promise of one party would be sufficient consideration for the contract of the other party." Movant says this charge was error—First, because movant contends that there was no evidence of any benefit to defendant or any injury to Magee, Fletcher & Co., as a consideration of this note; second, because the court failed to charge the counter proposition, that, if there was no benefit to defendant and no injury to Magee, Fletcher & Co. as a consideration for the note, it would be without consideration, though the court did charge that if there was no consideration for the note, and the plaintiff purchased with notice of that fact, he could not recover; third, because the charge was misleading to the jury, in that it directed their

attention to the promises and counter promises in the agreement, whereas there was no suit on the agreement, but on the note, and was calculated to make the impression on their minds that the promises or stipulations in the agreement were a sufficient consideration for the note, whereas movant contends there was nothing contained in the agreement which could by any possibility be referred to the note as a consideration for the note, and the agreement contained no contract on the part of Magee, Fletcher & Co., conferred no right upon defendant which could stand as a consideration for the note, or which could be referred to the note, but really was all on one side, and that there was no right or benefit conferred on defendant by the agreement, and no promise to him by the other parties to the contract, but was only part of a cleverly-devised scheme to injure defendant by obtaining from him the note in question. (12) J. C. Browing testified that he had given to Magee, Fletcher & Co. a note similar to the one sued on, and accompanied by a contract like the one in evidence, and that he received a letter from Martin & Hunt about it; but it turned out the note belonged to Hunt alone, and that in conversation with Hunt (the plaintiff), in speaking about the notes taken by Magee, Fletcher & Co., Hunt had said: "We gave one hundred dollars apiece for them." Witness said he did not know who Hunt meant by "we," but he inferred from the fact that Martin & Hunt were in partnership in the livery business, and the fact that Hunt said they (Martin & Hunt) had purchased together some of the Magee, Fletcher & Co. notes, when Hunt (the plaintiff) said "we" had paid \$100 each for the notes, he meant Martin & Hunt. The court, over the objection of defendant's counsel, ruled out the statement of witness as to whom he inferred were meant by "we" as used by Hunt. Defendant says this ruling was error. Defendant then offered to prove by the witness that Martin, of the firm of Martin & Hunt, said that they knew all about the contracts made between Magee, Fletcher & Co. and the parties who gave the notes when they purchased the notes. The court excluded the testimony, on the ground that there was no evidence to connect Martin with the note sued on, and to show he was interested with plaintiff in said note. Defendant says this ruling was error.

Perry & Craig, for plaintiff in error. J. B. Estes and J. C. Boone, for defendant in error.

PER CURIAM. Judgment reversed.

(91 Ga. 405)

TITTLE v. BENNETT, Ordinary.

(Supreme Court of Georgia. March 19, 1894.)

GUARDIAN'S BOND — LIABILITY OF SURETY — CONTRACT — EFFECT ON PERSONS NOT PARTIES.

1. A surety upon a guardian's bond, after obtaining his discharge under section 1817 of

the Code, although liable to the ward for any past default of the guardian, is not liable to a surety of the guardian upon a second bond, who has answered for that default in consequence of his own statutory liability upon the second bond. This liability of the second surety is primary as between himself and the first surety, and he has no right, either of indemnity or of contribution, from the latter.

2. A proposal by the administrator of the first surety to the second, pending litigation against them jointly upon both bonds in a suit by the ward, to the effect that, however the litigation might turn out, they would share the burden equally, and the assent thereto by the second surety, constituted no binding contract, especially as against a surety upon the administrator's bond, who had no share in the making or the acceptance of the proposal, and neither consented to nor ratified the same.

3. It results from the foregoing that the declaration of the plaintiff below set forth no cause of action, and that the court erred in not dismissing the same on motion of the defendant.

(Syllabus by the Court.)

Error from superior court, Dade county; T. W. Milner, Judge.

Action by J. A. Bennett, ordinary, for the use of J. A. Case, against J. M. Sutton and Thomas Tittle. Judgment for plaintiff, and defendant Tittle brings error, and plaintiff brings a cross bill of exceptions. Judgment reversed. On cross bill of exceptions, judgment affirmed.

The following is the official report:

To an action by the ordinary for use of J. A. Case against J. M. Sutton and Thomas Tittle a general demurrer was filed by Tittle, who was the only defendant served. The demurrer was overruled, and this ruling is assigned as error. The declaration sets forth the following: On December 7, 1874, J. M. Sutton, as principal, and Thomas Tittle and others, named as securities, entered into an administrator's bond for the faithful performance by J. M. Sutton of his duties as administrator of the estate of Leroy Sutton, upon the acceptance of which bond J. M. Sutton took possession of the estate. In his lifetime, Leroy Sutton become bound as surety on the bond of one Jenkins as guardian of his wards, J. W. Williams and Jane Williams, the latter of whom married one Sammons. Jenkins died without accounting for his trust. While Leroy Sutton was so bound, he applied to the ordinary to be released from the suretyship, whereupon the ordinary required Jenkins to give another bond, which he did, giving as one of his sureties J. A. Case. After the death of Jenkins, his wards, having arrived at majority, began their action against both sets of sureties, and on the trial recovered judgment, March 25, 1887, against J. M. Sutton, administrator of Leroy Sutton, McKenzie Nicholas, and J. A. Case, for \$287.20 for the waste arising upon the bond first given by Jenkins, and \$367.53 arising after the execution of the second bond, and unaccounted for by Jenkins. During the pendency of said litigation, J. M. Sutton, administrator, went to J. A. Case, and, not knowing how the ac-

counting would show up, offered Case a proposition that, however it might turn out, they would equally share the burden, to which Case assented. At the time of the rendition of the judgment in favor of the wards of Jenkins, J. M. Sutton had already converted into money the property of the intestate liable to levy and sale, and had himself removed to Tennessee. McKenzie Nicholas, the other surety, was wholly insolvent, having no property liable to seizure under the law; and Case was forced to pay off the whole of the judgment, and the execution issued to enforce the same was returned by the sheriff with an entry of no property as to Leroy Sutton, whereby J. M. Sutton as principal, and his sureties, became liable to an action to enforce contribution. All of said sureties except Tittle have removed from the state, and have no property therein, except Larkin Payne, who is dead, and there is now no administrator on his estate.

W. U. & J. P. Jacoway, T. J. Lumpkin, and Jones & Martin, for plaintiff in error. R. J. & J. McCamy and McCutchen & Shumate, for defendant in error.

PER CURIAM. Judgment reversed. On cross bill of exceptions, judgment affirmed.

(93 Ga. 542)

**J. G. HYND'S MANUF'G CO. et al. v.  
OGLESBY & MEADOR GROC-  
ERY CO. et al.**

(Supreme Court of Georgia. Jan. 27, 1894.)  
**EXECUTION SALE OF MORTGAGED LANDS—DISTRIBUTION OF PROCEEDS.**

The holder of an unforced closed mortgage on property brought to sale under a general judgment junior to the mortgage could not, without the consent of the mortgagor and the plaintiff in execution, cause the entire estate to be sold, and afterwards claim the fund in the sheriff's hands.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; C. J. Wellborn, Judge.

Application by J. G. Hynds Manufacturing Company and others against the Oglesby & Meador Grocery Company and others for a rule admitting the petitioners to share in the proceeds of an execution sale in the hands of the sheriff. From an order granting the respondents a share in the proceeds the petitioners bring error. Reversed.

H. H. Dean, for plaintiffs in error. Wier Boyd and M. G. Boyd, for defendants in error.

SIMMONS, J. Movants in a rule against the sheriff, to which the Oglesby & Meador Grocery Company had been made a party defendant, contested with the respondent company for the remainder of a fund raised by a sale of realty under a levy of executions of the movants founded on general judgments. The respondent company claimed under a mortgage of prior date to the judgments,

and in its petition to be made a party defendant alleged that at the sale in question the entire estate in the land was sold, and that the defendant in *fi. fa.* was wholly insolvent, and had no other property besides that which was sold under the levy. It appeared that counsel for the respondent company gave public notice to the bidders at the sale that the entire estate would be sold, and that the company would look to the proceeds of the sale to extinguish its mortgage; but the movants were not present, and gave no consent to this. The mortgage was not foreclosed at the time of the sale. The respondent company was the purchaser at the sale. The judge, presiding without a jury, awarded the fund to the mortgage, and to this ruling the movants excepted.

A sale of land under a general judgment junior to a mortgage thereon is a sale of the equity of redemption only, unless the mortgage has been foreclosed, and the mortgagee places his execution in the hands of the officer making the sale, and causes the title unincumbered to be sold (Code, § 1967; *Tarver v. Ellison*, 57 Ga. 54), or unless the mortgagor and the mortgagee and the plaintiff in the *fi. fa.* levied consent that the entire estate shall be sold (Code, § 3974). The mortgage in this case not having been foreclosed, and no such consent having been given by the plaintiffs in *fi. fa.*, the interest sold was merely the equity of redemption, and the court erred in holding that the mortgage was entitled to the fund. Counsel for the defendant in error relied upon the case of *Baker v. Gladden*, 72 Ga. 460, in which it was ruled that the holder of an unforced closed mortgage on land sold at sheriff's sale, although he could not at law claim payment out of the fund arising from the sale, could make such a claim in equity, and, upon proper allegations, showing the insolvency of the debtor, and that the mortgage creditor would be without remedy unless such fund were awarded him, would be entitled to priority over creditors who claimed under judgment junior to the mortgage. In that case, however, the court was not dealing with a fund raised by a sale of the equity of redemption. The executions under which the sale was had were older than the mortgage, and the whole estate was sold, and the fund in controversy was the balance remaining after these executions had been satisfied. Clearly, that decision is not applicable to the case at bar. Judgment reversed.

(96 Ga. 494)

**WESTERN UNION TEL. CO. v. MOSS.**

(Supreme Court of Georgia. Feb. 26, 1894.)  
**TELEGRAPH COMPANY—FAILURE TO TRANSMIT TELEGRAM—PAYMENT.**

1. An agent of a telegraph company has no right to substitute a free message from himself for a prepaid message furnished to him for transmission, and a subsequent return of the money, and its acceptance by the person who paid it will not operate as a ratification of

such substitution, without evidence showing that this person knew of the substitution at the time the money was refunded to him. In the present case the evidence fails to show such knowledge.

2. Where a telegraph company has incurred the statutory penalty for failure to transmit and deliver a message, merely refunding the money received by it as prepayment for service never performed will not bar an action for the penalty.

(Syllabus by the Court.)

Error from superior court, Cobb county; G. F. Gober, Judge.

Action by William E. Moss against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bigby, Reed & Berry and Clay & Blair, for plaintiff in error. W. B. Power, for defendant in error.

**BLECKLEY, O. J.** 1. The default chargeable to the company was not a mere error in transmission, but a total failure to transmit and deliver the message which was intrusted to it. The agent, whether actuated by a motive of kindness or any other, had no right to substitute a free message of his own for that which he had received for transmission, and which was paid for in advance. True it is that this substitution was capable of ratification, but no ratification could result from an act done without knowledge of the thing to be ratified. Though the evidence rendered it certain that the money prepaid as compensation for sending the message over the wires, and delivering it at destination, was refunded shortly after the substitution of the one message for the other took place, this, without proof that the money was received and accepted with knowledge of the substitution, would not suffice to establish ratification. And the evidence wholly failed to show such knowledge.

2. If the company incurred the statutory penalty, there was no remission of the penalty by receiving back the money which had been paid to the company for service which it never performed. It could not cancel the penalty by merely refunding this money. Had there been some express agreement, amounting to an accord, and the refunded money had been received in satisfaction, the penalty might have been released or discharged. But no such agreement appears. Merely refunding the money by the one party, and receiving it back by the other, did not constitute any bar to the action. *Telegraph Co. v. Taylor*, 84 Ga. 408, 11 S. E. 396, citing *Telegraph Co. v. Buchanan*, 35 Ind. 430. Judgment affirmed.

(83 Ga. 526)

#### **BARRETT v. VERDERY.**

(Supreme Court of Georgia. Dec. 18, 1893.)

##### **BREACH OF CONTRACT—DAMAGES.**

The evidence fully establishing the making of the contract declared upon, and its

breach, the plaintiff was entitled to recover as damages the difference between the value of the interest sold, at the time the breach occurred, and the amount which the defendant had contracted to pay for that interest. There was evidence tending to show that this difference amounted to as much as \$368.50. The special pleas of the defendant were no answer to the action.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by Thomas G. Barrett against E. F. Verdery. Judgment for defendant, and plaintiff brings error. Reversed.

W. K. Miller, for plaintiff in error. Salem Dutcher, for defendant in error.

**SIMMONS, J.** It appears from the declaration that the defendant contracted with the plaintiff for the purchase of an interest in certain patent rights held by the plaintiff under a license from the American Electric Light Company of New York, agreeing to pay \$500 therefor, but subsequently refused to accept or pay for the same, and the plaintiff seeks to recover upon this contract. The case came to this court upon exceptions to the overruling of a demurrer to the declaration, and the judgment of the court below was affirmed. 89 Ga. 349, 15 S. E. 476. A trial was then had before the judge without a jury. A motion to strike the defendant's special pleas, on the ground that they contained no defense to the action, was overruled; and the court, after hearing the evidence, rendered judgment for the defendant. The plaintiff made a motion for a new trial, which was overruled, and to this ruling he excepted. He excepted also to the refusal of the court to strike the defendant's special pleas.

We think the court erred in refusing to strike these pleas. The defenses set up therein were based upon matters arising subsequently to the refusal of the defendant to comply with his contract. If the rights the plaintiff had contracted to sell were forfeited, as averred in one of the pleas, by his failure to organize, within a year from the date of his license, a corporation which should succeed to his rights under the license, the forfeiture could not have occurred prior to the defendant's refusal to take the interest contracted for, as the year had not then expired; the license being dated December 10, 1881, and the refusal having taken place in the following February. A breach of contract cannot be justified by anything the other party to the contract may have done or omitted to do afterwards. If the defendant had no legal ground for refusing to comply with his contract at the time of such refusal, the right of action which then accrued to the plaintiff would not be defeated by any subsequent forfeiture of the plaintiff's rights under the license, nor by his subsequent dealings with the interest which the defendant had contracted to take. That the contract

declared upon was a valid contract, the breach of which would entitle the plaintiff to recover, was decided when the case was here before. 89 Ga. 349, 15 S. E. 476. The contract, and the breach of it, as alleged, being fully established by the proof, and the defendant having failed to establish a valid defense to the same, the plaintiff was entitled to a judgment for at least nominal damages and costs. "In every case of breach of contract, the other party has a right to damages," and, "if there be no actual damages, the plaintiff can have nominal damages, which will carry the costs." Code, § 2946; *Bank v. Sibley*, 71 Ga. 727 (4), 733; *Kenny v. Collier*, 79 Ga. 748, 745. It follows from what has been said that a new trial should be awarded.

Whether the plaintiff would be entitled to actual damages or not would depend upon whether, at the time the breach of contract occurred, the salable value of the interest contracted for was less than the contract price. If it was, the plaintiff would be entitled to recover the difference; this measure of damages being applicable where the vendor has retained as his own the property sold, upon the refusal of the vendee to take the same, as was done in this case. *Tied. Sales*, § 333. When the decision in this case was announced, we thought there was evidence tending to show that this difference amounted to as much as the sum stated in the headnote, but this was not absolutely adjudicated, and the process by which the result was reached need not be examined. Judgment reversed.

(93 Ga. 540)

#### DUNAGAN v. WEBSTER et al.

(Supreme Court of Georgia. Jan. 27, 1894.)

#### JUDGMENT AGAINST ADMINISTRATOR—LIABILITY OF DECEDENT'S HOMESTEAD.

Where one qualifies as administrator of a deceased person, it is an undertaking by the administrator equivalent to a contract to duly administer the estate according to law, for the benefit of the heirs and creditors. If such qualification took place prior to the passage of the homestead act of 1868, a homestead set apart to the wife of the administrator in 1873, out of his land, is subject to a judgment rendered against him by the court of ordinary, in favor of the heirs, upon a citation for a settlement of his accounts, although the judgment was based upon a failure by the administrator to pay over money, belonging to the estate, which did not come into his hands until 1887.

(Syllabus by the Court.)

Error from superior court, Hall county; C. J. Wellborn, Judge.

In the matter of the settlement of the estate of Joseph Dunagan, an execution was levied on the homestead of the administrator, on a judgment by the heirs against him; and Sarah Dunagan, the widow, interposed a claim. From an order holding the homestead liable, the widow brings error. Affirmed.

v.21s.e.no.1—5

Saml. C. Dunlap and W. L. Telford, for plaintiff in error. Geo. K. Looper, for defendant in error.

SIMMONS, J. Joseph Dunagan died in 1861, and in the same year J. T. and Ezekiel Dunagan qualified as administrators of his estate. In 1887 certain money which had been buried by the deceased was found, and went into the hands of the administrators. They were cited by the heirs to a settlement before the ordinary, and a judgment was rendered against them in favor of the heirs. An execution founded upon this judgment was levied on certain land as the property of Ezekiel Dunagan, and his wife interposed a claim to the property as having been set apart to her and her children, as a homestead and exemption, on March 29, 1873. It appeared that he had never sold or otherwise disposed of the land. Upon the agreed facts, the question whether the land was subject to the execution was submitted to the judge without a jury, and he found that it was, and to this ruling the claimant excepted. Where one qualifies as administrator, it is an undertaking equivalent to a contract on his part to duly administer the estate according to law for the benefit of heirs and creditors. In the present case the claim of the creditor was based upon this contract on the part of the administrator; and the contract, as we have seen, antedated the constitution of 1868, under which the homestead was set apart. The supreme court of the United States, in the case of *Gunn v. Barry*, 15 Wall. 610, reversing the decision of this court, held that the homestead right could not prevail against a contract created prior to the constitution; that, as to such contracts, the homestead is a nullity,—and that ruling has since been followed in several decisions of this court. It has also been held that, as between the homestead right and the claim of a creditor founded upon such a contract, the date of the contract, and not of the breach of it, governs in determining the question of priority. *Van Dyke v. Kilgo*, 54 Ga. 551; *Drinkwater v. Moreman*, 61 Ga. 395; *Hunt v. Juhan*, 63 Ga. 162; *Douglass v. Boylston*, 69 Ga. 186; *Willis v. Thornton*, 73 Ga. 128. It follows that the court below did not err in holding the property subject. Judgment affirmed.

(98 Ga. 445)

#### OSBORNE v. HUGHES.

(Supreme Court of Georgia. Feb. 26, 1894.)

#### APPEAL—INSUFFICIENT BOND.

As the surety on a replevy bond given by the defendant in a distress warrant is liable for the condemnation money by reason of his suretyship on that bond, he cannot become surety on an appeal taken by the defendant to the superior court from the judgment rendered against him in the justice's court. An appeal so entered is a nullity, and should be dismissed.

by the superior court, on motion. The case is ruled in principle by *Insurance Co. v. Plant*, 36 Ga. 623.

(Syllabus by the Court.)

Error from superior court, Catoosa county; T. W. Milner, Judge.

Action by Joseph W. Osborne against Jesse Hughes. From a judgment for plaintiff, defendant appeals to the superior court. From an order refusing to dismiss the appeal, plaintiff brings error. Reversed.

J. H. Anderson and Payne & Walker, for plaintiff in error. R. M. W. Glenn, for defendant in error.

PER CURIAM. Judgment reversed.

(93 Ga. 488)

**CENTRAL RAILROAD & BANKING CO.  
OF GEORGIA v. PHINAZEE.**

(Supreme Court of Georgia. Jan. 8, 1894.)

**LESSOR OF RAILROAD—LIABILITY FOR INJURIES—  
DEFECTIVE TRACK—INTOXICATION OF PLAINTIFF  
—CREDIBILITY OF WITNESS—FALSUS IN UNO.**

1. A chartered railroad company permitting another company to run trains over its railway, and thus to use its franchise, is liable to a passenger upon one of such trains for a personal injury sustained by him by reason of a derailment resulting from negligence in failing to have and maintain a safe track.

2. It is not incumbent upon the court to charge that, "if the jury should believe that any of the witnesses sworn for the plaintiff have been successfully impeached or contradicted in a material matter sworn to by him or them, then the jury can disregard the whole testimony of such witness." A witness might be contradicted in a material matter, and still be entitled to full credit as to other matters.

3. If the plaintiff's intoxication did not contribute to his injury, or to the degree of it, his being intoxicated would not affect his right to recover; nor should it count against him, as disqualifying him to avoid the consequences of the defendant's negligence, if the circumstances were such that a prudent, sober man could not have avoided them by the exercise of ordinary diligence.

4. The evidence was not so clearly insufficient to warrant a verdict as to render it reversible error for the presiding judge to deny a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. F. Jenkins, Judge.

Action by W. J. Phinazee against the Central Railroad & Banking Company of Georgia. Judgment for plaintiff, and defendant brings error. Affirmed.

R. F. Lyon, Steed & Wimberly, and John R. Cooper, for plaintiff in error. Hugh V. Washington and Hardeman, Davis & Turner, for defendant in error.

BLECKLEY, C. J. 1. There is no less skepticism in law than in theology. This court is called upon again and again for a fresh revelation of some legal truth which has already been revealed. After the cases of *Railroad Co. v. Mayes*, 49 Ga. 355; *Singleton v. Railroad Co.*, 70 Ga. 464; and *Railroad Co. v. Liddell*, 85 Ga. 482, 11 South.

853,—it would seem that there could be no reasonable doubt of the liability of a chartered railroad company permitting another company to run trains over its railway, and thus to use its franchise, to respond for any damage occasioned by negligence, whether its own or that of its lessee or licensee. Obviously, the principle of those cases extends to an injury sustained by a passenger in consequence of the derailment of a train caused by negligence in failing to have and maintain a safe track. Indeed, the last of the cases above cited related to injuries sustained by a passenger, and the proprietary company was held liable.

2. The request to charge the jury that, "if the jury should believe that any of the witnesses sworn for the plaintiff have been successfully impeached or contradicted in a material matter sworn to by him or them, then the jury can disregard the whole testimony of such witness, whether it be the plaintiff or other person," was open to the objection that it would apply as well to a contradiction resulting from honest mistake on the part of the witness attacked as to a contradiction due to willful and corrupt perjury. It might be clear to the jury that a witness contradicted in a material matter could be fully credited as to other matters, and, when this is the case, it is not a rule of law that the whole of his testimony can be disregarded. The rule of "falsus in uno falsus in omnibus" has relation to willful falsehood, and should be so restricted, in giving it in charge to the jury. *Skipper v. State*, 59 Ga. 63; *Ivey v. State*, 23 Ga. 576.

3. The charge of the court on the subject of the plaintiff's intoxication, when analyzed, is reducible, in substance, to two propositions: First, if his intoxication did not contribute to the injury, or to the degree of it, his being intoxicated would not affect his right to recover; second, that it should not count against him, as disqualifying him to avoid the consequences of the defendant's negligence, if the circumstances were such that a prudent, sober man could not have avoided them by the exercise of ordinary diligence. We think both of these propositions are sound, and that they exhaust all that was involved in the case as to the effect of the plaintiff's intoxication, whether it was total or partial. A common carrier, who, by negligence, injures a passenger, cannot shun, in whole or in part, liability to make compensation for the injury, because the passenger was intoxicated, unless his being intoxicated contributed either to produce or aggravate the injury; and surely the carrier cannot complain that he failed in diligence to protect himself against the consequences of the carrier's negligence, if the exercise of diligence, up to the measure of that which a prudent, sober man could and would have exercised under like circumstances, would not have been available. There is no rule of law which requires a passenger to preserve

his capacity to act at all times as a prudent man would act. If an occasion arises, by reason of the carrier's negligence, when a prudent, sober man could not, by the exercise of all ordinary diligence, protect himself, it would be of no consequence that a passenger injured by such negligence had, by voluntary drunkenness, incapacitated himself for the exercise of ordinary diligence. The loss of capacity to do that which, if done, would be unavailing, could not rationally count for any excuse to the carrier, or be chargeable to the passenger as a reason why he should not have compensation for his injuries. Morally, it might be a grievous fault in him, but legally it could have no significance, inasmuch as the result of the carrier's negligence would have been the same with the presence of the capacity as it was in its absence.

4. Had the trial court granted a new trial because the evidence was insufficient to warrant the verdict, we should have been well satisfied, but the insufficiency is not so clear as to cut off the discretion of the presiding judge in disposing of the motion for a new trial. It is impossible for us to say that he committed any reversible error in denying the motion. Judgment affirmed.

(93 Ga. 785)

# ROACH v. WESTERN & A. R. CO.

(Supreme Court of Georgia. July 16, 1894.)

EVIDENCE—RES GESTAE—HYPOTHETICAL INSTRUCTIONS—IMPUTED NEGLIGENCE.

1. Declarations made 20 minutes after a collision between a locomotive and a buggy, by one who was in the buggy, and who was injured by the collision, and who had been removed a considerable distance from the scene of the collision to a house in which he was being cared for, are not admissible as a part of the *res gestae* of the collision, the declarations being in the nature of a narrative of what had occurred, including statements as to the cause of the collision, and not spontaneous exclamations made on the spot, or very near thereto, and not in point of time so immediately after the occurrence as to be properly regarded as a part of the occurrence itself.

2. Except as to the subject embraced in the foregoing note, there was no substantial error in admitting or rejecting evidence.

3. The rule of law which would exempt the company from liability had the company been wholly free from negligence which contributed to the injury was not applicable to the facts of the case, and the charge of the court on that theory was hypothetical, and therefore erroneous.

4. The negligence of the driver and owner of a private vehicle, who, by such negligence, contributes to causing a collision with a locomotive, is not imputable to another person riding by invitation in the vehicle, unless that person had some right or was under some duty to control or influence the driver's conduct. Such right might arise by reason of the two being engaged at the time in a joint enterprise for their common benefit; and, if this were not so, the duty might arise from known or obvious incompetency of the driver, resulting from drunkenness or other cause.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by J. A. Roach against the Western & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Smith, Glenn & Smith, for plaintiff in error. Payne & Tye, for defendant in error.

LUMPKIN, J. Roach, Lindsey, and Saxon were riding in a buggy which belonged to Lindsey, and which was being driven by Saxon. While crossing the main track of the Western & Atlantic Railroad Company, at a street crossing in Cartersville, the locomotive of a train ran into the buggy, killing Lindsey, and injuring Roach and Saxon. Roach brought an action against the company for damages, which resulted in a verdict for the defendant. His motion for a new trial, which was overruled by the court, contains a large number of grounds, many of which are too trivial to require notice. The controlling questions in the case are indicated by the headnotes.

1. It appears that, after the collision, Saxon was removed from the scene of the injury, a distance varying, according to the evidence, from 150 to 200 yards, to the house of one Ann Strickland, in which he was being cared for. The court admitted in evidence, in favor of the defendant, declarations made by Saxon some 20 minutes after the collision had occurred, to the effect that the parties in the buggy were all drunk, and that liquor was the cause of all the trouble which had occurred. These declarations were in the nature of a narrative of what had occurred, and were not spontaneous exclamations made on the spot where the collision took place, or very near thereto. We are quite clear the court erred in admitting these declarations. They were not, in point either of time or distance, so closely connected with the occurrence to which they related as to be properly regarded as a part of the *res gestae*. Enough time had elapsed, and the declarant had been removed a sufficient distance, to allow time for reflection and some degree of deliberation. In no fair sense could what he said in the house to persons who were inquiring about the collision, and attending to his welfare, be treated as a part of the immediate facts of the catastrophe. Besides, Saxon was still in life at the time of the trial, and a competent witness. If the defendant desired the benefit of what he knew about the transaction, it was a very easy matter to put him on the stand. This court, in *Augusta Factory v. Barnes*, 72 Ga. 217, has gone as far, we presume, as it will ever go in sanctioning the admission, as a part of the *res gestae*, of evidence of this character. We are not disposed to extend in the least degree the doctrine of that case, although it was cited approvingly in *Ferguson v. Railway Co.*, 75 Ga. 640. In the latter case the declarations ad-

mitted occurred only a few minutes after the injury occurred, and were made at the very place of the injury. The declarations of Saxon being clearly inadmissible, we felt constrained to grant a new trial, because it is very probable, if not absolutely certain, that this evidence was highly injurious to the plaintiff's case.

2. Several grounds of the motion for a new trial relate to alleged errors in admitting and rejecting evidence. These grounds have already been referred to among those we have classed as trivial. After carefully examining and considering them all, we find in none of them any substantial error, and we deem it unnecessary to state or comment upon them, as so doing would contribute nothing of any real value either to the discussion of this case or to the law generally.

3. Some of the charges of the court were made upon the theory that the company was wholly free from negligence contributing to the injury. Even if these charges were, in the abstract, correct propositions of law, they were improperly given in the present case, because the evidence shows beyond any controversy that the company was negligent in failing to observe the statutory requirement as to checking the speed of the train in approaching the public crossing; and there was also evidence from which the jury might have inferred that the signals required by law in such a case were not given. Hence a charge based upon the hypothesis of complete diligence on the company's part may have misled the jury.

4. The evidence does not leave it perfectly clear whether Roach was riding in the buggy merely as a guest of the two other persons, or whether or not he and they were at the time engaged in a joint enterprise, and were using the buggy for their common benefit in carrying the same into effect. There is also, under the evidence, some room for question as to whether or not Roach, under the existing circumstances, was under any duty to control or influence the conduct of the driver. The doctrine of imputable negligence was discussed to some extent in *Railway Co. v. Markens*, 88 Ga. 60, 13 S. E. 855; and recently, in *Railway Co. v. Gravitt* (decided Feb. 26, 1894) 93 Ga. —, 20 S. E. 550, the subject was given a very thorough consideration, and many authorities were cited. It is unnecessary to now go over the ground then covered. Applying the law, as we understand it, to the present case, our conclusion is that, if Roach was riding by invitation in the buggy with the other two men, their negligence is not imputable to him, unless, by reason of his relations to them or the business in hand, he either had a right or was under a duty to take the necessary steps to prevent negligence on their part, and to look after his own safety. This right would arise if, under the circumstances, he was entitled, along with the others, to the use of the buggy and the control of its movements;

and the duty of self-preservation, the omission to guard which would amount to negligence on his part, would arise if, from drunkenness or other cause, the driver was obviously incompetent to exercise the proper care, and Roach failed to interpose or else leave the vehicle in time to escape the collision. Judgment reversed.

(93 Ga. 510)

# CENTRAL RAILROAD & BANKING CO. OF GEORGIA v. GOLDEN.

(Supreme Court of Georgia. Jan. 8, 1894.)

ACCIDENT NEAR RAILROAD CROSSING—FAILURE TO SIGNAL—CAPACITY OF MINOR—PRESUMPTIONS.

1. It was not error, in charging the jury, to recite sections 708-710 of the Code, which prescribe the duty of railroad companies and their employés touching the erection of blow posts, the speed of trains, and the duty to give signals on approaching public crossings, the action being for a personal injury by collision with a train approaching a public crossing, though more than 200 yards from the same. But the failure to observe the statutory requirements, while, in the abstract, negligence per se, may not be negligence at all relatively to a person thus injured. It may be no more than a fact to which the jury could look in ascertaining whether the company was negligent relatively to him or not. Had the injury occurred upon the public crossing, the rule of negligence per se would have been applicable without qualification.

2. There is no presumption of law that a boy between 10 and 14 years of age is not capable of exercising such care as may be requisite for avoiding injury by a railroad train in motion, whether the train be run negligently or not. In each case the question is for the jury in the light of all the facts and circumstances which go to manifest or illustrate the capacity of the particular boy in question.

3. The declaration not being ambiguous, it was error in the court in charging the jury to treat, either directly or indirectly, as a ground of recovery, any negligence of the defendant substantially different from that alleged, such as failure to prevent the plaintiff from climbing upon the cars.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Action by Oscar Golden, by his next friend, against the Central Railroad & Banking Company of Georgia. Judgment for plaintiff, and defendant brings error. Reversed.

Steed & Wimberly and John R. Cooper, for plaintiff in error. J. L. Hardeman, for defendant in error.

SIMMONS, J. 1. Complaint is made in the motion for a new trial that the court erred in giving in charge to the jury sections 708-710 of the Code, which prescribe the duties of railroad companies and their servants in approaching public crossings. It is claimed that these sections are not applicable to the facts of this case, inasmuch as the place on the track or right of way where the boy was injured was more than 200 yards from the crossing. If this were an original question in this court, I would be



Inclined to agree with the views of counsel for the plaintiff in error, but, inasmuch as this court has decided several times, notably in the case of *Railroad Co. v. Jones*, 65 Ga. 631, that such a charge was not erroneous, and those cases never having been reviewed and overruled, the court is bound thereby. But this court, so far as I know, has never held, relatively to a person that distance from the crossing, that the omission to give the signals required by law is negligence per se, as was charged in this case by the trial judge. It has held that the evidence of noncompliance with the statute by the servants of the railroad company is admissible, and the jury may be instructed by the judge that they may consider it. This, I think, is as far as the court has gone on this subject. Those decisions may be correct upon the idea that the proof of omission of this duty on the part of the railroad company's servants might give rise to an inference that they were in other respects negligent or reckless. So far as I know, no court in this country has yet held that the omission to give signals prescribed by statute is negligence per se relatively to a person not on or near the crossing, except in those states where the statute makes it negligence per se. This court, while holding, as above announced, that the evidence was admissible, and the charge thereon proper, has never definitely and accurately determined what weight or effect it ought to have with the jury. In this connection, however, see the opinion of Lumpkin, J., in *Railway Co. v. Gravitt* (decided at the present term) 93 Ga. 369, 20 S. E. 550. Although the present case was decided earlier than that case, the opinion in the latter was filed before this opinion was prepared.

2. The court charged the jury, in substance, that between the ages of 10 and 14 years the law does not presume that a person has arrived at the age of discretion, unless it shall appear that he is liable, and possesses the capacity, to discern what is right and what is wrong; and it must be shown by proof that he knew the distinction between good and evil, and had capacity to realize the danger and avoid the same. We do not think this charge was pertinent and appropriate. There is no presumption of law that a boy between 10 and 14 years of age is not capable of exercising such care as may be requisite for avoiding injury by a railroad train in motion, whether the train be run negligently or not. It would be folly to say that a boy 12 years old, and of ordinary intelligence, as this boy seems to have been, would not know it was dangerous to attempt to climb upon a moving freight train while it was in rapid motion. In a case of this kind we do not think the jury should be instructed as to presumptions of law in regard to the capacity of the boy, but the case should be tried on its special facts, and the jury should determine from

the testimony whether he did have sufficient capacity at the time of the injury to know that the act which he was about to do was dangerous. It is true that in the case of *Rhodes v. Railroad Co.*, 84 Ga. 320, 10 S. E. 922, Blanford, J., in delivering the opinion of the court, said that the analogies of the criminal law as to the age of discretion might be followed in determining as to the capacity of an infant to realize and avoid danger; but in that case he was giving reasons why the court should not sustain a demurrer to the declaration on the ground that the facts alleged in the declaration showed that the boy brought about the injury by his own conduct. What the court really holds in that case is that, upon such a demurrer, the judge cannot say *prima facie* that the boy had sufficient capacity to appreciate the danger of the act which he was about to do, and that the judge might avail himself of the analogies of the criminal law in passing upon the demurrer; but, where the case is being tried by a jury, they should be allowed to decide the question under the evidence, without being hampered by any presumption. *Railroad Co. v. Rylee*, 87 Ga. 491, 13 S. E. 584.

3. The negligence complained of in the declaration was that the engineer failed to sound the whistle; that he had time to see the plaintiff, but failed to see him; that he saw, or should have seen, that the plaintiff was a child. These were the only acts of negligence complained of. The court, in its charge to the jury, instructed them, in substance, that if the boy attempted to jump on a moving train, and fell under the train, he could not recover, unless the railroad company's servants, after discovering that he was endeavoring to do so, failed to prevent it by the exercise of ordinary care and diligence. It is a well-known rule that a plaintiff must recover upon the allegations of negligence set out in his declaration, and not for acts not alleged therein. This declaration was plain and unambiguous, and the court erred in charging the jury to treat, either directly or indirectly, as a ground of recovery, any negligence of the defendant substantially different from that alleged. See *Railroad Co. v. Hubbard*, 86 Ga. 627, 12 S. E. 1020, and cases cited. We cannot say that this charge did not influence the jury to find as they did. Judgment reversed.

(94 Ga. 422)

ROME R. CO. v. CHATTANOOGA, R. & C. R. CO.

(Supreme Court of Georgia. March 26, 1894.)

RAILROAD COMPANIES—JOINT USE OF TERMINAL—  
COMPENSATION—COLLECTION BY DISTRESS.

1. Where a railroad company, by contract, express or implied, admits another company into the possession, use, and occupation, jointly with itself, of its depot, yards, yard tracks, and other terminal facilities, the relation of landlord and tenant is established between the

two companies, and continues, if no term be fixed by contract, so long as such joint possession, use, and occupation may last; and, if no amount of compensation be agreed upon, the law will imply an undertaking to pay such amount as may appear to be fair and reasonable. Under the statutory system established by the Code, this compensation is, in its nature and character, rent, and may be collected by distress warrant sued out by the landlord company on affidavit setting forth and claiming a specific amount as due for rent; the tenant having, of course, a right to controvert the claim by counter affidavit, as may be done in other cases of distress for rent.

2. If, in the arrangement between the two companies, it was contemplated and understood that, as part of the means of enjoyment of the rented premises, the tenant should have the use upon the premises of some of the landlord's servants and rolling stock, whether continuously or only occasionally, and these were let with the premises in one and the same contract, the compensation for the whole in one gross sum—the really element being the main consideration, and the other elements only incidental—may be treated as rent, and collected by distress warrant.

3. It is not manifest that the price paid by another company for a similar occupation of the premises, after the occupation of the outgoing tenant company had ceased, would be admissible evidence upon the question of the amount of rent which this company ought to pay.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Distress warrant by the Rome Railroad Company against the Chattanooga, Rome & Columbus Railroad Company. From a judgment of nonsuit, plaintiff brings error. Reversed.

The following is the official report:

On May 4, 1891, the Rome Railroad Company obtained a distress warrant against the Chattanooga, Rome & Columbus Railroad Company for \$32,500 rent. The affidavit upon which the warrant issued alleged that the Chattanooga, Rome & Columbus Railroad Company was indebted to Rome Railroad Company \$32,500 "for the rent of depots and depot buildings and yards, tracks, and side tracks of the Rome Railroad Company in the city of Rome, Georgia," describing their location, "and also for the rent of the rights and privileges incident to the use and occupation of the said above-named property since the 18th day of July, 1888, and for the rent of the terminal facilities, rights, privileges, and franchises, and for the rent of the freight and passenger privileges in the city of Rome, and enjoyed by the said Chattanooga, Rome & Columbus Railroad Company since the 18th day of July, 1888, and also for the rent of box cars, caboose cars, and switch engines since the 18th day of July, 1888, in the sum aforesaid." Counter affidavit was made that the sum distrained for was not due.

At the conclusion of the testimony for plaintiff, the defendant moved a nonsuit, on the following grounds: (1) Because, under the evidence, the remedy by distress war-

rant does not lie, and the plaintiff is not entitled to recover. (2) Because, under the evidence, taken in connection with the affidavit of the plaintiff on which the warrant issued, distress will not lie, and plaintiff is not entitled to recover. (3) Because no contract is shown to pay any fixed sum as rent, in money or specifics, nor is any custom shown by which a payment in specifics may be implied, or the value thereof shown. (4) Because no term is shown. (5) Because the use of plaintiff's property was a mere license, revocable at the will of plaintiff, and for which distress will not lie. (6) Because the evidence shows that the sum claimed was for the use of certain railroad tracks, switches, depots, and privileges, all of which were in the possession of and controlled by plaintiff, and for the hire of personality and the services of the plaintiff's servants, and said sum cannot be apportioned so as to authorize a verdict for any sum on account of rent, if any such right exists. (7) Because under no view of the evidence can this action be maintained. (8) Because both railroad companies were under the management and control of the same offices and officers, and no valid contract could have been made on the subject, and none was made. This motion was sustained, and to this ruling plaintiff excepts.

The principal witness for the plaintiff was J. D. Williamson, who testified in brief: From July 18, 1888, to May, 1891, the Chattanooga, Rome & Columbus Railroad Company used the depot buildings, yards, grounds, side tracks, and other railroad terminal facilities of the Rome Railroad Company in the city of Rome. Said property belonged to the Rome Railroad Company and the Chattanooga, Rome & Columbus Railroad Company used and occupied the same as its tenant. There was no formal written contract between the parties, but there was an agreement that the Chattanooga, Rome & Columbus Railroad Company was to pay to the Rome Railroad Company, as rental for the premises, whatever they were worth for rent. It was to pay to the Rome Railroad Company, as rental for the use of its terminals, whatever they were worth for rent. "So far as I know, nothing has been paid on this rental account, and, if nothing has been paid, I consider that the C. R. & C. R. R. Co. would be indebted to the Rome R. R. Co. from eight to twelve thousand dollars per annum,—fairly, about ten thousand dollars per annum,—during the period it occupied and used the premises mentioned. I name the above amount, because, from my railroad experience, I consider it a fair rental for the premises, and for the uses to which the C. R. & C. R. R. Co. put the premises. From about May, 1885, to May, 1891, I was engaged in the organization, building, and operation of the C. R. & C. R. R. (formerly

the Rome & Carrollton Railroad). During that period, I had actual management of the property, and had ample means of obtaining knowledge of all its affairs. Was its president from the spring of 1885 till now, except from August 5, 1887, to July 11, 1889, when J. C. Clements was president. I became president of the Rome & Carrollton Construction Company in the fall of 1887, and continued president until July 11, 1889. It was provided at a stockholders' meeting of the C., R. & C. R. R. Co. that I should be the chief executive officer of C. M. Hillman, and should be made a director in and president of any construction company to which a contract for the building of the railroad might be assigned, and should remain such until the railroad should be completed and delivered to the railroad company, and should then be elected president of the railroad company; and this arrangement was carried into effect. The contract with Hillman for building the railroad was assigned to the Rome & Carrollton Construction Company, and the C., R. & C. R. R. Co. was built under that contract by the construction company. The construction company operated the C., R. & C. R. R. from July 1, 1888, to July 11, 1889. The road was completed July 1, 1888. By resolutions and assignments duly recorded on the minutes of both companies, a large majority of the stock of the C., R. & C. R. R. Co. was sold and delivered to Hillman, and by him sold and delivered to the construction company, who subsequently issued it in installments to its stockholders. During the period from July, 1888, until some time in July, 1889, while I was president of the construction company, Clements was president of the C., R. & C. R. R. Co. I was president of the Rome R. R. Co. from July 18, 1888, until about April 1, 1891. During the period from July 18, 1888, to May 5, 1891, a large majority of the stock of the C., R. & C. R. R. Co. was held by the construction company and its stockholders, and parties named as stockholders of the construction company were also stockholders of the C., R. & C. R. R. Co. In June, 1889, I paid for majority of the stock of the Rome R. R. Co.; having, before I paid for it, contracted to sell it to other parties. I parted with all interest I had in that railroad in June, 1889. The officers who acted both for the construction company and the Rome R. R. Co. on and after July 18, 1888, were myself, president, the general freight and passenger agent part of the time, the general manager at the time, the auditor, and the treasurer of the Rome R. R. Co., who was local cashier of the construction company. All of these ceased to be connected with the construction company on July 18, 1889, and some time in June, 1889, all of them ceased to act in a dual capacity for the construction company and the Rome R.

R. Co., except myself, as president, the auditor, and the treasurer; and from July, 1889, to May 5, 1891, these were the only officers of the C., R. & C. R. R. Co. who held corresponding positions in the Rome R. R. Co. I have had no connection with the Rome R. R. Co. since April 1, 1891. While no written contract was entered into, there was a distinct and definite agreement between the two companies that the C., R. & C. R. R. Co. was to pay to the Rome R. R. Co., for the use and occupancy of its terminals, etc., what they were worth for rent. I repeatedly stated to the directors, and also stated to the stockholders, of the Rome R. R. Co., that the C., R. & C. R. R. Co. was liable for, and would pay, as rental, whatever the premises were worth, and that, if it failed to pay to the Rome R. R. Co. the amount the premises were worth for rent, the Rome R. R. Co. had the right to go before a jury at any time to fix the amount. There was never any question of liability as to the C., R. & C. R. R. Co., as it at all times acknowledged its liability for rent; but on account of its financial necessities, at my repeated request, the directors of the Rome R. R. Co. postponed taking any action to recover their rents until just prior to May 5, 1891. The C., R. & C. R. R. Co. was unable to buy terminals, and was compelled to rent those of the Rome R. R. Co., and took possession of the terminal properties of the latter at Rome, under express agreement to pay rent for them. On account of the grades through the city, it was almost impossible to operate the railroad of the C., R. & C. R. R. without getting into the Rome R. R. yards, and in order to do business in Rome the C., R. & C. was virtually compelled to obtain the use of the yards, tracks, depot, etc., of the Rome R. R. This necessity was absolute and pressing. There was no other course practicable, except to rent from the Rome R. R. its terminals, etc. These terminals were used by the C., R. & C., not only for its local business in Rome, but also for its transfer business between other connecting roads in Rome, and it used the tracks of the Rome R. R. as a storage for cars going to and coming from other roads at Rome. It also used the depot buildings and offices for various officers, and virtually operated its transportation department from this point. By the use of these railroad facilities, it was enabled to reach directly manufacturers in Rome, without paying trackage or usual transfer charges, thus saving much money. Some of these Rome railroad tracks were also used by the C., R. & C. for its bulk car-load deliveries. In view of these things, it was extraordinarily beneficial and necessary to the C., R. & C. to rent these terminals. It was not understood that both roads were virtually owned by the same parties. Such was not the fact. It is true

that at first it was thought that the union of the business of the two roads in the same yard and depot, etc., would benefit the Rome road to some extent, and probably it was benefited thereby; but the benefits were mutual, and in the end it was clearly demonstrated that the defendant company enjoyed the larger share of the benefits arising from this arrangement."

The superintendent of the Rome Railroad, who had been such since June or July, 1889, and was acquainted with its terminal property, testified that he thought they were worth from ten to twelve thousand dollars a year as rent; that he thought the depot buildings were worth \$5,900; that, besides the depot and depot buildings, the terminals consisted of tracks and side tracks which the road owned entirely, and others which it owned jointly with other roads, but which it had the right to use as if it owned them entirely, and therefore, for the purpose of this estimate, he treated them as belonging to the Rome Railroad; that, the way they were situated, they were worth for rent ten or twelve thousand dollars per year for the time in question. He then detailed tracks belonging exclusively to the Rome Railroad, and others jointly with the East Tennessee, Virginia & Georgia Railroad, but over which no other road could get, except through the Rome road, and further testified that the Rome road switched cars for the Chattanooga, Rome & Columbus Railroad, putting them in all these places, and that constituted a part of the basis of his opinion as to the value of these terminals rented to the Chattanooga, Rome & Columbus, because the Rome Railroad Company had the right to charge trackage on all these cars; that he put in his estimate what it would be entitled to charge for trackage, but the Rome Railroad Company did not charge the Chattanooga, Rome & Columbus anything for trackage, but simply for rent; that for part of the time he thought the crew and engine of the Rome Railroad Company did some of the switching, or perhaps the Chattanooga, Rome & Columbus may have run a crew by itself, with permission of the Rome Railroad Company; that most of the time it was the crew and engine of the Rome; and that sometimes the latter would hire an engine from the Chattanooga, Rome & Columbus, for which sometimes the Rome would be charged seven dollars per day more than other roads.

The agent of the Nashville, Chattanooga & St. Louis Railroad and the Western & Atlantic Railroad, who had been engaged in that business for 20 years, and had had experience in connection with the terminal property of railroads, testified that he knew the railroad situation in Rome; that if for the time in question the Chattanooga, Rome & Columbus had the use of the terminals of the Rome Railroad Company, and ran all its

passenger and freight trains into and through the Rome Railroad yards, etc., and had the use of all its side tracks for bulk and car delivery, and as much as twelve or fourteen thousand cars passed over them for that time, which went into the Rome business, the terminals would be worth eight or ten thousand dollars per year for rent; that, under the ruling of the state railroad commission, the Rome Railroad would be permitted to charge \$2 per car for switching the 12,000 cars; that the Rome Railroad Company would be entitled to \$2 per car for the 12,000, for trackage; that ten thousand dollars per year would be nearer correct than eight, but that he "had figured in his mind about that"; that his testimony was a mere estimate; that he had had the Rome terminals pointed out to him, and there were four or five miles of side track outside of the yard limits which reached the largest interest in Rome; that it was not only an investment in property that made these valuable, but also the situation that controlled the volume of business, which no one else could get, on account of the position occupied by the tracks; that he took into consideration, also, the cost of transfer of cars by the Rome Railroad engines and crews, in making up his estimate, and understood that some of the tracks were for the joint use of the East Tennessee and Rome Railroads; that he based his opinion upon the idea that the Rome Railroad owned these tracks, and had the right to rent them, but would not think that the joint use of these tracks was worth eight or ten thousand dollars, if there was no other question connected with that; that he also took into consideration, in arriving at the amount he had stated, that the arrangement would enable the Chattanooga, Rome & Columbus to control some competitive business it would otherwise lose, and the Rome Railroad would get; that if the Rome Railroad did not own these terminals, it would alter his opinion, but if the Chattanooga, Rome & Columbus got the use of them from the Rome Railroad, and as its tenant, it would not change his opinion that it would average eight or ten thousand dollars per year for rent; and that his answer was based upon the hypothesis that the Rome Railroad Company handled these cars, paid expenses, and furnished the power and crew for handling this business.

In addition to the assignments of error as to the granting of the nonsuit, plaintiff alleges that the court erred in this: That, while its superintendent was on the stand, plaintiff, to throw light upon the value of the property for rent, offered to prove by him that the immediate successor of the Chattanooga, Rome & Columbus Railroad Company, the Central Railroad Company, which bought the Chattanooga, Rome & Columbus, paid plaintiff \$1,000 per month rent for the use of the same property as that leased to

the Chattanooga, Rome & Columbus, and that in fact said successor company did less business over these terminals than the Chattanooga, Rome & Columbus, which testimony was not admitted.

W. W. Brookes and W. T. Turnbull, for plaintiff in error. J. B. Vanham, for defendant in error.

PER CURIAM. Judgment reversed.

(93 Ga. 415)

### DUCKETT v. STATE.

(Supreme Court of Georgia. Dec. 18, 1894.)

CRIMINAL TRESPASS—ACCESSORY IN ADJOINING STATE—LIABILITY AS PRINCIPAL.

1. Where one hires another, in the state of Tennessee, to commit a trespass in Georgia, and the person hired does commit the trespass, and in so doing acts in a manner reasonably to be anticipated by the person who employed him, and thereby commits a misdemeanor, both are principals in the misdemeanor, and subject to indictment and punishment in Georgia. Thus, a constable in Tennessee, wishing to levy upon a horse which was in Georgia, hired a person to bring the horse into Tennessee, without specifying how it was to be brought, and the person employed rode the horse in Georgia, without the consent of the owner, and by this means executed his commission. *Held*, that the constable, as well as his agent, was guilty of a misdemeanor, under the statute making it penal to willfully ride or drive the horse of another without the consent of the owner.

2. There was no substantial error in the charge of the court, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Enoch Duckett was convicted of riding and driving a horse belonging to another, without her consent, and brings error. Affirmed.

Following is the official report:

Howard Tilley and Enoch Duckett were indicted for riding and driving a horse belonging to Mrs. Foster, without her consent, on August 1, 1892, in Whitfield county, Ga. Duckett was found guilty, and his motion for a new trial was overruled. The motion contained the grounds that the verdict was contrary to law and evidence, and to the following in the charge to the jury: "If you believe from the evidence that the defendant contracted with and procured one Howard Tilley to ride or drive the horse of the person mentioned in the bill of indictment, and the said Tilley, in pursuance of the contract, came into this state and county, and rode or drove the horse of the person mentioned in the bill of indictment, without the consent of such owner, the defendant would be guilty, and it would be your duty to convict him." Also, that the following charge was error, for want of evidence on which to base it: "If you believe from the evidence that the de-

fendant procured Tilley to ride the horse described in the bill of indictment, and he, said Tilley, did, in pursuance of a contract or agreement with the defendant, ride or drive the horse in Whitfield county, it would be your duty to find the defendant guilty." The testimony of Mrs. Foster was that she missed her horse on August 31, 1892, and the next day received a letter, addressed to her husband, from defendant Duckett, signing as constable, stating: "I this morning levied an execution on your horse, in favor of a bill of cost obtained against you on February 5th, 1891, before W. L. Atchley, J. P., on a peace warrant. You can get your horse by making good Tennessee delivery bond." This letter was headed, "Cleo, Tennessee, September 1st, 1892." On the receipt thereof, Mrs. Foster went up, filed her papers, and got the horse, which was her property. It was taken without her consent. She and her husband lived together. He sometimes drove this horse, but only when she consented for him to do so. He had no horse, but sometimes used this one. Howard Tilley and one Parker testified that in the latter part of August, 1892, defendant came to Parker's sawmill, in Bradley county, Tenn., where, in a conversation, he stated that he had an execution against old man Foster, and further said, "I would give \$2.50 if I had his horse across the line, so I could levy on it." To this Tilley replied, "I will do it for that," and defendant said, "If you do me any good, you will have to do it by Saturday, as my time is out then." This is all that was said. Tilley further testified that he went in the afternoon, and got the horse from the stable, and carried him into Tennessee, and let him stay until after night, and then afterwards carried him to another point in Tennessee, about a mile from where defendant lived. Defendant never paid him anything for getting the horse, and he never asked him for pay. He notified defendant where the horse was, and supposed he got it. Tilley rode the horse in Georgia about 100 yards. Did not tell defendant's counsel that he did not ride the horse in Georgia, but told him he did not think he rode him. He did not like old man Foster, and got the horse as much to get even with him as to get pay, but expected afterwards to get pay. Defendant did not tell him to get Mrs. Foster's horse. He talked about the old man's horse. Tilley got the horse he told him to get. Did not know it belonged to Mrs. Foster. Parker testified that he was present, and heard Tilley tell defendant's counsel that he did not ride the horse in Georgia.

Maddox & Starr, for plaintiff in error. A. W. Fite, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(98 Ga. 468)

**TRUSTEES ATLANTA UNIVERSITY v.  
CITY OF ATLANTA.**

(Supreme Court of Georgia. Nov. 6, 1893.)

**CONDEMNATION BY CITY — RIGHT TO BRIDGE  
STREET—CONTRACT RIGHTS IN EASEMENT—MAYOR  
AND CITY COUNCIL—CONSTRUCTION OF RESOLU-  
TION.**

1. Under the grant of power in the charter of the city of Atlanta "to open, lay out, widen, straighten or to otherwise change streets, alleys and squares in said city," the corporate authorities may condemn for the public use the whole or any part of the right of a private corporation to maintain one or more bridges across one of the public streets, and, after condemnation and payment of adequate compensation, may remove a bridge already erected, and prevent the erection of any other, at any place to which the right of the private corporation to bridge the street extends or applies. This is true although the easement sought to be appropriated or extinguished in whole or in part be grounded upon a contract heretofore made between the city, as one party, and the private corporation, as the other, in which the city fully recognized the easement, and agreed that it might be perpetual.

2. A resolution of the mayor and general council, which provides for the appointment of assessors to ascertain and fix the damages which will accrue to a private corporation by the appropriation of its property to municipal purposes, is not sufficiently certain and definite as to the interest in the roadway of Hunter street which is to be appropriated, the description being in these terms: "Whatever property rights the Atlanta University has in the roadway of Hunter street and in the privilege heretofore exercised of bridging Hunter street within its grounds." But this description is sufficiently certain and definite as to the privilege already exercised, of bridging the street. Condemnation of this privilege, however, would leave untouched any privilege of bridging the street elsewhere than at the particular location of the existing bridge.

3. In view of the law above announced, and of the limited scope of the resolution of the mayor and council, the judge did not err in denying the injunction prayed for: the resolution being nugatory as to rights in the roadway of the street, silent as to the bridge privilege not as yet acted upon, and lawful as to that privilege so far as exercised heretofore.

(Syllabus by the Court.)

Error from superior court, Fulton county; Marshall J. Clarke, Judge.

Petition by the trustees of Atlanta University for an injunction to restrain condemnation proceedings by the city of Atlanta. Judgment for defendant, and plaintiffs bring error. Affirmed.

John L. Hopkins & Sons, for plaintiffs in error. J. A. Anderson and Fulton Colville, for defendant in error.

**BLECKLEY, C. J.** 1. One of the charter powers given by statute to the city of Atlanta is "to open, lay out, widen, straighten, or to otherwise change streets, alleys and squares in said city." Acts 1874, p. 131; City Charter, § 60. This grant is comprehensive enough to embrace the alteration of a street in any respect, whether on, below, or above the surface of the earth. And the power to open streets embraces the power to keep them open, not only at the

surface, but over and above the same, indefinitely, or, at all events, to such height as may be either necessary or reasonably desirable for all the purposes of a street, both with reference to its use by the general public, and to its use locally by those residing or having property adjacent thereto. A street is not like a tunnel in the air, having its base on or in the ground, and mounting upward to a definite height, but is more like an open cut through the air, from the ground up to the sky, or to an indefinite elevation. Under the grant of power above recited, the city authorities may remove a bridge spanning the street, and prevent the erection of any other at the same place or elsewhere, thus opening and keeping open the aerial space, which is no less a part of the street than is the space occupied by it on or in the ground. To do all this, however, as against any vested right which the Atlanta University may have to maintain one or more bridges across the street in question to facilitate passage from its property abutting upon one side of the street to its property abutting upon the other side, would involve the condemnation of such right, and the payment of adequate compensation for this appropriation of private property. Of course, the compensation would not be adequate unless it comprehended, not only the value of the right, but also the value of the structure removed. The condemnation and compensation would have to embrace everything taken, though the city would not be obliged to take the whole right, but might take the present bridge alone, together with the right of maintaining it, leaving the right of the university to erect and maintain bridges elsewhere over the street unaffected. It is contended that because the right of the university to have and maintain the existing bridge and to erect others is grounded upon a contract heretofore made by the university with the city, in which the latter fully recognized the right, and agreed that it might be perpetual, this contract is sacred, and its obligation would be impaired by the appropriation now contemplated. We think this contention is unsound. There is no inconsistency between a grant in its terms perpetual, and a subsequent resumption of the property granted; this resumption being made for public use, and in the exercise of the right of eminent domain. The state itself could not grant an easement which would not be subject to resumption in the exercise of this right, and certainly the city could not. It is no revocation or violation of the grant under which private property is held, to take it for public use, on making adequate compensation to the owner. On the contrary, the proceeding to condemn and take, if it has self-consistency, concedes the sacredness of the grant, and the creation thereby of all the attributes of ownership which can arise by inviolable contract. Reduced to its essence,

a constitutional exercise of the right of eminent domain is not deprivation of property, but a compulsory exchange of one kind of property for another, or rather a compulsory sale of property for money,—an exchange of equivalent values. The right of the university, granting it to exist as claimed, is an easement,—a servitude to which the street is subject,—and is realty, as distinguishable from personal property. This easement, in whole or in part, is subject to be taken for the public use at the will of the state. The state, by its legislature, has conferred upon the city of Atlanta the power to condemn and make compensation for private property for municipal purposes, and, as above shown, has granted power to open, lay out, widen, straighten, or to otherwise change streets. We think the power of condemnation is comprehensive enough to embrace any realty which may be needful for appropriation by the city in opening, laying out, widening, straightening, or otherwise changing any streets within the city; the language of the charter of 1874, § 60, being as follows: "The said mayor and general council shall have full power and authority to open, lay out, to widen, straighten or otherwise change streets, alleys and squares in the said city of Atlanta. Wherever the said mayor and general council shall exercise the power above delegated, they shall appoint two freeholders, and the owners of said lots fronting on said streets or alleys, shall, on five days' notice, appoint two freeholders, who shall proceed to assess the damages sustained or the advantages derived by the owner or owners of said lots in consequence of the opening, widening, straightening or otherwise changing said streets or alleys, and in case said assessors cannot agree, they shall select a fifth freeholder; the said assessors to take an oath that they will faithfully discharge their duties, and either party to have the right to enter an appeal to the superior court of Fulton county within ten days from the rendition of said award." Subsequent amendments of the charter, while they vary somewhat the details of the procedure, do not restrict the power of condemnation itself. On the contrary, the act of August 21, 1891 (2 Acts 1890-91, p. 449), extends the power so as to embrace "lands for sites for the erection of public buildings \* \* \* for parks and for other purposes." The contention of the city in its answer, and in the argument made here by its counsel, to the effect that the university had a mere license, but no right, to bridge the street, is inconsistent with the condemnation proceedings which the city itself inaugurated, and is therefore entitled to no consideration in the present case, whatever would be its force under other circumstances. If the city intended to treat its contract of 1872 with the university as having the force only of a mere license, subject to revocation, it should

not have appointed assessors to act in the condemnation of the property rights of the university in the privilege heretofore exercised by the university in bridging the street, and invited the university to unite with itself in conducting the condemnation proceedings. By its own conduct the city has estopped itself, so far as this case is concerned, from denying the existence of the right which it sought to have appraised and condemned.

2. One ground upon which an injunction is sought by the university against the condemnation proceedings is the want of sufficient certainty in the latter. This question is to be tested by the resolution of the mayor and general council, adopted March 7, 1892. That resolution is in these terms: "Whereas the mayor and general council, by action adopted December 24th, 1891, adopted a report of the joint committee on streets and bridges, recommending that the Atlanta University be not allowed to erect a bridge over Hunter street, and that condemnation proceedings be had to exhaust whatever property rights the Atlanta University has in the roadway of Hunter street or in the privilege heretofore exercised of bridging Hunter street within its grounds; therefore, resolved, that George W. Parrott and Andrew J. West are hereby appointed assessors on the part of the city of Atlanta to act in the condemnation of the property rights of the Atlanta University in the roadway of Hunter street and in the privilege heretofore exercised in bridging said street. Resolved, further, that the city clerk give the notice usual in such cases to the authorities of the Atlanta University and that further proceedings be had in conformity to law." As to the roadway of Hunter street, this resolution is too indefinite and uncertain. There is nothing to indicate the nature, extent, or exercise of any right of the university in the roadway of the street. The thing to be assessed is therefore not pointed out, and no fact or circumstance is referred to, to identify or define it. The assessors could not appraise it without first ascertaining what it was, and they are furnished with no mark or attribute, by the aid of which to ascertain its nature or extent. In order to condemn to public use such an anomaly as the right of a private corporation in the roadway of a public street, there ought to be some description which would be available for identification. Condemnation proceedings are, in their nature, proceedings to seize and take. They may be analogized to a warrant to capture something, and surely a warrant to seize whatever property rights the Atlanta University has in the roadway of Hunter street would be too vague to enable an officer to execute it. As to the privilege heretofore exercised by bridging Hunter street within the grounds of the university, we think the resolution is sufficiently certain and definite. We understand from the record that the bridge erect-

ed by the university is there upon the ground, to show for itself. There was something by which to measure the property right exercised by the university in having and maintaining this bridge. Nothing is left uncertain, except the duration of the right in point of time, and, as no limit in that respect is indicated or suggested, the fair presumption would be that the right was one to be enjoyed in perpetuity. No less estate in the easement being expressed, an estate in fee therein should be understood, in harmony with the principle of conveyancing established by statute in Georgia, and expressed in section 2248 of the Code. The resolution, it will be observed, makes no reference to the right of bridging the street elsewhere than at the particular location of the existing bridge. Condemnation of the privilege, as heretofore exercised, would leave untouched any privilege which the university might have to place and maintain other bridges at other sites. Our conclusion is that the condemnation proceedings were legal and sufficient relatively to the one object of condemning the property rights of the university in the privilege heretofore exercised by it in bridging the street; and, inasmuch as the appropriation of these rights would involve the destruction and discontinuance of the bridge itself, the value of the bridge would have to be included, in making compensation for the property rights condemned.

3. All that remains is to determine whether the injunction prayed for should or should not have been granted. If what we have held above is correct, there is no doubt that an injunction was properly denied as to the bridge privilege; for it was not needed, as to that part of the privilege not embraced in the resolution, and the petitioners had no right to it, as to the part which was so embraced. It would not have been error, perhaps, to grant an injunction as to the property rights of the university in the roadway of Hunter street; but, as the resolution of the mayor and general council was simply nugatory in respect to these rights, no injunction, as to them, was necessary. We thus see our way to an affirmance of the judgment as a whole. Judgment affirmed.

(93 Ga. 491)

GIANNONE v. FLEETWOOD et al.

(Supreme Court of Georgia. Jan. 8, 1894.)

BILL OF SALE—PROOF BY SUBSCRIBING WITNESS—LEAVING GOODS WITH DEBTOR—ESTOPPEL TO CLAIM—FRAUD—FATHER AND SON—PRESUMPTION.

1. The owner of the furniture in a barber shop does not, by merely allowing the same to stay there for use and be used, hold it out as a basis for giving credit to the occupants of the shop, whether they be conducting business on their own account, or for him, and as his servants or employees. Where they have made debts in their own transactions, for which he is not liable, and have given their promissory notes therefor, a person purchasing these notes, or taking them as collateral security, and af-

terwards obtaining judgment upon them, has no right to collect the judgment out of the furniture because he saw the furniture in the shop, and their sign over the door, before he purchased the notes, or took them as collateral security; the inference in his own mind being that the furniture belonged to them, but no representation to that effect having been made to him.

2. Where the sons of the claimant carried on business in a barber shop, with a sign over the door bearing their name, in a controversy between the claimant and their creditor, involving title to the furniture in the shop,—the claimant contending that the furniture was his, and that his sons were using it in his business, and not their own,—a charge of the court instructing the jury that transactions between father and son are to be closely scrutinized was pertinent and correct.

3. Though a bill of sale to personalty is good without an attesting witness, yet, where it has such witness, it is not admissible in evidence as a muniment of title, without proof by that witness of its execution, unless his non-production is accounted for.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Writ of error by J. Giannone from a judgment in favor of Fleetwood & Co. Reversed.

L. D. Moore, for plaintiff in error. Blount & Grace, for defendants in error.

BLECKLEY, C. J. Under the evidence, it was error to charge the jury that "If the claimant permitted the defendants to use the property as their own, hold themselves out as the owners of the same, and they obtained credit upon the faith of it, then you could use that testimony to determine whether or not it was the property of the claimant or the property of the defendants, and to determine whether or not the claim is one of good faith, or one of bad faith." The claimant allowed the furniture to stay in the shop to be used, but, if it belonged to him, this was not holding it out as the property of the occupants, or as a basis for giving them credit, nor was it granting to them any permission, express or implied, so to hold it out. Moreover, there was no evidence that credit was extended to the occupants on the faith of this furniture. The occupants gave their notes to Johns & Co. for rent. The credit was therefore extended by Johns & Co., and the evidence is wholly silent as to what they, relied upon as the basis of it. Fleetwood & Co. extended credit to Johns & Co., taking these notes as collateral. Fleetwood & Co. believed the makers of the notes owned the furniture, but, so far as appears, they believed it only because a member of the firm saw the sign of the occupants over the door of the barber shop, and saw chairs and furniture in the shop, and the occupants running it. He made the inference that the furniture belonged to them, but no representation to that effect from them, or any one else, appears to have been made. The court erred in instructing the jury as above recited, and in not granting a new trial because of that misdirection. Judgment reversed.



(93 Ga. 443)

**LOUDERMILK et al. v. LOUDERMILK.**

(Supreme Court of Georgia. Jan. 27, 1894.)

**ASSIGNMENT OF NONNEGOTIABLE NOTE—EFFECT—ACTION ON NOTE—DEFENSES—PAROL EVIDENCE—LIABILITY OF INDORSEER—CONSIDERATION FOR INDORSEMENT.**

1. Where the payee of a nonnegotiable promissory note indorses the same to a third person by name, without any words of limitation or exception, this is a written assignment of the note to the indorsee, and under Code, § 2244, he can maintain an action upon it in his own name against the maker, and the latter cannot set up as a defense a parol agreement between the assignor and the assignee to the effect that only a definite sum should be collected by the latter on the note. The effect of this agreement would be to vary the terms of the written assignment, and qualify their legal effect.

2. The donor of a promissory note, when sued by the donee upon his indorsement to the latter, may defend by setting up the gift, and alleging a state of facts which shows that the indorsement was based on love and affection only, and was without any valuable consideration.

3. There was no error in striking the special plea of the maker of the note, but it was error to strike the special plea of the indorser. (Syllabus by the Court.)

Error from superior court, Habersham county; C. J. Wellborn, Judge.

Action by J. M. Loudermilk against T. A. Loudermilk and another. Judgment for plaintiff, and defendants bring error. Reversed.

The following is the official report:

J. M. Loudermilk sued T. A. Loudermilk as principal and Jacob Loudermilk as indorser on a promissory note made by T. A. Loudermilk, dated January 16, 1883, due January 1, 1889, payable to Jacob Loudermilk, for \$350. The note bore a credit for \$150, dated June 11, 1891, and was indorsed thus: "I hereby indorse the within note to J. M. Loudermilk," which indorsement was signed by Jacob Loudermilk. The court, on motion, struck the pleas other than that of general issue filed by defendants, and entered up judgment for the plaintiff against defendants for \$259.83 principal, \$31.78 interest, and further interest at 7 per cent. To both rulings the defendants excepted. The special pleas are as follows: T. A. Loudermilk says that the note is nonnegotiable, and was a gift from his father, Jacob Loudermilk, for the sum of \$200, which gift was made February 22, 1892; and it was expressly stated by both defendant and Jacob, before the gift was made, that the note was to draw no back interest, and that at said time only \$200 was due thereon, and the gift was received by plaintiff with the conditions aforesaid. Further, on August 9, 1892, this defendant tendered to plaintiff \$206.60 as the full amount of the principal and interest due on the note, which tender was bona fide, and was and is continuous. At the time of said gift, and before the note was received by plaintiff, defendant stated to him that there was only \$200 due on it;

that the interest at that time had been given him by his father by his stating to him that it should draw no interest; and that plaintiff received the note after that from his father, with the same statement from him. Jacob Loudermilk says that he held the note against his son T. A. Loudermilk, on which was due \$200; that, in accordance with a scheme of his in making gifts to his children, he made a gift, February 22, 1892, of the note to his son, plaintiff, which gift was made and received with the express understanding that no interest was due on it, and that it only represented an indebtedness of \$200, and the note was only indorsed by defendant for that amount.

J. J. Bowden and J. B. Jones, for plaintiffs in error. J. C. Edwards and A. G. McCurry, for defendant in error.

**PER CURIAM.** Judgment reversed.

(93 Ga. 446)

**HEATH v. STATE.**

(Supreme Court of Georgia. Feb. 26, 1894.)

**WITNESS—POWER OF VISION—TEST DURING TRIAL—VOLUNTARY MANSLAUGHTER—PROPERTY OF CHARGE.**

1. The presiding judge was not obliged to allow the power of vision of a witness under cross-examination to be tested by requiring the witness to go to the window, and look at an object on the street, which object was not visible to the judge and jury from their positions in the court room.

2. The charge of the court to the jury being full as relates to murder, involuntary manslaughter, and justifiable homicide, it was not error to charge on the subject of voluntary manslaughter substantially as laid down in the Code in the definition of that offense, the instrument of the homicide being a long-handled shovel, and the mortal blow having been struck therewith under circumstances which left the proper grading of the homicide open to some question.

3. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Schley county; W. H. Fish, Judge.

Robert Heath was convicted of homicide, and brings error. Affirmed.

E. F. Hinton and J. R. Williams, for plaintiff in error. C. B. Hudson, Sol. Gen., and J. B. Hudson, for the State.

**PER CURIAM.** Judgment affirmed.

(93 Ga. 768)

**BAILEY v. BAILEY.****HEARD v. HUBBARD.**

(Supreme Court of Georgia. June 25, 1894.)

**JUDGMENT LIEN—EFFECT AS AGAINST PURCHASERS—DELAY IN ENTERING JUDGMENT—RECORD OF DEED.**

Making every concession as to the fullest possible scope of the first section of the act of 1889, providing when transfers and liens shall take effect as against third persons, it is certain that the lien of judgments, to which

the second section of the act applies, dates, as to bona fide conveyances by the debtor to third persons, only from the time the executions issuing thereon shall be entered upon the general execution docket, unless such entry be made within 10 days after the judgments were rendered. Hence, such conveyances made by absolute deed, whether intended to secure a debt or for full ownership, and whether made before or after the judgment in question was rendered, are not affected by the judgment if the deed was actually recorded before the execution based on the judgment was entered on the general execution docket, such entry having been delayed until after the 10-days limit had expired. A deed for value, made and taken bona fide before a judgment against the maker was rendered, may be filed for record and recorded after rendition of the judgment, and with notice of the same, without subjecting the property conveyed to a lien of the judgment, where that lien dates only from a subsequent entry of the execution on the proper docket.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Error from superior court, Dawson county; G. F. Gober, Judge.

Proceedings in execution by Alice Bailey and Boise Bailey, in which land levied on was claimed by Cynthia Bailey, and like proceedings by J. A. Heard against Boise Bailey, in which land levied on was claimed by W. W. Hubbard. From judgments for claimants in both cases, the execution plaintiffs bring error. Affirmed.

D. H. Pope, for plaintiff in error. Alice Bailey, H. Morgan, and Wooten & Wooten, for defendant in error Cynthia Bailey.

Geo. K. Looper and R. P. Lattner, for plaintiff in error J. A. Heard. Jas. M. Bishop, for defendant in error W. W. Hubbard.

LUMPKIN, J. These two cases were considered and decided together. In the first, it appears that an execution in favor of Alice Bailey against Boise Bailey was levied upon land which was claimed by Cynthia Bailey. The title to the land in question was in the defendant in execution on the 3d day of September, 1891, on which day he, in consideration of \$800, and "natural love and affection," conveyed it absolutely to the claimant. The judgment upon which the plaintiff's execution issued was rendered October 7, 1891, and the fact of its rendition was known to the claimant on the day the judgment was rendered. The deed from the defendant in execution to the claimant was recorded October 10, 1891. The plaintiff's execution was not entered on the general execution docket until December 12, 1891. There was a verdict for the claimant, and, the plaintiff's motion for a new trial having been overruled, she excepted. The other case was, by consent, submitted to the presiding judge for trial without a jury upon an agreed statement of facts, from which it appeared that on December 9, 1890, the defendant in execution conveyed the land in dispute to

the claimant as security for a debt, taking a bond for a reconveyance of the land upon the payment of the debt. The judgment to which the plaintiff sought to subject the land was dated December 20, 1890. The deed above mentioned was filed for record February 2, 1892, and recorded the next day. The plaintiff's execution was issued April 15, 1893, and entered upon the general execution docket April 17, 1893. The court adjudged that the land was not subject to the execution, and the plaintiff excepted.

An examination of the above-recited facts will show that the two cases are somewhat similar. They differ in the following respects: In the first, the deed relied upon by the claimant was a deed for full ownership. In the second, the deed under which the claimant held was given to secure a debt. But, as the latter deed passed title as well as the former, we do not think this difference in the facts is material. Again, in the first case, the plaintiff's judgment was rendered more than 30 days after the date of the deed to the claimant. In the second case, the plaintiff obtained judgment within less than 30 days after the defendant in execution had conveyed to the claimant. This difference in the facts of the two cases is also immaterial. If the latter case was controlled absolutely by the act of September 30, 1885, "To regulate the registration of deeds and bills of sale which are given as security for debt, and to prescribe the consequences of a failure to duly record the same" (Acts 1884-85, p. 124), the difference in the two cases just indicated might have been of some consequence. But as due effect must be given to the act of October 1, 1889, "To provide when transfers and liens shall take effect as against third persons" (Acts 1889, p. 106), this difference becomes unimportant.

In the following respects, the two cases are precisely alike: In each of them, the deed to the claimant, though not recorded until more than 30 days after its date, was in fact recorded before the plaintiff's execution was entered upon the general execution docket; and in each case, the entry of the execution upon such docket was not made until more than 10 days after the rendition of the judgment. We therefore think the determination of the two cases depends upon the effect and meaning of the language used in the second section of the act last cited. That act became of force on the 1st day of January, 1890. We do not think the first section of that act is applicable to the two cases now under consideration, and therefore do not now pass upon the question as to whether or not the word "lien," where used in the phrase, "transfer or lien binding the same property," occurring in that section, is to be understood as applying only to liens acquired by contract, or as including also liens by judg-

ment. Whatever may be the scope of the first section of that act with reference to the question just mentioned, or to any other, it is quite certain that under the second section of that act the lien of a judgment dates, as *bona fide* conveyances by the debtor to third persons, only from the time the execution issuing thereon shall be entered upon the general execution docket, unless such entry is made within 10 days from the date of the rendition of the judgment. In other words, no matter when a judgment is rendered, unless within 10 days from its date the execution issued thereon is entered upon that docket, that judgment has no lien upon the property of the defendant, dating from its rendition, as against the rights or interests of a third party, acting in good faith, and without notice, who has acquired a transfer of the defendant's property. Under the provisions of this section, it would be immaterial whether the conveyance to such third party, if an absolute deed, was made to secure a debt, or for full ownership, nor whether it was made before or after the judgment was rendered, provided the deed was actually recorded before the execution based on the judgment was entered upon the general execution docket, and provided, of course, the making of that entry had been delayed until after the 10-days limit had expired, because the section expressly provides that when such delay has occurred the lien of the judgment shall date only from its entry on the docket. Nor is there anything in that section from which it can even be inferred that where one has, in good faith, taken a conveyance from a debtor, mere knowledge on the part of the former of the subsequent rendition of a judgment against the debtor will relieve the judgment creditor from entering his execution on the general docket. Such knowledge is of no consequence, and in no sense deprives the grantee in the conveyance of his position as a *bona fide* purchaser, if in fact he was so when he took the conveyance. When such purchaser has, *bona fide* and for value, obtained a deed before a judgment against the maker of it is rendered, and has had this deed duly filed and recorded, even after the rendition of the judgment, and with notice of the same, his title to the property is complete and valid, and not subject to the lien of the judgment, where that lien dates only from a subsequent entry of the execution on the proper docket. Under these circumstances, it seems plain that the title of the debtor has passed to the purchaser, and the record of the transfer has become complete, at a time when the lien of the judgment creditor could not attach to the property at all. A case which, in principle, is somewhat in point, is that of *Cottrell v. Bank*, 89 Ga. 508, 15 S. E. 944, in which it was held that the retention of title by the vendor in a written contract

of conditional sale of personalty would prevail over the lien of a subsequent mortgage on the same property, made by the conditional vendee to one who gave credit and took the mortgage without notice of the vendor's title, the mortgage also not being recorded in time. Judgments in both cases affirmed.

(93 Ga. 520)

### TOMPKINS v. COMPTON.

(Supreme Court of Georgia. Oct. 24, 1893.)

#### CONSOLIDATION OF CORPORATIONS—ILLEGAL SALE OF STOCK—PURCHASE-MONEY NOTE—RIGHTS OF HOLDER.

1. Under the laws of Alabama, in the absence of express statutory authority, there can be no consolidation of the stock of one corporation with that of another, so as to create a consolidated company composed of the stockholders of both corporations; and to attempt such a scheme, over the objection or anticipated objection of a minority of the stockholders in either corporation, is illegal, and contrary to public policy.

2. Where, in contemplation of such an illegal scheme, and for the purpose of carrying it into effect, some of the stockholders in one corporation sell their stock to some of those in the other, and are to be paid therefor in part by a transfer of stock of the consolidated company when such company shall be formed, the sale is tainted with the element of illegality on the part of the sellers as well as the buyers; and if the consolidated company is not formed, and never issues any stock, and, because the buyers are thereby unable to deliver the stock, they execute to the sellers their notes or bonds promising to pay a sum of money in lieu of making a delivery of the stock, these notes are tainted with the illegality which attached to the contract of sale, and for that reason are not collectible. The legal principle applicable to the case is that where both parties to an illegal contract are to share in the fruits thereof, and the contract fails to bear some of the anticipated fruits, an undertaking, by way of compromise, of one of the parties to compensate the other for his disappointment, is illegal, and therefore void.

3. One who purchases promissory notes or bonds founded upon a consideration illegal and contrary to public policy, with full knowledge of the facts, takes them subject to all the defenses which might be urged against the original payee.

4. The court erred in striking the defendant's special pleas in so far as they rested on the element of illegality.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by J. Compton against Henry B. Tompkins. Judgment for plaintiff, and defendant brings error. Reversed.

Alex. C. King and Wm. B. Farley, for plaintiff in error. Goodwin & Westmoreland, for defendant in error.

SIMMONS, J. Tompkins was sued by Compton upon two promissory notes, executed by Tompkins and Woodson, at Sheffield, Ala., May 28, 1888, one payable to Compton or order, the other payable to Graves or order, and indorsed by Graves to Compton. The defendant filed special pleas, setting up, among other grounds of defense, that the con-

sideration of the notes sued on was illegal. A general demurrer to these pleas was sustained, and the defendant excepted. We think the pleas contain a good defense in so far as they rest upon the element of illegality. It appears from the allegations therein that the defendant was president of the Sheffield Street-Railway Company, a corporation in Alabama, and that the plaintiff and Graves were stockholders of the Sheffield & Tuscumbia Street-Railway Company, a competing corporation of the same state. The defendant and other stockholders of the first-named company, among whom was Woodson, in order to bring about a consolidation of the two companies, negotiated with McMillan, the president of the other company, and his associates, among whom were the plaintiff and Graves, for the purchase of their stock in that company, so that the defendant and his associates might own and control a majority of the stock in both companies, supposing that thereby they would be enabled to consolidate the two railway lines, over the objection of the minority stockholders, who were known to be opposed to the scheme. The plaintiff and Graves, as well as McMillan, knew of and sympathized with the scheme for consolidation and the manner in which it was proposed to carry it out, which was by voting the consolidation, and then electing officers who were favorable to the interests of the Sheffield Street Railway and the East Sheffield Land Company, as against the interests of the minority stockholders of the Sheffield & Tuscumbia Street-Railway Company. In furtherance of this undertaking, McMillan and his associates, including the plaintiff and Graves, sold their stock in the last-named company to the defendant and his associates for a certain amount in cash and 100 shares of stock "in the consolidated street-railway company, to be furnished by the consolidation" of these railway companies; the terms of the sale being embodied in a written contract, a copy of which was annexed to the pleadings. The main design and purpose of the consolidation, it is alleged, was to benefit the property of the East Sheffield Land Company, and get rid of a rival street-railway line. But, though all the parties mentioned endeavored to bring it about, the consolidation fell through, because of the want of power, under the laws of Alabama, for a majority of shareholders to effect the same over the active objection of the minority stockholders in the Sheffield & Tuscumbia Street-Railway Company, who carried the matter into the courts, and obtained a decision of the supreme court of Alabama annulling and setting aside the consolidation (Nathan v. Tompkins, 82 Ala. 437, 2 South. 747); and so no stock was ever issued by the contemplated consolidated company. The notes sued on, it is alleged, "were given in adjustment of an illegal demand for the one hundred shares of contemplated consolidated stock, or its estimated value, which stock never existed, because the street rail-

ways were never and could not be legally consolidated. \* \* \* said companies having no power so to act, under the law under which the same were incorporated" (Code Ala. 1876, § 2021). It is further alleged that the note to Graves, upon which the plaintiff sues in this action, was indorsed by Graves to the plaintiff after it had become due, and was taken by the plaintiff with full knowledge of the facts and circumstances under which it was given by the defendant.

Under the laws of Alabama, in the absence of express statutory authority, there can be no consolidation of the stock of one corporation with that of another, so as to create a consolidated company composed of the stockholders of both corporations; and to attempt such a scheme, over the objection or anticipated objection of a minority of the stockholders in either corporation, is illegal, and contrary to public policy. See Nathan v. Tompkins, supra; Railroad Co. v. Wood (Ala.) 7 South. 108. On this point there was no contest in the argument before us; but it was contended that the illegality of the attempted consolidation did not affect the consideration of the notes (1) because the parties to whom the notes were given had a right to sell their stock, and to be paid for it, no matter what use the purchasers may have intended to make of it; and (2) because the intended consolidation had been abandoned before the notes were made, and they were given under a new contract, distinct from the original contract of sale. In the state in which this contract was made, it has been held that a sale is rendered illegal on the part of the seller, as well as on the part of the buyer, if the seller knows that the buyer's purpose is to apply the subject of the sale to an unlawful use. Milner v. Patton, 49 Ala. 423, overruling Thedford v. McClintock, 47 Ala. 647; Iron Co. v. Spradley, 51 Ala. 175; Ware v. Jones, 61 Ala. 293. "Mere knowledge of the illegal purpose," says Brickell, C. J., in the case first cited, "is all the law requires to pronounce judgment against the contract. This is the rigid rule of the common law, from which there should be no departure." And so Mr. Benjamin states the law to be, in his work on Sales, where it is said: "The sale of a thing in itself an innocent and proper article of commerce is void when the seller sells it knowing that it is intended to be used for an immoral or illegal purpose. In several of the earlier cases something more than this mere knowledge was held necessary, and evidence was required of an intention on the vendor's part to aid in the illegal purpose, or profit by the immoral act. The later decisions overrule this doctrine." See Benn. Ed. 1892, § 892 et seq. In the notes to that work, however, in the edition referred to, it is said (page 504) that "generally the vendor of an article which may be lawfully sold or used for some purpose can recover the price, although it be bought to

use for some unlawful purpose, unless the vendor participated in and intended to aid in carrying out that unlawful use. Mere knowledge on his part that the vendee intended and expected to use it for an unlawful purpose (if the two elements can be distinguished from each other) will not avoid the sale." See cases cited; also, *Tied. Sales*, p. 476, § 294, and citations. In either view of the law, it is clear that the sale now under consideration was illegal as to all parties to the contract. According to the pleas, the parties who sold the stock not only knew of the intended consolidation, but, by the terms of the contract, were to share in the fruits of it. It is equally clear, if the notes were given, as the pleas allege, in adjustment of a demand for the 100 shares of "contemplated consolidated stock," or its estimated value, that the notes are tainted with the illegality which attached to the original contract. "A contract executed in consideration of a previous illegal one, or in compromise of differences growing out of it, is like that whereon it rests,—illegal, and incapable of being enforced." *Bish. Cont.* 488; *Greenh. Pub. Policy*, p. 8, rule 10; *Wilson v. Bozeman*, 48 Ala. 71. If the allegation referred to is true, the giving of the notes amounted simply to an undertaking by one of the parties to an illegal contract, in the fruits of which both parties were to share, and which had failed to bear some of the anticipated fruits, to compensate the other party for his disappointment.

There is no merit in the contention that the defendant cannot defend by setting up his own unlawful conduct. See *Howell v. Fountain*, 3 Ga. 182; *Carey v. Smith*, 11 Ga. 547; *Bugg v. Towner*, 41 Ga. 318; *Harrison v. Hatcher*, 44 Ga. 642; *Heinman v. Newman*, 55 Ga. 262. In the case of *Bugg v. Towner*, *supra*, it is said: "It is objected that the defendant should not be heard to set up the illegality of the transaction for his own benefit. The reply is that courts sustain such a defense, not for the sake of the defendant, but upon general principles of public policy. In *Holman v. Johnson*, Cowp. 343, Lord Mansfield uses the following language, which has heretofore been approved and adopted by this court as a correct statement of the rule on this subject: 'The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to real justice as between him and the plaintiff; by accident, if I may say so. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man upon an illegal or an immoral act. If from the plaintiff's own statement, or otherwise, the cause of action appears to arise *ex turpi causa*, or the trans-

gression of a positive law of this country, then the courts say he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because it will not lend its aid to such a plaintiff. So, if the plaintiff and defendant should change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally at fault. *Potior est conditio defendentis*.'" The note to *Graves* having been taken by the plaintiff with full knowledge of the facts, it was taken subject to all the defenses which might be urged against the original payee. Judgment reversed.

(43 S. C. 304)

## RAMSEUR v. MOORE et al.

(Supreme Court of South Carolina. March 7, 1895.)

## DISMISSAL OF APPEAL—COSTS—WAIVER.

When, on appeal from a justice's court, the parties consent in writing to a dismissal, with costs, appellant is estopped to claim that costs were erroneously allowed.

Appeal from common pleas circuit court of York county; R. C. Watts, Judge.

Action in a justice's court by D. S. Ramseur against Moore, Bruce & Co. From an order of the circuit court dismissing an appeal by defendants from the taxation of costs by the clerk, they appeal. Affirmed.

N. W. Hardin, for appellants. W. B. De Loach, for respondent.

McIVER, C. J. The plaintiff having recovered judgment, before a trial justice, against the defendants (for what amount is not stated in the case), the defendants appealed to the circuit court, but upon what grounds does not appear. The case seems to have been docketed upon the proper calendar of the circuit court at fall term, 1893, and was continued at that term, because, as it is alleged, the record could not be found. At the term (spring term, 1894), the record still being missing, his honor, Judge Watts, granted the following order: "Upon hearing the appeal, in the above-entitled case, and it appearing that the papers in said case being lost, appellants' attorney consenting, on motion of W. B. De Loach, respondent's attorney, it is ordered that the said appeal be dismissed, and with costs." This order was neither excepted to nor appealed from, and, on the contrary, was formally consented to, in writing, by the attorney for the appellants. Soon thereafter, the clerk, upon due notice, taxed the costs of respondent, as set forth in the case; but, as there was no exception to any particular item of costs allowed by such taxation, the items need not be set forth here. At the reference before the clerk for the taxation of costs, appellants' attorney presented two

affidavits, set forth in the case,—one made by the trial justice, and the other by himself; the former stating that "all the records" in the case had been sent by him to the clerk of the court, and the latter stating that he was informed by the clerk that he could not find said records, for which reason only he consented to the order dismissing the appeal, hereinabove set out. From the taxation of costs made by the clerk, the defendants appealed to the circuit court, and the same was heard by his honor, Judge Fraser, who dismissed the appeal, and affirmed the taxation of costs made by the clerk. The only exception taken to this taxation before Judge Fraser is set forth in the case, as follows: "Because the said clerk erred in taxing costs against the appellants; because the order dismissing the appeal and the facts show that the said appeal was dismissed for want of prosecution; and because the return of the trial justice had been lost." From the order of Judge Fraser dismissing the appeal, the defendants have appealed to this court, upon the following exceptions: "(1) It is respectfully submitted that his honor, Judge Fraser, erred in affirming the judgment of the clerk, because the order of Judge Watts shows that the said appeal from the trial justice was dismissed, and dismissed because the records were lost; that the said cause was dismissed for want of prosecution, as the appellants and Judge Watts had no record upon which said cause could be heard upon its merits; and that the cause was not heard upon its merits. (2) Because the evidence did not show that the amount involved in the action exceeded the sum of \$20, but the evidence before the clerk and judge did show that the cause was dismissed because the records were lost, and for no other reason. (3) Because the judge should have decided that the action was dismissed for the want of prosecution on the part of the appellants, or because they could not prosecute the cause further, because the records were lost; and it was error to affirm the clerk's judgment that required appellants to pay costs."

The first and third exceptions, relating, as they do, to the same matter, and practically presenting the same questions,—to wit, whether the dismissal of the appeal from the judgment of the trial justice because of the loss of the records can be regarded as a dismissal for want of prosecution, such as would deprive the parties of the right to costs, under sections 373 and 368 of the Code,—may be considered together. It seems to us that the appellants are effectually estopped from raising any such question by their formal consent, in writing, to the order of Judge Watts. That order, unappealed from, whether right or wrong, must be regarded as the law of this case. By that order it was explicitly adjudged that the appeal be dismissed, "with costs"; and hence the appellants are precluded now from raising any question as to

their liability for costs. It is unnecessary, therefore, and would perhaps be improper, for us to consider a question which has already been adjudged by competent authority. But we may add that it is by no means free from doubt that an appeal dismissed on motion of the respondent, because the return of the trial justice cannot be found, can be regarded as an appeal dismissed for want of prosecution, under the provisions of section 368, which seems to contemplate a case where "neither party brings it to a hearing before the end of the second term," when the appeal is dismissed by the court itself, in which case no costs are allowed, under section 373 of the Code. This question, however, must not be regarded as adjudged, inasmuch as it cannot properly arise in this case.

As to the second exception, it is sufficient to say that no such point was raised in the circuit court, and it cannot therefore be considered.

The judgment of this court is that the judgment of the circuit court be affirmed.

(43 S. C. 290)

WILSON et al. v. TOWNSHIP OF YORK et al. SAME v. TOWNSHIP OF CATAWBA et al. SAME v. TOWNSHIP OF CHEROKEE et al. SAME v. TOWNSHIP OF EBENEZER et al.

(Supreme Court of South Carolina. March 7, 1895.)

RIGHT TO JURY TRIAL—COMPULSORY REFERENCE.

1. The fact that, in an action by an attorney for fees, it is also sought to impose a lien on a certain fund, does not entitle plaintiff to have the question as to the value of the services tried to the court.

2. Where a party is entitled to a jury trial, the court cannot order the testimony to be taken by a referee, on which the case may be afterwards tried by a jury.

3. Where a party is entitled to a jury trial, inconvenience of witnesses, and length of time the case would take, if the testimony were taken before a jury, are not grounds for granting a compulsory reference.

Appeals from common pleas circuit court of York county; R. C. Watts, Judge.

Actions by Wilson, Wilson & McDow, continued in the name of W. B. Wilson, Jr., and another, on the death of plaintiff W. B. Wilson, Sr., against the township of York and others, and against the township of Catawba and others, and against the township of Cherokee and others, and against the township of Ebenezer and others, to recover for services rendered as attorneys. From an order in each case referring the case to a referee to take testimony, defendants appeal. Reversed.

The report of the trial judge, referred to in the opinion, was as follows: "This cause is before me for the purpose of settling 'case' for the purpose of appeal to supreme court. The defendants' attorneys served a 'proposed case,' to which plaintiffs' attorneys served amenements, which were not accepted by

defendants' attorneys, and it is before me for settlement. After I passed order of April 5th, the case was reached on regular call of the docket, the plaintiffs' attorneys having failed to get the consent of the defendants' attorneys and the local bar to consent that a day be fixed for trial. When this case was called, plaintiffs' attorneys offered to take up and try with case the other three cases against the townships of York county, which was not consented to by the defendants' attorneys. Thereupon, a jury was impaneled, and the trial proceeded. A great mass of testimony was adduced, both oral and documentary. A witness was there several days with the records of the United States court. Attorneys, as witnesses from the adjoining counties, were present and examined, and if the testimony was printed it would cover from 125 to 150 pages of printed testimony. After I delivered my charge, the jury retired; but after having failed to agree, after several hours' deliberation, a mistrial was ordered. Counsel for plaintiffs thereupon, in open court, made a motion, orally, to refer the case to a referee to take the testimony, and also made a similar motion in each of the other three cases mentioned in the second exception herein. After argument of counsel, I granted the order of April 16th, stating orally that after hearing the whole case, testimony and all, that it was a case, in my judgment, that should be referred to take testimony. I am still of that opinion, and think that, in the interest of justice, it should be referred for that purpose. The testimony is voluminous. It is necessary for the plaintiffs to have the records of the United States court to prove their case, and witnesses from a distance, and it seemed to me to be fair and just to both sides to refer it as I did. I therefore recalled my order of April 5th, and passed the order appealed from, inasmuch as the jury failed to agree, and no motion for nonsuit made. I do not see what the supreme court would have to do with the testimony adduced at the trial, and I therefore overrule that much of plaintiffs' proposed amendment. The balance I have substantially incorporated in this report. Let the case for the supreme court be the proposed case of defendants' attorneys, and this report. R. C. Watts, Trial Judge. June 4th, 1894. At Chambers, Cash's Depot, S. C."

Finley & Brice and William B. McCaw, for appellants. McDonald, Douglass & Obear and Stanyarne Wilson, for respondents.

McIVER, C. J. The four cases above stated, involving the same questions, were heard and will be considered together. It appears that upon due notice his honor, Judge Ernest Gary, on the 11th of November, 1893, granted an order, from which there was no appeal, in the following terms: "On hearing

read the pleadings in the above-stated causes, and it appearing from the complaints that the causes of action stated are for unliquidated money demands, and on motion of Finley & Brice and W. B. McCaw, attorneys for defendants, it is ordered that each of the above-stated causes be stricken from calendar 2, calendar 1 being the proper calendar for the trial of said causes." At a subsequent term of the court, plaintiffs' attorneys gave notice of a motion to refer said causes to a referee "to take the testimony in said actions, and report the same to said court." This motion was heard by his honor, Judge Watts, and refused, on the 5th of April, 1894, "after hearing read the pleadings in the said case and the order of Judge Gary." One of the cases was then taken up for trial before a jury, who failing to agree upon a verdict, a mistrial was ordered; and on the 16th of April, 1894, Judge Watts granted another order, rescinding his previous order of the 5th of April, and referred it to a referee "to take all the testimony upon the issues raised by the pleadings herein, and that he report the same to this court with all convenient speed." The reasons for this last-mentioned order are given by Judge Watts in his order settling the case, entitled therein "Report of Trial Judge," a copy of which should appear in the report of this case. From this last-mentioned order of the 16th April, 1894, the defendants appeal upon the several grounds set out in the record, which raise but two questions: (1) Did Judge Watts have the power to reconsider and reverse the order of Judge Gary? (2) If he did, was there error in referring the case to a referee to take and report the testimony?

We will consider the second question first. To determine this question, it is necessary to ascertain what was the nature of the case, —was it an action at law, or in equity? We think that Judge Gary was right in holding that it was an action to recover an unliquidated money demand, and, if so, then, clearly, the parties were entitled to a trial by jury, unless that mode of trial had been waived, of which there is no pretense. The real object of the action, unquestionably, was to recover the amount of fees claimed to be due plaintiffs for professional services rendered the several townships sued, in some proceeding in the United States court, for which the defendants distinctly denied their liability. The fact that the plaintiffs, in their complaint, also asked that certain assets that had been placed in the hands of the defendant Spencer should be subjected to the payment of their claims, cannot alter the main feature of the action; for, even if it should be conceded that this imparted an equitable feature to the action, it is very obvious that, before such feature could be considered, it would be necessary for the plaintiffs first to establish their claims, which were nothing more than ordinary legal demands for the payment of money, and

this must be done before the tribunal appointed by law for that purpose.

It is contended, however, that the order appealed from does not deny the defendants' right of trial by jury, but simply provides for the taking of the testimony, upon which the case may afterwards be tried by a jury. It seems to us that a denial of any of the incidents to a trial by jury amounts to a denial of the right to that mode of trial, especially where, as in this case, the parties are denied what has always been regarded as a distinctive and peculiarly valuable feature of that mode of trial, to wit, that the testimony shall be taken in the presence of the jury, so that they may have an opportunity of observing the conduct and demeanor of the witnesses, and thus be better able to determine the weight to be given their testimony. Indeed, the proposition that the testimony in a case properly triable by a jury can be taken elsewhere than in the presence of the jury, except by consent, and except in those cases specially provided for by statute, is so utterly at variance with the long-established practice, and so entirely unsupported by authority, that we would be very slow to adopt such a view. But we need not pursue this discussion, as it has been settled by the decision of this court in the case of *De Walt v. Kinard*, 19 S. C. 286; for in that case, at page 295, the court used this language: "From what we have said, it follows that there was error in referring the whole case to the master to take the testimony, and report the same to the court; for on all the legal issues the defendant has a right to have the witnesses examined before a jury, except such witness as, under statutory provisions, may be examined by commission; for even when testimony is taken by the clerk, under the act of 1872 15 St. at Large, 41), the statute secures to either party the right to require the personal attendance and viva voce examination, at the trial, of the witnesses so examined." It seems to us, therefore, that there was error in referring the case to a referee to take and report the testimony, at least so far as the legal issues were concerned, inasmuch as it does not appear that this case fell within any of the subdivisions of section 293 of the Code, even if those subdivisions can be regarded as applying to a case like this. See *Smith v. Byrce*, 17 S. C. 538.

Under this view, the first question above stated loses its importance, though we may add that we think Judge Gary's order was the law of the case, and could not be properly disregarded by any subsequent circuit judge, unless, perhaps, the subsequent developments made by the trial put upon the case such a different aspect from that presented by the pleadings, which alone were before Judge Gary, as to show that the order of reference was proper. But we do not understand, from the remarks of Judge Watts in his order setting the case, that

such was the fact. He seems to have based his change of opinion upon the ground of the inconvenience of witnesses, and the length of time which would be consumed, if the case were tried before a jury. Such considerations, in our judgment, are not sufficient to warrant a compulsory order of reference to take the testimony, and thus practically deprive the parties of the right of trial by jury. The judgment of this court is that the orders appealed from in the cases stated in the title be reversed, and that the cases be remanded to the circuit court for a trial by jury of all the legal issues involved.

(43 S. C. 275)

TUMBLESTON v. RUMPH. SEIGLER v. SAME. REEVES v. SAME.  
HIOTT et al. v. SAME.

(Supreme Court of South Carolina. March 6, 1895.)

RECOVERY OF LAND—CLAIM FOR IMPROVEMENTS—SUFFICIENCY OF COMPLAINT—AMENDMENT.

1. Defendant having obtained judgment for 36 acres of a 100-acre tract in plaintiff's possession, the latter sued under Rev. St. 1893, § 1952, to recover for improvements made thereon, alleging that, when she "took a title to said 100 acres, she believed that she was receiving a valid and indefeasible title in fee simple," and that, while she "and those under whom she claims" were in possession of the 36 acres above described, "believing themselves to be the owners in fee thereof," they made permanent improvements thereon. *Held*, that this was not an allegation that plaintiffs, or those under whom they claimed, at the time of purchase believed the title to be good in fee as required by said section.

2. Where one against whom a judgment for land has been rendered in suing under Rev. St. 1893, § 1952, to recover for improvements, alleges that she believed that she was owner of the land at the time of making the improvements, instead of alleging that she so believed at the time of her purchase, as required by said section, she should be allowed to amend by inserting such allegation.

McIver, C. J., dissenting.

Appeal from common pleas circuit court of Colleton county; T. B. Fraser, Judge.

Four separate actions by Elizabeth Tumbleston, Edwin Seigler, Sarah Ann Reeves, and Josiah Hiott and others, respectively, against George Rumph, to recover the value of improvements of land. From a judgment for defendant, plaintiffs severally appeal. Reversed.

The order of the lower court, sustaining defendant's demurrers, was as follows: "These cases were heard by me at the term of the court held in February, 1893, on demurrers, in that the complaints did not state facts sufficient to constitute a cause of action. In the first of the above cases there is an additional ground: That there is a misjoinder as to Josiah Hiott, even if there is a good cause of action in favor of the other plaintiffs in that case. In the view I take of these cases, it is not necessary to rule on this question. These actions are claims for betterments, made by the plaintiffs against the same de-



defendant, who had brought several actions, or, perhaps, one action, against these several plaintiffs, resulting in a verdict and judgment in favor of the defendant in these cases, who was in the former action the plaintiff. They were legal actions. In such actions it is provided, in Gen. St. §§ 1835-1837, that within 48 hours, or during the term, the defendant may 'file a complaint' for so much money as the lands are made better by improvements. In these cases the value of the improvements can be recovered in cases where the purchaser who made the improvements supposed, at the time of such purchase, such title to be good in fee. See Gen. St. §§ 1835-1837. These three sections have not been repealed, but by the act of 1885 (see Act 1885, p. 432, §§ 1838, 1839) have been amended. An examination will show that these two sections refer to the mode of procedure in reference to the verdict and judgment for the improvements, and the mode of enforcing the judgment. In these cases the claim for improvements can be made only by compliance with the way provided by the statute. There is, however, another act of 1885 (see Act 1885, p. 343) which gives a remedy for improvements in 'legal and equitable' actions. In these cases, to entitle the defendant to recover, the improvements or betterments must be made by a defendant who 'believed, at the time he makes such improvements or betterments, that his title thereto is good in fee.' The defendant is 'allowed to set up in his answer a claim for so much money as the land has been increased in value in consequence of the improvements.' Then follow in the act special directions as to the verdict, judgment, and execution. After a careful consideration, I am satisfied that this act does not in any way modify the right to claim improvements, or the mode of procedure, as given by sections 1835-1839, as amended at page 432, Act 1885. In the first case the defendant must suppose his title to be good at the date of his purchase, and the remedy is by complaint. In the second case the defendant must believe his title to be good when he makes the improvements, and his remedy is by answer. In all four of the cases above stated the allegation is that the plaintiffs—the defendants in the original case—made the improvements 'believing themselves to be the owners in fee.' There is no allegation that they, or those under whom they claim, believed, at the time of the purchase, that the title was good,—an allegation which seems to have been carefully avoided. These remedies are given by statute, and must be governed by the statute, not only as to the extent of the right, but as to the mode in which the claim is to be set up. In all four of these cases, if the plaintiffs had any valid claim for the value of improvements, that claim should have been set up in their answers to the original complaint, and not by way of complaint af-

ter the rendition of the verdict and judgment thereon. It is therefore ordered and adjudged that the demurrers be sustained in each of the above-stated cases; and as, in my view, there is nothing to amend to, it is ordered and adjudged that the complaints in each of the above cases be dismissed, with costs."

Fishburne & Gruber and C. C. Tracy, for appellants. Howell, Murphy & Farrow, for respondent.

GARY, J. These four cases were called for trial at the February, 1893, term of the court of common pleas for Colleton county, before his honor, T. B. Fraser, presiding judge. On the call of the cases the defendant, through his attorneys, interposed an oral demurrer to each of the complaints, upon the grounds that the complaints did not allege facts sufficient to constitute a cause of action. The presiding judge took the papers away with him, and on the 30th of June, 1893, made an order sustaining the demurrer on this ground in each of the cases, refused leave to amend, and ordered the actions dismissed, with costs; which order will be incorporated in the report of the case.

The allegations in the several complaints as to the belief of ownership of the land are substantially the same. In the case of Elizabeth Tumbleston v. George Rumph it is alleged that, "at the time the plaintiff took a title to said one hundred acres, she believed that she was receiving a valid and indefeasible title in fee simple to the same; that while this plaintiff, and those under whom she claims, were in possession of the thirty-six acres above described, believing themselves to be the owners in fee thereof, they made many and valuable and permanent improvements thereon, whereby said premises were enhanced in value to the extent of five hundred and twenty-five dollars."

Appellants' first exception is as follows: "That the presiding judge erred in holding that there was no allegation in the complaints that the plaintiffs, or those under whom they claim, believed at the time of the purchase that the title was good in fee." An inspection of the complaints will show that there was no allegation that the plaintiffs, or those under whom they claim, believed at the time of the purchase that the title was good in fee, and therefore this exception is overruled.

The appellants' second exception is as follows: "Because the presiding judge erred in holding that it seemed that such allegation had been 'carefully avoided.'" This expression is wholly immaterial, and need not be considered.

The appellants' third exception is as follows: "That the presiding judge erred in deciding that in all four of these cases, if the plaintiffs had any valid claim for the value of improvements, that claim should have been set up in their answers to the original

complaints, and not by way of complaint after the rendition of the verdict and the judgment thereon." Section 1952 of the Revised Statutes of 1893 is as follows: "After final judgment in favor of the plaintiff in an action to recover lands and tenements, if the defendant or those under whom he claimed purchased the lands recovered in such action, or took a lease thereof, supposing at the time of such purchase such title to be good in fee, or such lease to convey and secure the title and interest therein expressed, the defendant shall be entitled to recover of the plaintiff in such action the full value of all improvements made upon such lands by such defendant, or those under whom he claims, in the manner hereinafter provided." Section 1957 of the Revised Statutes is as follows: "In any action hereafter brought, or now pending, and which has not been heard, for the recovery of lands and tenements, whether such action be denominated legal or equitable, the defendant who may have made improvements or betterments on such land, believing at the time he makes such improvements or betterments that his title thereto was good in fee, shall be allowed to set up in his answer a claim against his plaintiff for so much money as the land has been increased in value in consequence of the improvements so made." The statutes in regard to betterments were not intended simply as affirmations of the doctrine prevailing in cases of purchasers for valuable consideration without notice, but for the purpose of softening the asperities of the law, and affording relief where none otherwise existed. The requirements of section 1952, *supra*, are that the defendant, or those under whom he claims, should have been purchasers of the lands and tenements recovered; and that the defendant, or those under whom he claims, should have supposed at the time of such purchase such title to be good in fee. If the defendant, or those under whom he claims, supposed at the time of purchase the title to be good in fee, he shall be allowed compensation for improvements made after notice that the title was in another. *Templeton v. Lowry*, 22 S. C. 392; *McKnight v. Cooper*, 27 S. C. 92, 2 S. E. 842. Where the defendant, or those under whom he claims, really and honestly supposed, at the time of purchase, that the title was good in fee, he will be allowed compensation for improvements made upon the land recovered, even though he, or those under whom he claims, may have had knowledge of such facts as were sufficient to put him upon inquiry, which, if it had been properly pursued, would have led to knowledge of the fact that the title was in another. *Templeton v. Lowry*, *supra*. Section 1957 was intended to afford relief in such cases as were not covered by section 1952, by providing that the defendant who may have made improvements or betterments on the lands sought to be recovered from him, believing, at the time he made

such improvements or betterments, that his title thereto was good in fee, should be allowed to set up in his answer a claim against the plaintiff for so much money as the land was increased in value, in consequence of the improvements so made, even where neither the defendant, nor those under whom he claims, supposed at the time of purchase such title to be good in fee. The defendant may have believed in a certain case that, at the time he made the improvements or betterments, his title was good in fee. The defendant, or those under whom he claims, may also have believed at the time of purchase such title to be good in fee. In that case he could bring his action under section 1952. Section 1957 was intended to supplement, not to supersede, the provision of section 1952. The plaintiffs attempted to set out in their complaint such allegations as would bring the case under section 1952, and we are of the opinion that the presiding judge was in error in deciding in the manner alleged in appellants' third exception. This exception is therefore sustained.

Appellants' fourth exception is as follows: "That the presiding judge erred in sustaining the demurrer to the complaints herein, and ordering that the complaints be dismissed." There was no allegation that the plaintiffs, or those under whom they claimed, purchased the lands recovered from them supposing, at the time of such purchase, the title to be good in fee. This allegation was indispensable, and the presiding judge very properly sustained the demurrers. But, for the reasons stated in considering the next exception, he was in error in dismissing the complaints.

Appellants' fifth exception is as follows: "That the presiding judge erred in deciding that there was nothing to amend to, and refusing leave to the plaintiffs to amend their complaints." Under the authority of *McKnight v. Cooper*, 27 S. C. 92, 2 S. E. 842, we think the circuit judge was in error in refusing to allow the plaintiffs to amend the complaints herein.

It is the judgment of this court that the judgment of the circuit court be reversed, with leave to the plaintiffs to amend their complaints by alleging such other facts as they may be advised are necessary to state a cause of action under section 1952 of the Revised Statutes of this state.

McIVER, C. J. (dissenting). Being unable to adopt the view taken by Mr. Justice GARY of the questions presented by the appeals in the four cases above stated, which are practically the same, I propose to state briefly what I consider is the proper view. For this purpose it will be necessary to review the legislation upon the subject of betterments. The first statute which I find upon the subject is the act of 1870 (14 St. at Large, 313), the provisions of which have been incorporated in totidem verbis in the

General Statutes of 1882 (sections 1835-1841, both inclusive), with a correction of what is manifestly a mere clerical error in section 7 of the act, which does not alter the sense of the passage. Without undertaking to set forth a literal copy of these provisions, it will be sufficient to say, in general terms, that section 1835 provides that, after final judgment in favor of the plaintiff in an action to recover the possession of lands, if the defendant has purchased the lands, "supposing at the time of such purchase" that his title was good in fee, such defendant may recover from the said plaintiff the full value of all improvements made upon such lands by such defendant, "or those under whom he claims." Section 1836 simply provides how the value of the improvements shall be measured. Section 1837 provides how the value of the improvements shall be recovered, to wit, by filing a complaint for the same "within forty-eight hours, or during the term of the court" in which the judgment for the recovery of the lands shall be rendered. Section 1838 provides that, "on the entry of such action,"—by which I understand upon the filing of the complaint as provided for in section 1837,—the court shall stay all proceedings upon the judgment obtained in the action for the recovery of the lands until a final judgment shall be rendered under the complaint for the recovery of the value of the improvements. Section 1839 provides that execution on the judgment rendered in the action for the value of the improvements shall issue only against the lands recovered in the original action, and not against any other property of the plaintiff in such action. Section 1840 contains provisions which do not seem to be pertinent to the present inquiry. The same remark may be made as to the provisions of section 1841. Next, we find the act of 1885, entitled "An act to authorize defendants in actions to recover lands to set up a claim for improvements." 19 St. at Large, 343. This act entirely ignores the provisions contained in the several sections of the General Statutes above referred to, and, without making any reference thereto, provides as follows:

"Section 1. Be it enacted," etc., "that in any action hereafter brought, or now pending, and which has not been heard, for the recovery of lands and tenements, whether such action be denominated legal or equitable, the defendant, who may have made improvements or betterments on such land, believing at the time he makes such improvements or betterments that his title thereto was good in fee, shall be allowed to set up in his answer a claim against the plaintiff for so much money as the land has been increased in value in consequence of the improvements so made.

"Sec. 2. If the verdict or decree shall be for the plaintiff in such action, the jury or judge, who may render the same may at the same time, render a verdict or decree for the

defendant for so much money as the lands and tenements are so made better, after deducting the amount of damages, if any, recovered by the plaintiff in such action, and the lands and tenements as recovered shall be held to respond to such judgment for the defendant: provided, that execution on such judgment shall issue only against such lands and tenements so recovered by the plaintiff in such action, and shall not in any such case issue against the goods and chattels or other lands of the defendant [plaintiff?].

"Sec. 3. That all acts and parts of acts inconsistent with this act be, and the same are hereby repealed."

On the same day, to wit, the 26th of December, 1885, on which the foregoing act was passed, the legislature passed another act (19 St. at Large, 432), the title of which is: "An act to amend sections 1838 and 1839, of the General Statutes, relating to improvements made upon lands by occupying claimants." By this last-mentioned act, section 1838 is amended so as to provide for the rendition of a special verdict, "stating the value of the lands and tenements without the improvements put thereon in good faith by the defendants and the value thereof with improvements," and that defendant shall be entitled to a verdict for the value of the improvements thus ascertained, with interest from the date of the recovery of the lands. And section 1839 is so amended as to provide for a sale of the land recovered, the proceeds of which shall first be applied to the payment to the plaintiff in ejectment of the amount of the value of his land thus ascertained, and the surplus, if any, to the improving tenant, and also so as to make the judgment for betterments a lien on said land in preference to all other liens; "provided, however, that if the plaintiff in ejectment shall, within 60 days after the aforesaid special verdict, pay into the office of the clerk of the court, for the defendant, the value of the betterments so found by the special verdict, no sale of the land shall be ordered." Finally, it appears that all of the provisions of the General Statutes of 1882, as amended by the acts of 1885, last referred to, as well as the provisions of the act of 1885 above copied, have been incorporated in the Revised Statutes of 1893 as sections 1952-1960, both inclusive; but it must be remembered that these Revised Statutes, not having passed through the constitutional forms necessary for the purpose, cannot be regarded as having the force of law, although such revision has, by the act of 4th January, 1894 (21 St. at Large, 503), been "approved as a revision, digest and arrangement of the statute law, civil and criminal, of the state of South Carolina, as it stood at the date of the said report," to wit, on the 28th day of November, 1893, which, at most, can only operate as a legislative construction of what is the law, and not as a valid enactment of law.

From this review of the present state of the legislation upon the subject of betterments, it is manifest that the law upon that subject has been left in some confusion, to say the least of it. By the act of 1870, as it will be designated for convenience, inasmuch as we have seen the provisions of that act constitute the sections of the General Statutes of 1882 usually referred to as containing the original law upon the subject, provision was made whereby a defendant, from whom land was recovered in an action of ejectment, might recover of the plaintiff in such action the value of any improvements made upon such land, either by himself or by those under whom he claims, provided he has purchased the land, and supposed, at the time of such purchase, that his title was good in fee; and the mode of proceeding by which such claim was to be asserted was specially described and limited, to wit, by filing a complaint within 48 hours after the judgment in the action of ejectment was rendered, or during the term of court at which such judgment was obtained. But the provisions of the act of 1885, copied above, are that a defendant from whom land has been recovered in an action of ejectment, whether he acquired the same by purchase or otherwise, may recover the value of the improvements which he has put upon the land, by those under whom he claims (as in the act of 1870), provided he believed "at the time he makes such improvements or betterments that his title thereto was good in fee,"—not, as in the act of 1870, at the time of his purchase. And the mode of proceeding prescribed in this act, by which the claim for the value of the improvements is to be set up, is by answer, not by complaint, as in the act of 1870. It seems to me that the provisions of these two acts are so utterly at variance as to render them inconsistent with each other, at least so far as they relate to the conditions upon which a claim for betterments can be maintained, and the manner in which such claim must be set up or asserted; and, if so, by the express provisions of section 3 of the act of 1885, above copied, the latter act operates as a repeal of the former to the extent indicated. But as the other provisions of the act of 1870, as amended by the act of 1885 (found at page 432, 19 St. at Large), relating to the mode of enforcing payment of the amount ascertained to be the value of the improvements, are not necessarily inconsistent with the provisions of the act of 1885, as above set out, certainly not with the provisions of section 1 of that act, they are not repealed. It seems to me that the act of 1885, which has been set out in full in a previous part of this opinion, was designed to effect a radical change in the law, so far, at least, as it related to the conditions upon which a defendant from whom lands had been recovered in an action of ejectment could maintain a claim for improvements made upon the land, and the

manner in which such claim should be set up. Under the former law, this remedy was confined to a purchaser of land who believed, at the time of his purchase, that he had a good title; and he was allowed to claim for improvements made by those under whom he claimed as well as for those made by himself, and his remedy was by complaint to be filed in a very limited time, which had been construed rigidly in the case of *Garrison v. Dougherty*, 18 S. C. 486, and in *Godfrey v. Fielding*, 21 S. C. 313; but by the act of 1885 the remedy was extended to any person who had bona fide acquired possession of land, whether by purchase or otherwise, but his right of recovery was limited to the value of improvements made by himself, provided he believed, at the time he made the improvements, that his title was good, and he was allowed to set up his claim by his answer, and not required to file his complaint within the very limited period fixed by the former act. It is true that when the question arises how the provisions of the second section of the act of 1885 (found on page 343, 19 St. at Large) are to be reconciled with the provisions of the second section of the act of 1885, found on page 432 of the same volume,—both acts having been passed on the same day,—some difficulty may be presented; but, as these sections relate only to the mode of enforcing payment of the amount ascertained to be the value of the improvements, that question does not now arise, and need not, therefore, be considered. The only question with which we are at present concerned is whether the plaintiffs in the several cases have shown by their pleadings that they are entitled to the remedies sought, and as, I think, their claims should have been set up in their answers in the original action, and not by complaint, there was no error in rendering judgment dismissing their several complaints. Of course, under the view which I have taken, no amendment of the complaint could meet the difficulty, and hence there was no error in refusing leave to amend. If, however, I should be mistaken in the foregoing views, and the plaintiffs could present their claims by complaint, still I think there was no error in refusing leave to amend, under the case of *Lilly v. Railroad Co.*, 32 S. C. 142, 10 S. E. 932; for, even assuming that these appellants could assert their claims by a complaint, yet such complaint must be filed within 48 hours after the judgment in ejectment is rendered, or during the term at which such judgment is obtained, and a failure to file such complaint within the prescribed time is fatal. *Garrison v. Dougherty*, *supra*, and *Godfrey v. Fielding*, *supra*. Assuming that these complaints, as they were originally framed, were filed in time, though that does not distinctly appear in the "case," if they did not then contain sufficient allegations to sustain the claims for betterments the action, so to speak, could not be maintained; and to allow the appellants to insert

other allegations, after the time limited for the complaint to be filed, would be to give them a cause of action to which they did not then show themselves entitled, and that, too, after the time had expired within which the statute expressly required such claim to be asserted, and would be destructive of that promptness which was held in the two cases last cited to be a distinctive feature of the special statutory remedy. While the complaints in these cases did contain allegations which would have been sufficient to sustain the claims, under the provisions of the act of 1885, if these allegations had been made by answer to the original action, as is required by that act, yet as they were not made in that way, but by complaints which did not contain allegations necessary to support the claims under the act of 1870, as is shown in the opinion of Mr. Justice GARY, and as no amendment was applied for until after the time limited for asserting the claims by complaint had expired, I do not see how these appeals could, in any view of the case, be sustained. The case of McKnight v. Cooper, 27 S. C. 92, 2 S. E. 842, which is relied upon to sustain the motion for leave to amend, is not, in my judgment, in point. There the claim for betterments was asserted by answer, and the motion was for leave to amend the answer; while here the motion is to amend the complaints after the time limited for filing the same, by the express terms of the statute, had expired. It was, therefore, like the case of Lilly v. Railroad Co., supra, an attempt to amend by stating a cause of action after the time limited by statute for bringing such action had expired. It seems to me, therefore, that the judgment of the circuit court sustaining the demurrers, and refusing leave to amend, should be affirmed.

(93 Ga. 419)

WALLACE v. JONES et al.

(Supreme Court of Georgia. Jan. 27, 1894.)

**ACTION FOR LAND—SALE OF WARD'S LAND—PURCHASE BY GUARDIAN—DECREE BY CONSENT—ERROR—PURCHASE FOR VALUE—PURCHASER AT SHERIFF'S SALE—VOIDABLE TITLE—LIMITATIONS—RIGHTS OF MINOR—REMAINDER-MEN.**

1. The evidence showing beyond all controversy that the parties on both sides claimed under Thomas L. Wilcox,—the plaintiffs by a certain consent decree alone, and the defendant by the same decree as a link in one chain of his title, and by a sheriff's sale as a link in the other chain,—there was no error in treating the possession of Thomas L. Wilcox, prior both to the decree and the sheriff's sale, as available to the plaintiffs in founding their prima facie right to recover. Nor was there any error in making the comparative strength of the plaintiffs' title and the defendant's title the ultimate test of whether there should be a recovery or not. If the title of Thomas L. Wilcox in its complete integrity passed into the defendant, whether through the sheriff's sale or through the guardian's sale, the plaintiffs could not recover. If the sheriff's sale was defeated as a means of passing title by reason of four years' possession by the tenant for life under the decree, during which there was no legal obstacle to enforcing the levy, and if the guard-

ian's sale was defeated as a means of passing title by reason of notice in the defendant that the guardian himself was in fact the purchaser at his own sale, then the plaintiffs could recover.

2. Where minors, pending a bill filed by other persons, were made parties plaintiff by amendment, a next friend representing them, there was no need to serve them with a copy of the bill; and where a decree in their favor was taken at the first term, the decree purporting on its face to have been taken at that term by consent of parties, there was no irregularity, much less any absolute invalidity.

3. Where letters appear in the transcript of a record, the record being of a case in which there was a consent decree rendered many years ago, and the letters apparently have some relevancy to the fact of consent, they may be treated as a part of the record, and be received in evidence accordingly.

4. Where a man, his wife, and their minor children, the children being represented by a next friend, were coplaintiffs in a bill which was disposed of by a consent decree, and that decree declared that certain premises, previously the property of the husband and father, should belong to the wife for her life and to the children in remainder, this was, in effect, a conveyance by the husband and father; and if the wife and children, in and by the same decree, parted with other premises, which previously belonged to them, and these premises thereby became the property of the father and his children by a former marriage, the wife and her children were purchasers for value from the husband and father. Possession by the tenant for life under the decree for four years would inure to the benefit of the remainder-men as against the lien of an existing judgment against the husband and father.

5. A purchase by a guardian at his own sale, where the sale is otherwise legal, is not void, but is voidable only, at the election of the wards. A guardian may sell a vested remainder under an order granting leave to sell the land, his ward having no estate in the land except the remainder so sold.

6. Where one of the theories involved in the case on trial is that a guardian was the real purchaser at his own sale, although he conveyed by deed to another, and it appears that the other afterwards conveyed to a brother of the guardian, nominally for a consideration, but without any in fact, evidence that the brother, on selling and conveying the property to the party whose title is now attacked by the wards, paid a part of the purchase money received by him over to the guardian, is admissible, without showing that the brother's vendee, the party from whom this purchase money came, had notice that the guardian had any interest in it, or that it was received for his benefit. The sole relevancy of the evidence, however, would be in its tendency to show that the guardian was the real purchaser at his own sale, and that both his nominal vendee and his brother co-operated with him in abusing the guardianship, and thus made themselves trustees for the wards.

7. Where the value of the land in controversy in a given year is relevant, its value for some years immediately before and after may be relevant as tending to show what the value was in the given year.

8. Inadequacy of price alone, where the price named in the conveyance purports to be a substantial amount, such as \$200, for the remainder in one-half of a tract of land lying in a remote county from the one in which the sale took place, is not evidence from which it could rightly be inferred that a subsequent purchaser for value had notice that the guardian making the sale, and who conveyed to another person, was himself the real purchaser at that sale, and that the person to whom he conveyed acted for him in making the purchase.

9. There being no evidence that the defendant knew anything of the condition of the mind of the plaintiffs' mother in the interval from 1877 to 1889, evidence that she was of unsound mind during the whole or a part of that interval was not admissible to charge him with notice of anything; but it was admissible to affect him on the question as to whether the occupant of the land continued to be her tenant after she executed the deed of April 3, 1878, since it would bear on the question of her sanity when that deed was executed; and, if she was then insane, her grantee in that deed, he being a volunteer, would hold in trust for her, and the occupant of the land would be thereafter in possession under her, the same as he was before the deed was made.

10. If the title passed by the sheriff's sale, the immediate purchaser at that sale being then, as to the premises sold, a trustee for the children, he acquired, as against them, only a voidable title. But as the money which he advanced to purchase the execution, or to purchase the land under it, went to disincumber the title of the children, whether, in order to take the benefit of that sale, and avoid it as passing title to their trustee for his own purposes, they would not have to refund the amount advanced with interest, quære? And, some of the children being still minors, whether an election could be made for them except by a court exercising equity powers, quære?

11. There being no evidence tending to show that the defendant in *fi. fa.* became the owner of the *fi. fa.* before the sheriff's sale under it took place, or was the owner, legal or equitable, when that sale did take place, it was error to charge the jury anything whatever touching such ownership.

12. The possession of a tenant for life, or of any one holding under or for such tenant, cannot operate as notice to a purchaser of the estate in remainder of any defect in the title of his immediate vendor to the remainder interest, although he may not purchase the remainder separately, but the whole fee, his vendor having a conveyance which covers in the same deed both the estate for life and the remainder. Remainder-men, as such, are not entitled to possession, and cannot have it in their own right, until after the death of the tenant for life.

13. There was no error in charging the jury, in substance, thus: The right of action did not accrue to these minors, and they had no right to sue until their mother died. On the death of their mother, the right of possession was cast on them. The life estate, by the decree, was in her. There is no limitation running against either of them if you believe from the evidence that the mother did not die until 1889, because that is only four years ago, and, in order for limitation to run against one as to title to land it must be at least seven years; and the statute does not run against minors until they become of age and seven years thereafter. So, if you believe that the ages of these children were as represented by the testimony, there would be no bar by lapse of time upon their right of recovery.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. Clark, Judge.

Action by Mary A. Jones and others against John F. Wallace. Judgment for plaintiffs, and defendant brings error. Reversed.

The following is the official report:

Mary A. Jones and Robert Wilcox, and Susan and Jackson Wilcox, by their next friend, all being children of Thomas L. and Nancy E. Wilcox, brought complaint for land against John F. Wallace. The land sued for was the west half of lot 106 in the Elgh-

teenth district of De Kalb county. The suit was brought September 25, 1890. There was a verdict for plaintiffs, and, defendant's motion for new trial being overruled, he excepts.

It appeared upon the trial that in October, 1868, one Bass deeded to Thomas L. Wilcox the undivided half of 1,225 acres of land in the Eighteenth district of De Kalb county, including the east half of lot 106 and 130 acres of lots 106 and 57. The habendum was to Wilcox, his heirs and assigns. In trust for the sole support and use of Nancy Wilcox, his wife, her heirs and assigns, free from debts and liabilities of said Thomas L., with power to Nancy to empower Thomas L., by writing under her hand and seal, to sell and convey any part or the whole of said trust estate, and reinvest the proceeds in such other property, subject to the above-described trust, as he should deem most for the interest of the estate, at any time, and without any order of the court. In November, 1869, an agreement for partition was made by one Harris, trustee of his wife, owner of the other undivided interest, and Wilcox, trustee of his wife, by which, and the deeds of Harris and his wife to Wilcox, trustee for his wife, there was conveyed to Wilcox, trustee, the whole of lots 106 and 109 in the Eighteenth district. In September, 1870, Mrs. Wilcox, by her next friend, brought her bill against her husband, alleging that he, as trustee, held title to lands above mentioned and other land; that he had failed, as husband and trustee, to protect and support her and their children, Mary and Robert, and was mismanaging the estate, and was insolvent, and praying for a decree that he be compelled to make to her or another trustee title to the property, and deliver possession to her, etc. Under a written agreement made by the parties in April, 1871, a verdict and decree were taken at the March term, 1871, appointing two persons as partitioners to partition the land described in the bill, and make return; and that, when so partitioned, the title to the land so divided should vest in the parties respectively, according to the terms of the agreement, to wit, that the part having on it the buildings should vest in defendant as a homestead under the homestead laws of Georgia, for life, and at his death to go to his children by his first wife, and the other part to go to and be revested in, and continue to be the property of, Mrs. Wilcox, to her use for life, free from the debts, etc., of her present or future husband, with remainder to her children by said defendant. Provision was also made for counsel fees, to operate as a lien in favor of such counsel upon the property assigned to the parties respectively, etc. Under this decree the petitioners made return, from which it appeared, briefly stated, that they set apart all of lot 106, and 40 acres of the southeast corner of lot 109, to Thomas L. Wilcox, and the bal-

ance of lot 109 to Mrs. Wilcox, under the agreement. In September, 1874, this return having been lost, a copy was entered upon the minutes, and made the judgment of the court. By bill brought to the March term, 1875, of De Kalb superior court, Wilcox and his children by his first wife, suing by him as their next friend, against L. J. Winn and W. S. Thompson, alleged the decree and division above mentioned, and further: Prior to said decree one Cole sued Thomas L. Wilcox on what was a Confederate contract, and that was not worth more than \$100, and Thomas L. was informed by the clerk of the court that judgment would go against him for not more than the true amount due in United States currency; and Wilcox, being ignorant, relied on this, and did not appear, and afterwards learned that plaintiff's attorneys, themselves ignorant of the truth, Cole being absent, and not knowing what was done, entered judgment for the full sum, principal and interest, on May 3, 1871. Afterwards, Cole, not knowing that judgment had been rendered for this large amount, transferred the fl. fa. to Thompson and Winn for \$150. Wilcox is entitled to have the judgment set aside, and excess above what is justly due written off; but, if he is estopped by his laches, the other complainants, by their rights, either under the homestead laws, as *custis que trustent* or otherwise beneficiaries, are not estopped for any greater amount than the amount Winn and Thompson paid; and, though the debt to Cole is older than the homestead laws of 1868, yet the judgment can be enforced against the homestead rights only for the true amount of the debt. Winn and Thompson are seeking to enforce the fl. fa. for the full amount nominally due against the property set apart under the decree to Wilcox and his children. In September, 1873, one Knott, by Winn, as his attorney, obtained judgment against Wilcox, and fl. fa. from this judgment was on January 30, 1874, levied on lot 109. On Friday before the sale day in April at which the property was advertised, the levying officer informed Wilcox the sale would be postponed, and for this reason he did not attend the sale. The property levied on was worth \$2,000,—greatly in excess of the amount of the fl. fa.,—which was well known to plaintiff's attorney. Plaintiff himself was absent, yet the whole lot 109 was exposed to sale, and bid off by Thompson and Winn for \$95, which was credited on the fl. fa. Then they conceived the idea of possessing themselves of all the complainants' property, and hunted up Cole, or corresponded with him, and bought his fl. fa. Afterwards, on July 6, 1874, they caused the Knott fl. fa. to be again levied on lot 106, but did not levy the Cole fl. fa., though they held it, intending to place it in the hands of the sheriff, and claim the proceeds of the sale to be applied to both fl. fas. This was prevented for a time by

one Todd, who was induced to advance the amount due on the Knott fl. fa., and pay it off. Subsequently, in furtherance of their purpose, Winn and Thompson caused the Cole fl. fa. to be levied on lot 106, and the sale was arrested by a claim filed by complainants, yet pending. Thomas L. Wilcox was adjudicated bankrupt, and discharged from his debts, and the property in controversy was duly set apart to him in April, 1874, as a homestead exemption under the act of congress, and is for that reason protected from said levy. Lot 109 was not fairly or legally sold, because complicated with the rights of Nancy E. and her children, because of the bankruptcy proceedings, the excessive amount of the Cole fl. fa., and of the promise of the sheriff not to sell, and, as against Winn and Thompson, complainants are entitled to have the same resold clear of doubt or incumbrances, if liable at all, and the proceeds applied to the fl. fa. They prayed that the sale be set aside as to lot 109; that the Cole fl. fa. be decreed to be valid for \$150 only; that all the property be held exempt under the bankruptcy and homestead laws from said fl. fa.; that, if this might not be done, the land be sold in parcels, so that, when enough was made to pay the Cole fl. fa., the balance would be preserved to complainants; that, if this might not be done, Wilcox be decreed entitled to the old homestead of 50 acres for himself and 5 acres to each of his minor children; that by a proper decree the same might be set aside out of the property to him and them; that defendants might be enjoined from prosecuting the claim case; and for general relief. At the March term, 1891, the bill was amended, and apparently Nancy E. Wilcox and her children made parties complainant, and complainants prayed: If the court permitted defendants to retain all or any part of lot 109, a new division be made by the court, by its decree, of the remaining part of all the land, between Thomas L. Wilcox and Mrs. Nancy E. Wilcox for herself and in behalf of her children, Mary, Robert, Susan, and Jackson, such as should be fair and just; and the amount so set apart to her and her said children be placed beyond the control of Thomas L., or any of his creditors, and be vested in her during her life, for the use of herself and said children, free from the debts or control of any future husband, and, after her death, to go to said four children; and such part to be in lieu of all claims for dower, year's support, alimony, or other claims of said Nancy against Thomas L. or his property. On March 25, 1875, Winn and Thompson answered, in brief: They knew nothing about the consideration of the Cole debt, or the statement made to Wilcox, or the action of Cole's attorneys. The Cole fl. fa. was transferred to them for valuable consideration, and with full knowledge of its existence and amount on the part of Cole.



They do not believe there was any mistake on the part of Wilcox, but, if there were, it would not entitle complainants to the relief sought. They are seeking to enforce the Cole judgment, and have a right to do so. They deny the statement claimed to have been made by the sheriff as to the Knott *fi. fa.*, and deny that the levy of that *fi. fa.* was excessive; the sheriff having in his hands older executions, amounting to over \$1,200. The proceeds of the sale were not credited on the Knott *fi. fa.*, but on the Cole *fi. fa.* There was no correspondence with Cole, or intention to take unfair advantage of any of complainants, and defendants are ready to settle with complainants for the amount which appears to be due on the Cole *fi. fa.* That *fi. fa.* was levied, but not for the purpose charged, and was arrested by claims; but they deny the grounds of the claims, and are entitled to have the *fi. fa.* proceed for the full amount appearing on its face to be due, regardless of any bankruptcy or homestead proceedings. Lot 109 was fairly and legally sold, and bought by them in good faith, under judgment upon a contract older than the homestead or bankruptcy laws, or any pretended trust or separate estate of complainants, or any of them; and the land now levied on is subject to the execution named. In view of the helpless condition of the female and minor complainants, and as an act of charity to them, and with a view to a full adjustment of all differences, and to fix the title to the property, they offer to surrender the Cole *fi. fa.* and all claims to the half of lot 109, provided the title to the other half of that lot be fixed in them, and all costs accruing in any way out of the litigation relevant to the property be paid by complainants; and they consent that a decree be taken at the present term carrying into effect this proposition. As part of the record of the last above mentioned bill and answer, plaintiffs put in evidence two letters. The first was dated March 22, 1875, signed by George Hillyer, addressed to Mrs. Nancy Wilcox, and stated: When the writer last saw her, the idea about settling her land matter was for Winn and Thompson to have the north half of lot 109, and she the south half for life, with remainder to her children; Wilcox to have three-quarters of lot 106 for life, with remainder to his children by his first wife; and the attorneys to have the other quarter of 106. Since, the proposition had been changed, so as to let her and children take the west half of 106, with buildings on it, remainder to her children; Wilcox and his children by his first wife to have the east half of lot 106 and the south quarter of 109; and the lawyers the southwest quarter of 109. This settlement to be final, and in full of all her claims for dower, homestead, and other marital rights in Wilcox's land. In the letter Mrs. Wilcox was asked to let the writer know what she thought of it, and

write on the back of the letter whether she consented for the settlement to be made as above, and have some neighbor witness her signature, and send it to the writer. The other letter was addressed to Mr. Hillyer, signed by Mrs. Wilcox, her signature being witnessed by John F. Wallace, dated March 22, 1875, and stated: She would agree to the proposition for her and her children to take the west half of 106, with the buildings on it, provided it should be free from all debts, and that she might have the right to use it in any way beneficial to her family. This was the most inferior of the land, but she had several children; she would accept it on account of the buildings on it.

It further appears: By order of the court on March 26, 1875, on application of Mrs. Wilcox for herself and as next friend for the minor children of herself and Thomas L. Wilcox, naming them, they were made parties plaintiff in the bill. During said March term a verdict was rendered that the title of defendants under the sheriff's sale to the north half of lot 109 be confirmed as against all the complainants; that the sheriff's sale of the south half of 109, and the purchase thereof by defendants, be declared void, and this verdict and decree to operate as a release and reconveyance by defendants of all their interest in that half; that the Cole judgment be decreed paid, and defendants enjoined from using it against complainants, or others claiming under them, and its lien on any of lots 109 and 106 be declared released and discharged; that all right of complainants, or either of them, in any way, be released, discharged, and set aside as to the north half of 109 in favor of the title of defendants; that all divisions theretofore made among complainants concerning lots 109 and 106 be entirely set aside, and the following division made and decreed in lieu thereof: Mrs. Wilcox, for herself and as next friend of her minor children, gives up and releases all interest in lot 109, and receives in lieu the west half of lot 106, including the improvements thereon, to vest in her and her four said children, for their use during her life, and, after her death, to go in remainder to said four children, free from the debts and control of Wilcox or any future husband she may have, in satisfaction of all right or claim which she and her children have or might thereafter have against Wilcox or his property. The east half of 106 and southeast quarter of 109 to vest in Wilcox for himself and his children by his first wife, with power to sell the same at public or private sale, and apply the proceeds in repurchasing other property under similar trust, or to the education or other use of himself and said children, free from all claims on the part of Mrs. Wilcox and her four children. The expenses of the litigation and certain attorneys' fees mentioned to be made out of the southwest quarter of lot 109, set apart to pay such fees and costs, for which purpose execution to



issue against said quarter, and, if anything remained out of its proceeds after payment of costs and attorneys' fees, such remainder to be paid over to Wilcox. On the same day—March 26, 1875—a decree was rendered in accordance with this verdict.

Among other evidence introduced by defendant was the following: Transfer of the Knott *f. fa.*, and judgment to Robert Todd, August 3, 1874, signed, "L. J. Winn, Plaintiff's Attorney." Transfer of the same by Todd to John Neal and L. J. Winn, December 10, 1879. Transfer of the same by Winn and Neal to Clark Wilcox, March 1, 1880. The original suit by Knott against Wilcox on a note dated March 7, 1866, and judgment rendered thereon by default for \$200 principal and \$84.85 interest, March 29, 1872. Upon the *f. fa.* were entries of no property, November 4, 1872, and levy on lot 109 January 30, 1874, sale by the sheriff to Thompson and Winn for \$95, and, after payment of costs, \$68.87, credited to the Cole *f. fa.*, April 7, 1874; and levy on lot 106 as the property of, and then in possession of, defendant, January 30, 1874. Defendant also introduced deed by the sheriff of De Kalb county to Clark Wilcox, dated March 2, 1880, reciting levy of the Knott *f. fa.* upon the land conveyed, and its public sale on the first Tuesday in March, 1880, and that Wilcox was the highest bidder, at \$500, and conveying lot 106. Also copy of the record in the ordinary's office of Wilcox county (to which the Wilcoxes had removed from De Kalb county) in the matter of T. L. Wilcox, guardian of Mary, Robert, Susan, and Jackson Wilcox, his minor children, containing letters of guardianship, November 5, 1877. Order of the ordinary at the March term, 1878, granting leave to the guardian to sell the interest of said minors in lot 106, their interest being the west half of said lot, reciting publication of notice of the guardian's application as required by law, and that no objections had been filed. Return of sale of the lot, March 5, 1878, for \$500 cash; the return being made December, 1878, under oath of the guardian. Annual return of the guardian, March, 1890, charging himself with the amount received from the sale of the west half of lot 106 to D. F. McCrimmon, \$500; and credits to the guardian, commencing in March, 1878, annually, to July, 1883, of \$100 per year, for the support, etc., of the minors; and accounting for the interest annually accruing upon the proceeds of the sale. At the April term, 1890, this return was allowed, approved, and ratified, with the vouchers accompanying the same, by the ordinary. Discharge of the guardian at the July term, 1890, of the court of ordinary, it being stated in the order of discharge that \$500, the estate of the wards, had been expended, under the approval and order of the court, in the support, etc., of the minors; that there was then nothing in the guardian's hands as such, and no necessity for continuing the

guardianship. Defendant also introduced deed from Thomas L. Wilcox, guardian of Mary, Robert, Susan, and Jackson Wilcox, to McCrimmon, made April 2, 1878, containing the usual recitals, and conveying, in consideration of \$200 "in hand paid," the western half of lot 106, described as being the same property decreed to said children after the termination of the life estate of the wife of said Wilcox, as appeared by decree of De Kalb superior court, March term, 1875, in the bill filed by Wilcox for himself et al. against Winn et al. Also deed from Thomas L. Wilcox, Nancy E. Wilcox, and McCrimmon to Clark Wilcox, dated April 3, 1878, reciting a consideration of \$500, and conveying the west half of lot 106, east half of lot 106, and southeast quarter of lot 109; said Nancy E. conveying her life interest in the west half of 106, McCrimmon conveying the interest in remainder which her minor children had under the decree, and Wilcox, by authority of the decree, conveying the east half of 106 and southeast quarter of 109; the decree being made part of the deed, and the conveyance being intended to operate as a separate conveyance by each of the parties of all right, title, and interest to any or all of the property. Also deed from Clark Wilcox to defendant, Wallace, dated November 20, 1889, in consideration of \$2,500, to the entire lot 106, being a warranty deed in the usual form. The deeds from the sheriff to Clark Wilcox, from T. L. Wilcox, guardian, to McCrimmon, and from Wilcox, his wife, and McCrimmon to Clark Wilcox, were of record when the deed was made by Clark Wilcox to defendant.

The motion for new trial contained the general grounds that the verdict was contrary to law, evidence, etc. Also: Because the court admitted the record of the suit, verdict, and decree of Wilcox and his minor children against Winn and Thompson, over the objection of defendant that it was a decree taken at the first term of the court, without the consent of the parties, and without service having been perfected on all the parties thereto, and because it appeared upon the face of the record that Mary, Robert, Susan, and Jackson Wilcox were made parties plaintiff in the case on the application of Mrs. Wilcox, wife of said Thomas L., and without service upon them. Because the court admitted as part of such record the two letters mentioned, over objection of defendant that there was nothing in said record showing these letters to have had anything to do with the case, that there was no evidence showing that such letters had ever been written, and that the facts therein recited were irrelevant. Because the court, over objection of defendant that the evidence was irrelevant, allowed plaintiffs to prove the value of the land in dispute in the year 1880. Because the court allowed plaintiffs to prove by Clark Wilcox what he did with the \$2,500 he got from defendant for the

land sold him in 1889, and that he paid a portion of this money to his brother Thomas L. Wilcox; the objection of defendant being that it was irrelevant, and could not affect his title, without notice thereof to him. Because the court, over defendant's objection that the evidence was irrelevant, allowed plaintiff to prove the condition of the mind of Mrs. Nancy E. Wilcox from 1877 to 1889. Because the court allowed plaintiffs to introduce the following answer of one Clark to interrogatories: He knew Mrs. Nancy E. Wilcox in her lifetime. Knew her since 1877, and considered her insane since that time. Saw her constantly until 1882. Then he moved away and saw her but very few times. The objection of defendant to this evidence was that it was the opinion of the witness without stating the facts upon which that opinion was founded. It appears from the record that no facts were stated by this witness touching his knowledge of the mental condition of Mrs. Wilcox, other than as appears from his answer just above given. Because the court allowed plaintiffs to introduce the tax returns of Clark Wilcox and Thomas L. Wilcox from 1875 to 1881, showing the assessed value of the land in dispute by them; defendant's objection being that these valuations were irrelevant. Because the court erred in charging: "In these suits the plaintiffs must recover by rules of law, upon the strength of their own title, and not upon the weakness of their adversaries' title. Hence, to enable these plaintiffs to recover, they must show a superior title in this case to the one that is shown by the defendant. Their title must be stronger and better than his. I charge you that you shall begin your investigation as to the title to this land on the part of the plaintiffs to the rights on the part of the plaintiffs under the decree rendered in 1875 upon a litigation between Thomas L. Wilcox and his wife and children and other children on the one part and Locklin J. Winn and William S. Thompson of the other part. Whatever rights are still in these plaintiffs by that decree, is so much in their behalf, and you are to take that as established. For instance, if there is a decree which arises out of complications and litigations concerning this land that had taken place heretofore, and in the decree it is contained that Mrs. Nancy Wilcox and her children by Thomas L. Wilcox shall have the west half of 106 as the finality of everything that had transpired before, why that would place, so far as that decree goes, the title in them. Now, beginning there, they must show that they had possession under that decree of this lot of land,—this lady, the mother of these children, and the children with her. It appears, and is a conceded fact, and which I may state to you, that according to that decree the mother, Mrs. Nancy Wilcox, had a life interest in this west half of 106, with remainder over these children; and that Mrs. Nancy Wilcox is dead, which,

of course, throws the remainder interest, the title in remainder, upon these children; and, if their rights had not been—if there was nothing to legally interfere with their rights under it, they would, of course, have the right to have it adjudged that they are the owners of this lot of land, the west half of 106; that is to say, that they have got a paper title to it. That decree has the effect of a deed of putting the title in them to that lot. Well, but this is not sufficient for them to recover upon. They must show more than that in order to make out in law what we call a prima facie case, and to put it upon the defendant to show that he holds a better title than that which the plaintiff has shown. Well, it is a rule of law that if one has a deed to land, and is in possession under that deed, that he would have a right to recover in ejectment as against a person who has no better right. A deed to land,—and in this case a decree to land,—defining the boundaries of the land, and a possession under it, gives a party a prima facie right to recover. The deed—or, in this case, the decree—defines the boundary, and the possession of any portion of the land where there is a deed to it defining the boundary extends to the boundaries. So if you shall believe from the evidence that these parties show this,—that they have this right under this decree, and that their mother has been in possession of that land upon that,—then they would have the right to recover, if nothing better was shown. And in regard to possession, as it affects this phase of the case, and as it may affect others about which I may charge you, they are entitled to avail themselves of the possessions of Thomas L. Wilcox, if you believe from the evidence that Thomas L. Wilcox was in possession of this land, that it was a part of the land that originally came to him in his name as trustee for his wife, and that in this settlement he yielded up his claim to this portion of land, having been once in possession of it. So, where it has been a possession which will create a prescription or statutory right, or the mere possession which will give one a status in court to recover against a wrongdoer, they are entitled to have counted in their behalf the possession of Thomas L. Wilcox, and also the possession, as I said, in themselves." Because the court, in the portion of the charge set forth in the last paragraph above, charged that the plaintiffs could recover upon the weakness of the defendant's title, and not upon the strength of their own; and that plaintiffs might recover under the decree of 1875, and a possession thereunder, provided no better title was shown by the defendant; and a possession which would create a prescriptive right in plaintiffs would authorize the recovery against a wrongdoer. Because the court erred in charging: "So, if you believe that under this decree these parties were in possession un-

der it, or Thomas L. Wilcox had been in possession, under whom they claim, and whose wife and children they were, that would give them the right to recover, unless there was some better right shown on the part of the defendant. The plaintiffs contend that they had the title; that they had the possession for as much as four years,—a bona fide possession for value, adverse possession of four years against this fl. fa. I charge you, then, if the decree passes to these persons the title to this land, then that they stand in the relation of purchasers. The law in regard to this is a statute of limitations as against judgments to protect bona fide purchasers, who, if they are in for as much as four years, and are bona fide for value, why they are protected against the lien of the judgment. The lien of the judgment is destroyed thereby. The defendant says, in regard to that point, the lien of the judgment—that there was a levy pending when they took this possession, and that, therefore, that is inoperative; that four years passes, because there was that levy. I charge you, upon the authority of our supreme court, that if a person makes a levy upon land,—plaintiff in execution makes a levy upon land,—and delays to enforce that levy for as much as four years, against one who during that time is in possession, the parties are entitled to the same right as though there had not been any levy." Because the court erred in charging: "Then the plaintiffs claim again that in respect to this deed which Mr. Clark Wilcox has under a guardian's sale, that that cannot avail the defendant, because, according to the evidence, as they claim, virtually Mr. Thomas L. Wilcox was a purchaser at his own guardian's sale. They claim that, according to the testimony of Mr. McCrimmon, that he, McCrimmon, acted as the agent of the guardian, Mr. Thomas L. Wilcox, and that he made a deed to Clark Wilcox at the request of Mr. Thomas L. Wilcox, and that there was no money paid by him. That would not be operative against Mr. Wallace, the purchaser, unless he had knowledge of that, or notice of that which under the law will charge one with knowledge; and they claim that the orders and the deeds and the papers connected with it are sufficient to put Mr. Wallace upon notice, which would be equivalent to knowledge that that was the case, and therefore he cannot rely upon that deed from McCrimmon, as the original purchaser at the guardian's sale, to Mr. Clark Wilcox, and the deed of Mr. Clark Wilcox to Mr. Wallace. Then I charge you that, if you shall believe from what you find in these deeds, and applying thereto the verbal evidence that is before you, that there is anything in it to put Mr. Wallace upon inquiry, that then he would be charged with notice." Alleged to be error in that it failed to define the extent of the notice or knowl-

edge upon the part of the defendant of the irregularities in the sale which would be operative against him as a purchaser, and because there was no evidence in the case which would authorize it. Because the court erred in charging: "And in respect to everything—in respect to all this, every phase of this case, so far as it is necessary to bring home to Mr. Wallace—Mr. Wallace must have notice in order to affect him in regard to these deeds. To this branch of the case, and to every other branch of the case, it may be material, in order for you to come to a verdict, that I charge you that he is charged with the recitations in the deeds, and in the whole scope of the deed; and the decrees and everything of a paper kind which applies to the case that is sufficient to put Mr. Wallace upon notice, to put him upon inquiry, and in that way, if that is the case, then he would not be a bona fide purchaser without notice; but, if there is nothing there to charge him with notice or knowledge so far as that is concerned, he would be protected in his purchase to the extent that it does not give the plaintiffs an exclusively legal right against him, and I charge you in regard to that, if you believe that this possession under this decree exists, why that would rise above all the notice to Mr. Wallace, and would be effectual in favor of these plaintiffs, whether Mr. Wallace had notice or not. Another point in regard to notice that is claimed,—and so I charge you,—that if there is any connection with these deeds from the guardian under which it appears, and you are satisfied that there was gross inadequacy of price, that would be another circumstance for you to consider as to whether you would bring home notice to Mr. Wallace; so as to put him upon inquiry; and if you find that then he would not be a bona fide purchaser,—an innocent purchaser,—if you find it is not sufficient to bring it home, then he would be a bona fide purchaser without notice, and, so far as this guardian's deed is concerned, the title that came to him under it doesn't charge him with notice, and the title was in Mr. Clark Wilcox, then he would be entitled to have you determine in his favor upon that point." Because the entire charge upon the relation of defendant, as a bona fide purchaser of the land, to the case, and the notice or knowledge of irregularities in the guardian's sale, and the deeds made affecting him as a bona fide purchaser, was confused, and calculated to, and did, misdirect the jury in the consideration of that issue. Error in charging: "The right of action did not accrue to these minors, and they have got no right until they become of age and their mother dies. On the death of their mother, the title was cast on them, because the life estate, by that decree, is in her. There is no limitation running against either of them, if you believe from the evidence that the mother did not die until 1889, because that is only four years

ago; and, in order to have limitation run against one as to title to land, it must be at least seven years, and doesn't run against minors until they become of age, and doesn't run against a minor when they become of age until seven years after. So, if you believe that the ages of these children, why then there would be no bar as to time upon their right of recovery. It is claimed by the defendant that Mr. Thomas L. Wilcox, the guardian of these children, got an order to sell, and sold legally, and that it passed the title out of these children. I think I charged you that the plaintiffs claim here that Mr. Wilcox was the purchaser at his own sale; and if you believe that he was the purchaser at his own sale, why that sale would be void,—that is to say, except as to somebody who purchases from him, or from the person in whom the title was, who had no notice,—and therefore you are to look to these papers, under the rules of law I give you in charge, to see whether it is sufficient to put him upon notice." Error in charging: "There is another point that is made by the plaintiffs here. They say that the evidence—it is deducible from the evidence, inferable from the evidence—that this execution that sold this land, and under which Mr. Wallace became the purchaser, was really the property of the defendant in execution, Thomas L. Wilcox. Now, if you believe that there is sufficient evidence to enable you to believe that, why, then they could not sell that to any one purchasing without that knowledge, so far as that is concerned; but in respect to that matter, why it's just like the matter of notice, as I charged you in the other case. If you do not think there is sufficient in the case to charge Mr. Wallace with notice of that, why, so far as that is concerned, he would get a title." Alleged to be error, in that there was no evidence to authorize it.

The grounds of the motion were verified with the qualifications that exceptions to the charge should be considered in connection with the whole charge; that consent to the decree was based upon the answer of defendants; and that the letters were admitted because considered exhibits to the record, on which appeared the decree claimed to be a consent decree.

Candler & Thomson and John L. Hopkins & Sons, for plaintiff in error. Geo. Hillyer, John S. Candler, and D. C. McClennan, for defendants in error.

PER CURIAM. Judgment reversed.

(93 Ga. 535)

ROBINSON et al. v. STEVENS.

(Supreme Court of Georgia. Jan. 27, 1894.)

FRAUDULENT CONVEYANCE — HUSBAND AND WIFE  
— CONCEALMENT OF LOAN — IMPROPER REMARKS  
OF ATTORNEY — CURE BY INSTRUCTIONS.

1. There was no error in refusing to give in charge to the jury propositions of law which,

though correct in the abstract, were not applicable to the case nor authorized by the evidence.

2. No inquiry being made of her, it was no fraud by a wife, who had loaned money to her husband for use in his business, not to disclose to the public, or to persons who subsequently credited him on the faith of the money, the fact that she had made the loan, or that she was his creditor by reason thereof.

3. The trial court having required counsel for the defendant in error to desist from his improper remarks to the jury, when they were objected to, and having characterized the same as improper, and instructed the jury to disregard them, and not having been requested to declare a mistrial on account of their prejudicial effect, they were not cause for setting aside the verdict, especially as the verdict was strongly supported by the evidence.

4. It was not error to exclude declarations of the defendant's husband and father, not made in her presence, tending to show that the money in question was given to the husband, and not to her. As to her, these declarations were mere hearsay.

(Syllabus by the Court.)

Error from superior court, Hall county; C. J. Wellborn, Judge.

Action by A. M. Robinson & Co. against Lucy J. Stevens. Judgment for defendant, and plaintiffs bring error. Affirmed.

S. C. Dunlap, W. L. Telford, and J. B. Estes, for plaintiffs in error. M. L. Smith and H. H. Dean, for defendant in error.

SIMMONS, J. On January 22, 1890, a bill of sale expressing a consideration of \$3,000 was made to Mrs. Stevens by her husband, who was then insolvent, covering his stock of merchandise. Subsequently an equitable petition was brought against Mrs. Stevens and her husband and against C. A. Davis, her father, by Robinson & Co., for the purpose of setting aside the bill of sale, and to recover judgment against the defendants for the amount of a bill of goods sold by the plaintiffs to Stevens in June, 1889, the account for which fell due January 1, 1890. The plaintiffs claimed, among other things, that the goods were sold by them to Stevens on credit, based upon the sum of \$5,000 turned over to him by Davis in February, 1889, with which sum he went into the mercantile business; and that the bill of sale to his wife was fraudulent and void as against his creditors. The suit was afterwards withdrawn as to Davis, and, Stevens having confessed judgment for the amount claimed, the case proceeded against Mrs. Stevens alone. Upon the second trial of the case a verdict was rendered in her favor, and the plaintiffs made a motion for a new trial, which was overruled, and they excepted. It appeared from the evidence at the trial that the consideration of the bill of sale was a debt of \$3,000 to Mrs. Stevens from her husband; that \$5,000, which had been given her by her father, was loaned by her to her husband to go into business with, upon the agreement that he was to repay her at such times and in such sums as she might demand; that he returned \$2,000, and used the remainder in his

business, and she took the bill of sale in payment of this balance, subject to a mortgage of the same date to Kiser & Co. She testified that this was done in perfect good faith, without any secret reservation therein to her husband, and without any intention to hinder, delay, or defraud creditors.

1. The requests to charge set out in the third and fourth grounds of the motion for a new trial were not in writing, and, even if they had been, the refusal of the court to charge as requested would not be cause for a new trial, there being no evidence which would warrant the jury in finding that the bill of sale was without a valuable consideration, or that it was made or taken for the purpose of hindering, delaying, or defrauding creditors.

2. The court did not err in declining the request to charge set out in the fifth ground of the motion for a new trial, nor in charging the jury as complained of in the sixth ground. One who lends money to another is under no duty, where no inquiry is made of him on the subject, to disclose to the public, or to persons who subsequently credit the debtor on the faith of the money, the fact that he has made the loan, or that the borrower is indebted to him on account of it; and a wife who lends money to her husband does not stand upon a different footing in this respect from any other person who lends money to another. There is no evidence in this case that, prior to the creation of the debt sued upon, any inquiry was made of the wife in regard to the money in question, or the husband's indebtedness to her, or that she said or did anything to mislead the plaintiffs or anybody else in regard to it. Indeed, it appears that she had no communication of any kind with the plaintiffs or any of their salesmen prior to that time. The cases of *Gorman v. Wood*, 68 Ga. 527; *Brown v. West*, 70 Ga. 201; and *Kennedy v. Lee*, 72 Ga. 39,—relied upon by counsel in support of these grounds of the motion for new trial, are not in point. The case of a person who allows another to deal with specific property as his own, and obtain credit from third persons on the faith of it, and who then claims that property as against such creditors, upon the ground that it is his, and not the property of the debtor, is altogether different from the case of one who lends money or sells property to another, and does not claim the particular money or property, but simply stands on his rights as a creditor.

3. Another ground of the motion for a new trial was that counsel for the defendant, in his argument to the jury, stated that the judge had set aside the verdict rendered against Mrs. Stevens on a former trial, and this showed what he thought of the case. The court did not err in declining to grant a new trial on this ground. It appears that when counsel for the plaintiffs objected to the remark the court stopped

counsel who had made the same, and stated to the jury that it was improper, and instructed them to disregard it. If counsel who objected to the remark considered it so far prejudicial that its effect upon the jury could not be counteracted, the proper course was to move that the case be withdrawn from the jury, and a mistrial be declared; and, if the court refused to grant this request, the refusal would be subject-matter for review by this court. See *Railroad Co. v. Johnson*, 90 Ga. 501(6), 506, 16 S. E. 49. No such motion was made in this case.

4. Other grounds of the motion for a new trial are to the effect that the court erred in refusing to admit in evidence testimony as to declarations of Stevens and Davis to one of the plaintiffs, tending to show that the money in question was a gift by Davis to Stevens himself, and not to Mrs. Stevens. The court did not err in excluding this testimony. When this trial took place, Davis and Stevens were not parties to the case; and as to Mrs. Stevens the declarations were merely hearsay, not having been made in her presence, nor, so far as appears, by her authority.

5. The verdict is strongly supported by the evidence, and the court below did not err in refusing a new trial. Judgment affirmed.

(33 Ga. 450)

#### FUSSELL v. STATE.

(Supreme Court of Georgia. Oct. 24, 1893.)

CRIMINAL PROSECUTION—IMPEACHMENT OF WITNESS—DELAY IN PROSECUTION—EXPLANATION—CONTRADICTORY STATEMENTS—INSTRUCTIONS.

1. It appearing that the defense sought to draw from the fact that the prosecutor had delayed the prosecution for several months an inference unfavorable to him as a witness, there was no error in allowing him to testify that the prosecution had been thus delayed as the result of a consultation between himself and the solicitor general and another person.

2. There was no error in allowing a witness to testify to a confession which he swears was made by the accused to a third person in the dark, although the witness stated he did not see the accused, but only knew him by his voice. The testimony is admissible, its probative value being a question for the jury.

3. A witness impeached by proof of contradictory statements cannot be sustained by proof of his own declarations, consistent with his evidence at the trial, made at other times and places, whether prior or subsequent to the time of making the contradictory statements imputed to him.

4. Where evidence for the accused tends to impeach more than one of the state's witnesses, the charge of the court on the subject of impeachment should not be restricted to one witness only, but should be broad enough to embrace all to which the evidence applies.

5. Except as to points herein specifically ruled, there was no error.

(Syllabus by the Court.)

Error from superior court, Irwin county; J. L. Sweat, Judge.

Dan Fussell was convicted of arson, and brings error. Reversed.

The following is the official report:

Dan Fussell was convicted of arson, and his motion for a new trial was overruled. The state proved by Lewis Mobley that the storehouse of Mobley & Mitchell was burned, and that he saw defendant strike a match and set the house on fire. There was other testimony to the effect that the defendant voluntarily admitted that he had done the burning. It also appeared that when he was prosecuted for this offense he left the place, and was brought back from another county. The defense introduced testimony to impeach Lewis Mobley, by proof of contradictory statements, which was met by testimony tending to support his credibility.

The first special ground for new trial is that the court, over objection, allowed Lewis Mobley to testify that he consulted T. D. Wilcox and the solicitor general about the case after the burning, and, as a result of the conversation, delayed the prosecution of the defendant; the objection being that this was irrelevant and illegal. It appeared that the burning took place in December, 1889, and that the indictment was found at the next April term of the superior court. It seems from the testimony of Mobley, on cross-examination, that he was asked questions concerning his waiting from December to April to prosecute the defendant, etc.

Over objection, the court allowed Alex Mobley to testify that he never saw Lewis Mobley the night of the burning, the objection being that this was irrelevant and illegal.

Jonas Pearson testified that he heard the defendant (who was his cousin) make a statement about this burning to Carrie Chambers. He said he did the work; that he was offered so much, but only got three dollars and a half a gallon of whisky; that he did the burning of Lewis Mobley's store; and that he was at Pearson's Station "on the scout" from that burning. On cross-examination he testified: "I passed by Dan [defendant] and Carrie Chambers, where they were talking. \* \* \* I waited there about a minute. I don't know how long it had been up to that time since I had seen Dan. It had been four or five years. I did not speak to him. \* \* \* I never went to shake hands with my cousin Dan. I did not really know who he was. I only recognized his voice. They were not by the firelight. They were off in the dark. \* \* \* Q. When did you find out that it was Dan Fussell talking that night? A. On Sunday morning, about eight o'clock. \* \* \* He was talking to Carrie Chambers. \* \* \* He and Carrie were standing there talking, and after he left \* \* \* Carrie Chambers says, 'Did you know that man? You ought to know him. That is Dan Fussell.' She says, 'Didn't you know him last night, when you passed him?' I says: 'I recognized his voice. I did not know his face. I could not see his face.'" The defendant moved the court to exclude from the jury what the witness had testified he heard the

defendant say to Carrie Chambers about the burning, upon the ground that the witness derived his knowledge as to the person who made the statement from hearsay evidence, to wit, what Carrie Chambers told him the next morning. The motion was overruled.

Over objection, the court allowed Julia Graham to testify for the state: "I was hallooing and taking on about the burning, and Lewis Mobley said: 'Hush. I know who burnt it. Dan Fussell burnt it.' We were going to the house when Lewis told me that." And Mary Mobley to testify: "On night of burning, Lewis Mobley had a conversation with me and my brother George. He told George to go home and put on his clothes, and go hunt up Dan Fussell, and kill him, because he saw him set the house on fire. When we got back to the house, George was gone." And Robert Mobley to testify that, next day after the burning, Lewis went to his house, and told him that Dan Fussell had burnt his house down,—burnt his store; that he saw him; that the reason he did not run onto him was because he had a gun, and the man that would do such business as that would kill a man. The objection was that this was hearsay and illegal testimony. It seems to have been offered and admitted in answer to testimony tending to prove contradictory statements by Lewis Mobley. After it had been before the jury for about a day, the court, on excluding similar testimony offered by the state, said: "Gentlemen of the jury, the court instructs you that all such testimony as may have been admitted here before you, offered by the state, showing statements made, not at the scene of the burning, and not at the time and place where the defense has introduced proof that he made contradictory statements, the court instructs you that such testimony is ruled out and excluded from your consideration, and you are not authorized to consider it." The motion for new trial assigns error upon the admission of the testimony objected to, and alleges that this ruling and instruction of the court to the jury were error, and that such instruction was not sufficient to dissipate the effect produced on the minds of the jury by the illegal testimony.

The court, in charging the jury, gave this further instruction: "In this case, gentlemen of the jury, in reference to this matter of impeachment, the court desires again to call the attention of the jury, at this time, to the fact that, when an effort has been made to impeach a witness by proof of contradictory statements made by him, that you only are to consider such testimony as was not ruled out by the court and excluded from your consideration, or such evidence offered by the prosecution to sustain such witnesses as went to show, or tended to show, that at the scene of the burning, at that time and place, the witness in fact did not make the conflicting statement disputed by him, and the fact that he made such statement at that time were considered with

his testimony before you. But, in reference to their showing contradictory statements made by him at any other time and place, that only so far as his testimony shows, at those times and places, that he had made these contradictory statements, disputed by him, and had made statements then and there consistent with statements made by him on the trial of the case, that only and that far and in that respect are you to consider the testimony which was delivered by the various witnesses upon that subject; and you are not to consider any testimony of any witness showing that at other times and places, other than at the scene of burning, and at the times and places as claimed, that other parties were present who testified to contradictory statements made by the witness sought to be impeached. All other times and places to which the testimony has referred have been ruled out, and you will not consider the testimony of any witness that may have testified before you as to these matters." The defendant alleges that this charge was an improper statement of the rules of law applicable on the subject, and that it is abstruse, recondite, ambiguous, and misleading to the jury.

The court charged: "Now, in this case, gentlemen of the jury, it is contended by the defense that they have, in the manner pointed out by this law which the court has given you in charge, successfully impeached one of the main witnesses for the prosecution, by disproving facts testified to by him; by proof of contradictory statements made by him as to matters relevant to his testimony in this case. You will look to the testimony as to that matter, and determine for yourselves how far such impeachment has been successful." This ground avers that counsel for defendant, in arguing the defendant's case before the jury, did not assume the position that one witness only of the state had been impeached by the defense, but insisted during the argument to the jury that several of the state's witnesses had been contradicted by the witnesses of the defendant. Therefore, movant alleges that said charge of the court to the jury was erroneous; that it was an intimation by the court of an opinion as to the effect of the testimony of defendant's witnesses as impeaching evidence. It restricted the effect of the impeaching testimony of the defense to one of the state's witnesses only, and intimated an opinion as to what had and had not been shown by the evidence for the defense with reference to the impeachment and contradiction of the state's witnesses.

Error is assigned on the refusal of the court to charge thus: "A witness who is impeached by being shown to have testified knowingly and willfully false to a material or immaterial fact in the case in which he is sworn, cannot be sustained by proof of general good character." The court charged: "If a witness swears willfully and knowingly false, even to a collateral fact,

his testimony ought to be rejected entirely, unless it be so corroborated by circumstances or other evidence as to be irresistible. But likewise, in this connection, the court charges you that if, from the testimony submitted to you, you shall be satisfied that a witness has been shown to have willfully and knowingly sworn falsely to any material fact in the case, that then, independent of proof of good character, and regardless of that, provided you shall be satisfied from the testimony submitted to you that the witness has been shown to have testified falsely, that you would be authorized to disregard the testimony of such witness entirely, and to give it no place in your investigations. Where it is sought, gentlemen of the jury, to impeach a witness, and likewise to sustain a witness, it is a matter, after all, for the jury to determine for themselves as to how far the effort to impeach has been successful, and as to how far he has been sustained, or as to what weight, if any, they will give to the testimony of such witness in their investigation for the purpose of ascertaining the truth in the case." The defendant alleges that this charge is more favorable to the state than to defendant, and that it was misleading, ambiguous, and erroneous.

Error is assigned on this charge: "If your finding be that of guilty, the form of your verdict will be, 'We, the jury, find the defendant guilty.' If you believe from the testimony, under the rules of law that I have given you, that the defendant is not guilty, the form of your verdict will be, 'We, the jury, find the defendant not guilty.' And, in either event, date, and let one of your number sign, your verdict, as foreman. Take this indictment, and enter upon the consideration of the case."

E. D. Graham, for plaintiff in error. Tom Eason, Sol. Gen., and Hines, Shubrick & Felder, for the State.

BLECKLEY, C. J. 1. The arson for which the accused was indicted was committed by burning the storehouse of Mobley & Mitchell, a copartnership. Lewis Mobley, one of the firm, testified that he saw the accused strike a match and set the house on fire. This occurred in December, and it seems that no steps to prosecute were taken until the following April. The court allowed him to explain the delay, and the explanation given was that he had consulted one T. D. Wilcox and the solicitor general, and that the delay was the result of this consultation. There was no error in allowing the witness thus to explain the delay. As he professed to have seen the offense committed, it would naturally raise the inquiry why he had not sued out a warrant at once, and caused the guilty person to be arrested. The direction taken by the cross-examination of the witness indicated that the defense sought to draw from the delay an inference unfavorable to the



credibility of the witness. The explanation given would tend to rebut or keep down this inference. For that purpose it was legitimate.

2. The witness Jonas Pearson overheard a conversation between the accused and Carrie Chambers, in which the former admitted that he did the burning, and was paid, for doing it, three dollars, and a half gallon of whisky. The witness recognized the accused by his voice, the conversation being carried on in the dark. The motion to exclude the evidence upon the ground that the witness derived his knowledge as to the person who made the statement from Carrie Chambers, the next morning, was correctly denied, for this motion assumed that the witness, in the course of his cross-examination, receded from his testimony that he recognized the accused by his voice, whereas, as we think, he meant to adhere to that testimony, and in no wise qualify it. The jury would know how to estimate the difference between identification made by vision and that made by the sense of hearing, together with a previous acquaintance with the voice of the speaker.

3. The Code (section 3875) declares, "a witness impeached by proof of contradictory statements may be sustained by proof of general good character, the effect of the evidence to be determined by the jury"; a previous section (3871) saying he may be impeached "by proof of contradictory statements previously made by him as to matters relevant to his testimony and to the case." The witness Lewis Mobley was impeached by proof of contradictory statements, and the court admitted, perhaps for the purpose of sustaining him, evidence of other statements which were consistent with his evidence at the trial. This was error. Before the trial was concluded the court discovered the error, and endeavored to correct it by certain instructions to the jury, which are set out in the reporter's statement. We think these instructions were not sufficiently specific. They left the jury to determine what evidence was ruled out or withdrawn, whereas the court should have specified in detail the withdrawn evidence, and should have had it eliminated from the brief or notes of the evidence, so that the jury could have made no mistake as to what was left for their consideration. Touching the inadmissibility of the evidence, see *Railroad Co. v. Oaks*, 52 Ga. 410, and *McCord v. State*, 83 Ga. 531, 10 S. E. 437.

4. In charging the jury, the court dealt with the impeachment of witnesses as if there had been evidence tending to impeach one of the state's witnesses only, the language used being this: "Now, in this case, gentlemen of the jury, it is contended by the defense that they have, in the manner pointed out by this law which the court has given you in charge, successfully impeached one of the main witnesses for the prosecution by disproving facts testified to by him; by proof of contradictory statements made by him as

to matters relevant to his testimony in this case. You will look to the testimony as to that matter, and determine for yourselves how far such impeachment has been successful." The recital of facts contained in the motion for a new trial is duly verified by the judge. One of these recitals is that "counsel for defendant, in arguing the defendant's case before the jury, did not assume the position that one witness only of the state had been impeached by the defense, but insisted, during the argument to the jury, that several of the state's witnesses had been contradicted by the witnesses for the defendant." On looking to the brief of evidence, we find that the jury might have been justified in considering more than one of the state's witnesses as discredited. This being so, the charge on the subject of impeachment should not have been restricted to one only, but should have been broad enough to embrace all to whom the impeaching evidence could have fairly been applied.

5. Except in admitting evidence as to what was said by the witness Lewis Mobley, tending to corroborate what he swore at the trial, and in not afterwards withdrawing it from the jury, in such definite terms as to preclude the possibility of mistake concerning it, and except in charging the jury, as above set out, in terms too narrow, on the subject of impeachment, we discover no error committed by the court, but for these errors there ought to be a new trial. Judgment reversed.

(93 Ga. 457)

# ATLANTA CONSOL. ST. RY. CO. v. HARD-AGE.

(Supreme Court of Georgia. Oct. 24, 1893.)

## ACTION AGAINST CARRIER — WRONGFUL EJECTION OF PASSENGER — EVIDENCE — DAMAGES.

1. It appearing that the conductor of defendant's car was informed that the plaintiff and her child were sick when they boarded the car, there was no error in allowing the plaintiff to testify that she took the car because of the sickness of herself and child, or that her husband desired her to take the car for this reason.

2. There was no error in allowing the plaintiff to testify that at the place where she was ejected from the car there was no protection for ladies or strangers, with reference to the police, although the absence of such protection was not alleged in the declaration.

3. In an action by a married woman against a common carrier for wrongful expulsion from a car, section 3066 of the Code may apply, both in letter and spirit; but the terms of section 3067 are not literally applicable, though the principle of the section, except as to considering the worldly circumstances of the parties, is applicable in so far as injury to the feelings is concerned.

4. In view of the evidence in the record, it was error for the presiding judge to make no allusion whatever to any issue between the plaintiff and the defendant, and none whatever to any defense which might be embraced in the evidence.

5. A request to charge that "the jury must find a verdict on the acts of negligence alleged in the declaration" is susceptible of being misunderstood. Had the request been to charge that there could be no verdict for the plaintiff



based on any negligence not alleged in the declaration, it should have been given.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by Lillie J. Hardage against the Atlanta Consolidated Street-Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

N. J. & T. A. Hammond, for plaintiff in error. Hutcheson & Key, for defendant in error.

BLECKLEY, C. J. 1, 2. We fail to see that there was any error in admitting evidence. The conductor was informed that the plaintiff and her child were sick when they boarded the car. Surely, it was competent for her to testify that she took the car because of the sickness of herself and child, or that for this reason her husband desired her to take the car. If it was a fact that she and her child were sick, and the conductor knew it, why should this not go before the jury? If they were sick people, they were entitled to be treated as such, the conductor knowing of their condition. It is true that whether the sickness constituted the motive for going by the cars or not was of little consequence, but it was not wholly irrelevant, inasmuch as it served to account for the plaintiff's presence on the car, and her relation to the company as a passenger. The declaration did not allege that at the place where the plaintiff was ejected there was no police protection for ladies or strangers, but it was competent to prove this fact, not to show any negligence or misconduct on the part of the defendant, but to show the actual condition in which the plaintiff was placed by the acts of negligence or misconduct which were alleged. The absence of police protection, though not imputable in any respect to any omission of duty on the part of the defendant, would throw some light on the mental distress and suffering which the plaintiff probably underwent when she was ejected, and immediately thereafter during the time she was obliged to remain alone in a sparsely-populated and unprotected neighborhood. It surely cannot be necessary to allege all the surroundings which may serve to aggravate an injury, in order to have them admitted in evidence at the trial.

3. The court charged the jury as follows: "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff. In such cases, no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed by the jury. In every tort there may be aggravating circumstances, either in the act or the intention; and in that event the jury may

give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." This charge is complained of because, under the facts in the case, as alleged and proved, there were no aggravating circumstances either in the act or the intention of the parties who acted for the defendant, and there was no ground for finding punitive damages. The language of the charge is found verbatim in the Code, but the two sections quoted from are presented in their inverse order. Section 3066 reads thus: "In every tort, there may be aggravating circumstances either in the act or the intention, and in that event, the jury may give additional damages either to deter the wrong doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." This section applies to the case, both in letter and in spirit. According to the plaintiff's evidence, her fare had been paid for a passage to the end of the line. She and her infant were both sick. They were put off by the conductor, without any reason or justification whatever, before the end of the line was reached, and when it was about a mile distant. It does not appear what the conductor's intention was, but the act itself was an outrage. It was a gross violation of the duty of the carrier, and a gross disregard of the rights of the passenger. The part of the charge taken from section 3067 of the Code is in these words: "In some torts the entire injury is to the peace, happiness or feelings of the plaintiff. In such case no measure of damages can be prescribed except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attending circumstances should be weighed." The letter of this section does not apply, for where a common carrier wrongfully expels a passenger the entire injury is not to peace, happiness, or feelings. A part of the injury consists in the violation of a public duty by the carrier, and in the inconvenience and delay occasioned the passenger. But the principle of this section, except as to considering the worldly circumstances of the parties, is applicable both as to the measure of damages on account of wounded feelings, and the weighing of all the attendant facts, including the presence or absence of bad faith. In estimating damages for injury to the feelings, whether the entire injury, or only a part of it, consists of that element, no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The charge was inapplicable and erroneous in so far as it made any reference to the worldly circumstances of the parties. Railroad Co. v. Homer, 73 Ga. 251.

4. The eighth ground of the motion for a new trial is well founded. It complains that "the court erred in failing to state to

the jury that the defendant denied the allegations of the plaintiff, and did not state to the jury the issues made by the pleadings and the evidence, and did not charge the jury the defendant's side of the case." The whole charge is in the record. It contains no allusion to any issue between the parties, nor to any defense set up or sought to be established. It submits to the jury the plaintiff's side of the case alone, and, except in finally instructing as to the form of the verdict, it ignores any possibility of a finding in favor of the defendant. On looking to the evidence, we discover that it was legally possible, under an appropriate charge of the court, for the jury to arrive at a conclusion that the case was well defended. The evidence was clear that at the time of the alleged misconduct the defendant had only nine conductors in its employment who ran on the particular line upon which the alleged tort was committed. All of these were examined, and the motorman who ran the car on which the plaintiff said she was a passenger was also examined. If the evidence of these 10 witnesses was true, it was scarcely possible that the plaintiff had any cause of action. She was the only witness as to the misconduct complained of, and there was enough conflict between her evidence and that submitted in behalf of the defendant to render necessary at least some reference in the charge of the court to the case made by the defendant. We doubt not it was an inadvertence on the part of the presiding judge not to have mentioned the defendant's side of the case at all, but it was certainly an error of sufficient magnitude to require a new trial.

5. The request to charge that "the jury must find a verdict on the acts of negligence alleged in the declaration" was properly refused. The declaration was not based on mere negligence. It alleged actual ejection from the car. Doubtless, the purpose of the request was to exclude a finding for the plaintiff based on any negligence not alleged in the declaration. Had the request been so shaped as to convey this idea, it should have been given. In view of the facts of the case, it was subject to be misunderstood and misapplied. Judgment reversed.

(93 Ga. 497)

#### DENHAM v. WALKER.

(Supreme Court of Georgia. Dec. 18, 1893.)

CONDITION IN DEED — PAYMENT OF ANNUITY — MANNER OF PERFORMANCE—EFFECT OF STIPULATIONS—PAROL EVIDENCE.

1. The condition subsequent, as expressed in a deed conveying an estate in fee simple, being the payment of a certain annuity by the grantee to the grantor on a given day in each year during the life of the grantor, the condition was not broken so long as the annuity was not in arrears; and until the condition was broken the grantor had no right to re-enter as for a forfeiture, and no cause of action to cancel the deed as a cloud upon his title.

2. The annuity, although payable in money, could be discharged by payment otherwise, by mutual stipulation and consent; and if the grantor agreed to take, and did take, the rents and profits of the premises, produced by his own management and superintendence of the property, in lieu of the annuity specified in the deed, this was a discharge as to all installments of the annuity which became payable for those years covered by payments of the annuity in this manner.

3. Parol evidence is admissible to show that an annuity payable in money was, during certain years, actually paid by allowing the annuitant, under a parol agreement, to take charge of the premises, rent them out for all he could get, whether more or less than the annuity, and take the whole income; he having in fact so done, and thereby executed the parol agreement, in so far as it applied to the time which had elapsed when the entry for nonpayment was made.

4. The questions submitted to the jury covered the merits of the controversy, and there was no error in not submitting other questions proposed. The evidence, though directly conflicting, warranted the findings, and there was no error in denying a new trial.

5. Error of the court in decreeing upon a verdict is no cause for a new trial, and, there being in the bill of exceptions no assignment of error in the decree itself, the decree is not under review.

(Syllabus by the Court.)

Error from superior court, Richmond county; H. C. Roney, Judge.

Petition by one Denham for the cancellation of a deed, and for an injunction against William L. Walker. Judgment for defendant, and Carrie Denham, executrix, substituted in place of the original plaintiff, brings error. Affirmed.

The following is the official report:

The grounds of the motion for new trial, in addition to those alleging that the verdict is contrary to law and evidence, are as follows: That the court erred in allowing the defendant and his wife to testify that, some 10 days after the execution and delivery of the deed, he and the plaintiff entered into a new contract, not in writing, by which it was agreed that the plaintiff would take the rents of the land in place of the annuity. To this testimony the plaintiff objected on the ground that a writing was necessary to the validity of the subsequent contract. That the court refused to submit, as requested by the plaintiff's counsel, the following questions to the jury: "Was there a new contract entered into by the plaintiff and defendant for the land in dispute, as set out in defendant's plea? Was the alleged new contract evidenced by any writing signed by the plaintiff, or any one authorized by him to sign it? Was there such performance of the alleged contract by the defendant as would make it a fraud for the plaintiff not to perform his part thereof? Was there a valid consideration to support the new alleged contract, or was it nudum pactum? What was the consideration, if any?" And that the court erred in submitting to the jury, in lieu of the above questions, the following: "Has Walker paid Denham annually \$350, under the terms of

the deed? If you answer that he paid the annuity, state how he paid it. Was the payment cash, or otherwise? Was there a new parol contract entered into by the plaintiff and defendant in reference to the payment of annuity, as set out in the defendant's plea? And, if so, when was the contract made? If the contract was made, did Denham agree to accept in lieu of the annuity the income of the property in question, in full payment of the annuity? Did Denham, in pursuance of the parol contract, take possession of the property, and collect rents, or any part thereof?" That the court erred in making the final decree, the same not being authorized under the facts, as found by the jury.

E. F. Verdery and W. H. Fleming, for plaintiff in error. P. J. Sullivan, for defendant in error.

SIMMONS, J. On the 16th of February, 1887, Denham conveyed to Walker an estate in fee simple, upon a condition subsequent, which condition was expressed in the deed as follows: "Provided, nevertheless, and this conveyance is made on the express condition, that the said party of the second part shall pay to the party of the first part, for and during the time of the natural life of the said party of the first part, an annuity of three hundred and fifty dollars, the first of which is to be paid and become due on the 16th of February, 1888." On the 29th of March, 1890, Denham filed a petition for the cancellation of the deed, and for an injunction against the assertion of title thereunder by Walker; alleging that Walker had failed to comply with the condition above stated, and had neglected and refused to pay the annuities as they had fallen due, by reason of which failure petitioner re-entered and took possession of the premises in February, 1890, and that, while the deed was no longer of any binding force, it created a cloud upon the title. The defendant filed a plea in which he set up that "some time after the execution of said deed the said Denham entered into a new contract with this defendant, wherein he agreed that if he (defendant) would allow him (Denham) to collect the entire income of said property, \* \* \* which amounted to a sum as great or greater than the annuity in said deed provided for, and also to apply the whole of said income to his (Denham's) own personal use, for and during the period of his natural life, he (Denham) would look solely and alone to the income of said property, whether the same was greater or less, for the annuity covenanted and agreed upon in said deed, \* \* \* and released this defendant from all further liability therefor," and "that since the execution of said deed, and in conformity to the subsequent contract aforesaid, \* \* \* the said Denham has collected all the rents and income thereof, and ap-

plied the same to his own use." Under questions submitted by the court, the jury found that no annuity had been paid according to the terms of the deed, but that about 10 days after its date a new parol contract was entered into between the parties, as set up in the defendant's plea, by which the plaintiff agreed to accept in lieu of the annuity the income of the property, in full payment thereof, and that in pursuance of this parol contract the plaintiff took possession of the property, and collected the rents. Thereupon, the court decreed that the parol contract so made was legal, and should be carried out, in lieu of the original contract for payment of the annuity. The plaintiff made a motion for a new trial, the grounds of which are set out in the reporter's statement, and the overruling of this motion is excepted to.

1, 2. The condition of the deed was not broken so long as the annuity was not in arrears; and until the condition was broken the grantor had no right to re-enter as for a forfeiture, and no cause of action to cancel the deed as a cloud upon his title. The annuity, although payable in money, could be discharged by payment otherwise, by mutual stipulation and consent; and if the grantor, after he had parted with the property, agreed to take, in lieu of the annuity stipulated in the deed, the rents and profits of the premises, produced by his own management and superintendence of the property, and did in fact take charge of the property, and receive the rents and profits, in accordance with this agreement, this was a discharge of the annuity as to each year in which payment was received in this manner.

3. It was contended that, as the original contract was one which the statute of frauds required to be in writing, any agreement to vary the contract must also be in writing. Whatever may be the proper view as to the admissibility of parol proof to establish an agreement of this kind, where the agreement is wholly executory, such proof is clearly competent where there is evidence that the agreement has been performed. In view of the evidence in this case as to performance, the court did not err in admitting proof of the oral agreement set up in the plea. On this subject, see Wood, St. Frauds (Ed. 1884) pp. 760, 761, § 403; 2 Benj. Sales (Corbin's Ed., 1889) § 215, and note; 2 Reed, St. Frauds (Ed. 1884) § 468 et seq.; Beach v. Covillard, 4 Cal. 315; Dearborn v. Cross, 7 Cow. 48; Le Fevre v. Le Fevre, 4 Serg. & R. 241; and other cases cited by these authorities. Id. pp. 244, 245. The questions submitted to the jury covered the merits of the controversy, and there was no error in not submitting other questions proposed. The evidence, though conflicting, warranted the findings of the jury, and there was no error in denying a new trial. It appears that Denham was an old man, over 80 years of

age, unmarried, and living with Walker and his wife at the time the deed was made; and there is some indication that his intention in making the conveyance was to provide, not merely for himself, but for Walker's wife, who was his grandniece, and to whom he had already devised the property. Walker testified that a few days after the deed was made his wife expressed dissatisfaction with the stipulation as to the payment of an annuity, whereupon Denham said that all he wanted was to have the place during his life, and, if Walker would give him possession and control of the place during his life, he would collect the income, and take it in full discharge of his annuity whether the income was greater or less. He (Walker) agreed to this, and Denham, in pursuance of this agreement, took charge of the place, made contracts with tenants, collected the rents, and appropriated them to his own use; and nothing was said about any claim against him (Walker) until more than two years had elapsed. About that time Denham had some disagreement with him about other matters, left his house, and soon after married; and, after this disagreement, Denham, for the first time, asserted his claim for the annuity. Mrs. Walker testified to the same effect as her husband. Denham testified that he did take charge of the property, under an agreement with Walker, soon after the deed was made, and that he took from the tenants rent notes for that year, for an amount equal to the annuity specified in the deed, taking them as agent for Walker, but retaining for himself the money collected; also, that he continued to do this each succeeding year, until the spring of 1890, shortly before this suit was brought, when he resumed possession in his own right. He denied, however, that the rents thus collected were to be accepted by him in full discharge of the annuity, and claimed that a balance was due him for each year during that period, the amount collected having fallen short of the amount of the annuity. Accepting, as the verdict requires us to do, the defendant's version of the agreement under which the plaintiff took charge of the property and received the rents and profits, it appears that when the suit was brought no installment of the annuity was in arrears. The annuity for each year had been discharged, down to February 16, 1890, the end of the third year, and under the terms of the deed the next installment would not be due until 1891. The plaintiff, therefore, had no right to re-enter, as for a forfeiture, at the time he did, and no right to have the deed canceled as a cloud upon his title. Whether the court erred in decreeing that the agreement set up in the defendant's plea should be carried out in lieu of the original contract for payment of the annuity, it is unnecessary to decide, there being in the bill of exceptions no assignment of error in the decree itself. Error of the

court in decreeing upon a verdict is not cause for a new trial. See *Brand v. Kennedy*, 71 Ga. 707, 709 (4). Judgment affirmed.

(98 Ga. 515)

TURNER et al. v. PEARSON.

(Supreme Court of Georgia. Jan. 27, 1894.)

MOTION FOR NEW TRIAL—EFFECT OF EXCEPTIONS PENDENTE LITE—ACCOUNT STATED WITH EXECUTOR—EFFECT.

1. Upon the hearing of the motion for a new trial, the court had no authority to consider exceptions pendente lite filed by the defendant, assigning as error the striking of certain pleas, there being in the motion no complaint that the court erred in striking the pleas.

2. The only ground of the motion for a new trial being that the verdict was contrary to law and evidence, and it appearing that the evidence demanded the verdict, the court erred in granting a new trial.

3. On consideration of the exceptions pendente lite filed by the defendant, upon which error was assigned here, it is ruled that where the defendant gave a promissory note to the plaintiff's testator in his lifetime, and after his death, upon an accounting and settlement between the defendant and the executor, a new note was given in renewal of the former one, the defendant, when sued upon the last note, could not set up in a plea of payment alleged credits which ought to have been upon the first note, and of which the defendant necessarily must have had knowledge; the pleas alleging no conduct or representations on the part of the executor, in procuring the new note, amounting to fraud, nor setting up any facts showing that in giving the new note anything was said or done by which the defendant should have been deceived or misled.

(Syllabus by the Court.)

Error from superior court, Hancock county; H. McWhorter, Judge.

Action by D. L. Turner and others, executors, against Stephen E. Pearson. A verdict was returned for plaintiffs, a new trial granted, and plaintiffs bring error. Reversed. Judgment on exceptions pendente lite affirmed.

Following is the official report:

The stricken plea was as follows: "The note sued on was given by defendant to plaintiff under the following circumstances, to wit: That about the year 1869 defendant, being indebted to various parties, made application to said Thomas M. Turner, plaintiff's testator, who had previously proposed his assistance, for financial aid to pay off and discharge such indebtedness. This the said Turner agreed to do, taking as his security therefor a transfer from the creditors of the *fi. fas.* or other evidences of indebtedness against this defendant held by them, and taking also from the defendant his promissory note for the amount represented by him to have been paid for such evidences of indebtedness against this defendant; it being expressly understood and agreed between said testator and this defendant that he was to remain in possession, control, and ownership of the property then owned by him; and to pay off, as he might be able, the indebtedness thus contracted

with said testator, said testator entering then and there into a written agreement never to enforce said *fi. fa.* or *fi. fas.* or other evidences of debt against him, but to hold them for his protection. The only real liability of this defendant not by this agreement canceled or liquidated was the note given as aforesaid. Nevertheless, and notwithstanding said executions were paid off as aforesaid, and said note given in consideration thereof, said testator caused the lands of this defendant to be levied on and exposed to sale under one or more of said *fi. fas.* which had been issued against the estate of this defendant's father, Stephen Pearson, who departed this life about the year 1854, being wholly free from any indebtedness at the time of his death, and purchased said lands, taking the sheriff's deed thereto, but having never entered into possession thereof, contracting and agreeing with the defendant that this defendant should continue to remain in the possession, control, and ownership of the same just as though no such ostensible sale had been made, and that the previous agreement made concerning said ownership and possession should remain of force, neither the value of said property nor the amount of said testator's bid being credited on said notes. This defendant sold off various parts of said lands, the proceeds of said sales being paid to said testator, he, by consent of parties, making deeds or titles to the purchasers thereof, and agreeing to credit said note with the proceeds thereof, which credits, had they been properly made according to agreement, would have more than paid off and discharged said note. And this defendant further says that the note, the foundation of this present suit, would have never been made by him to plaintiff but for the fraud practiced upon him by De Lamar Turner, who had the custody of the books and papers of said testator, and who represented to him that he had received full credit for the proceeds of sales of all lands sold by him, when in fact said credits had not been given, of which failure to give said credits defendant was ignorant at the time of the execution of said note, and had no means of ascertaining the same, and did not discover the failure of said De Lamar Turner to give such credits, or the falsity of his representations, until after the same was made and executed; and that he would have never made and executed said note if such knowledge had been imparted to him. Wherefore defendant prays that plaintiff be required to make him a good and sufficient title to the lands described in plaintiff's amended petition alleged to have been the consideration of said note, and that defendant have judgment against said plaintiff for whatever amount may be found due to him after a full investigation of said cause, to be levied of the goods and chattels, lands and tenements, of the said testator in the

hands to be administered. Defendant, in support of the allegation of payment, \* \* \* says that in the year 1872 there was paid to T. M. Turner the proceeds of the sale of 564 (five hundred and sixty-four) acres land sold and conveyed to John M. Garrard, trustee, \$3,587 (thirty-five hundred and eighty-seven dollars), which amount was to go as a credit on his note then held by him; that one hundred acres more of the land of the respondent was sold to Mach Boyer for the sum of one thousand dollars, about the same time; in the year 1877 one hundred and ninety-five acres of his lands was sold to Columbus Boyer, for the sum of \$1,365 (thirteen hundred and sixty-five dollars); also one hundred and twenty-seven acres to A. J. Spratt, for the sum of \$885 (eight hundred and eighty-five dollars), sold in the year 1877 or 1878; also one hundred acres sold to Mrs. R. M. Johnson, for the sum of \$700 (seven hundred dollars), 367 (three hundred and sixty-seven) acres to J. M., J. T., and Columbus Boyer, for \$2,300 (twenty-three hundred dollars); also about seventy acres to Columbus Boyer, for four hundred and ninety dollars; also 44 (forty-four) acres to A. Guill for two hundred and twenty dollars; also 37 (thirty-seven) acres sold to J. M. Lary, for the sum of \$222 (two hundred and twenty-two dollars); also 200 (two hundred) acres land sold of lands of T. J. Pearson, defendant's brother, of which this defendant was to receive a credit of one thousand dollars; also \$800 (eight hundred dollars) paid to T. M. Turner by Mrs. Georgia Ann Culver, from the sale of her lands,—all of which payments aggregate the sum of more than eleven thousand dollars, which sum is in excess of the amounts due; that all of which proceeds from the sale of said lands were paid on this debt, and were in the hands of the executor of T. M. Turner, deceased, at the time of the execution of the note sued on, and knowledge of which was withheld from this defendant."

J. T. Jordan, for plaintiffs in error. Reese & Little, for defendant in error.

SIMMONS, J. 1. The executors of T. M. Turner sued Pearson upon a promissory note dated February 10, 1886, due January 1st next after date, signed by the defendant and payable to De Lamar Turner, executor. The defendant filed an equitable plea, the allegations of which will be found in the official report. On demurrer, this plea was stricken by the court, and the defendant filed exceptions *pendente lite*. The plaintiffs introduced the note in evidence, and closed. The defendant introduced no evidence, and the jury returned a verdict for the plaintiffs. The defendant moved for a new trial, upon the ground that the verdict was contrary to law and evidence; and a new trial was granted. The plaintiffs thereupon filed their bill of exceptions, in which they alleged,

among other things, that the court erred in considering, on the hearing of the motion for a new trial, the exceptions pendente lite, they not being incorporated in or made a part of the motion. In this the court erred. The court had no authority to grant a motion for a new trial upon any other grounds than those set out in the motion. *Shipley v. Elswald*, 54 Ga. 520.

2. The only evidence before the jury being the note sued on, the evidence demanded the verdict; and, the only ground of the motion for a new trial being that the verdict was contrary to law and evidence, the court erred in setting the verdict aside and granting a new trial.

3. The exceptions pendente lite having been sent up in the record, properly certified, this court, on the application of counsel for the defendant in error, granted him leave to assign error thereon. Upon consideration of the error assigned, we are of the opinion that the court below was right in the ruling complained of. Where a debtor by promissory note and his creditor meet and have an accounting and settlement, and the debtor gives a new note for the balance due, in renewal of the old note, we do not think the debtor, when sued thereon, can, without alleging fraud or mistake, set up, in a plea of payment, alleged credits which ought to have been made upon the first note. If the defendant made the payments to the testator, as alleged, he ought to have known, when the accounting and settlement with the executor was had, whether these payments had been credited or not; he ought really to have known more about this than the executor did; and he cannot be allowed, after renewing his note to the executor, to say that certain credits for payments made to the testator should be allowed him now, unless he alleges some conduct or representations on the part of the executor, in procuring the new note, amounting to fraud, or that something was said or done by the executor by which he (the defendant) was deceived or misled. There being no such allegation in the plea in question, it was properly stricken.

Judgment reversed. Judgment on the exceptions pendente lite affirmed.

(116 N. C. 184)

#### ELLIOTT v. TYSON.

(Supreme Court of North Carolina. March 5, 1895.)

##### APPEAL—DETERMINATION OF COSTS.

Where the controversy between the parties has been adjusted pending the action, an appeal will not lie merely to determine the costs.

Appeal from superior court, Pitt county; Bynum, Judge.

Action by L. F. Elliott against C. T. Tyson. There was a judgment for plaintiff for costs, and defendant appeals. Dismissed.

Shepherd & Busbee, for appellant. J. B. Batchelor and T. J. Jarvis, for appellee.

FAIROLOTH, C. J. In this action the parties settled their matters by paying and receiving from each other according to the contract. At the conclusion of the trial, the court rendered a judgment in favor of the plaintiff, and against the defendant, for costs only, and the defendant appealed.

When nothing is involved except costs, an appeal will not be allowed. *Clark's Code*, 560; *Futrell v. Deans* (at this term) 20 S. E. 1013. When the subject-matter of the action has been lost, destroyed, or adjusted between the parties, an appeal will not be allowed for costs only. *State v. Byrd*, 93 N. C. 624. Appeal dismissed.

(116 N. C. 992)

#### STATE v. MILLS.

(Supreme Court of North Carolina. March 5, 1895.)

##### CRIMINAL LAW—INSTRUCTIONS.

Instructions need not be given in the language of the request, but are sufficient if given in substance.

Appeal from superior court, Wake county; Bynum, Judge.

George M. Mills, convicted of murder, appeals. Affirmed.

W. J. Wimberly testified: That his daughter Iana left home with defendant, and that they said they were going to a neighbor's house. That, between 1 and 2 in the night, defendant came back and said, "Some one has killed Iana." That he also said that, when they went on, Iana wanted to go to the Vaughan house, to see the house, stuck her head in the door, and some one in the house knocked her on the head. "He stepped back, and the lick was repeated. He hollowed, and the one in the house told him to shut his mouth, and get away quick, or he would kill him, and he went as fast as he could. Asked him what made him so late getting back. Said he got lost coming back. He did not say what time they got to Vaughan's house, but they could have gotten there before dark. It is  $\frac{3}{4}$  of a mile from my house. Is in a field, cultivated, southwest from my house. That night there was a little blood on his right shirt sleeve. He said it was spattered on there when they struck Iana." This testimony was corroborated by the girl's mother. There was evidence that the girl was pregnant, and that defendant was the cause of her condition. There was testimony that defendant had said that he would make away with a woman in such case if he had to kill her, and testimony that the girl, when asked about her condition, said that, if anything was the matter with her, defendant was the cause of it. A storekeeper testified that, on the day preceding the assault on the girl, defendant had bought laudanum of him, and identified a piece of blood-stained paper as

part of the paper in which he had wrapped it. There was evidence tending to show that defendant had taken the girl to the Vaughan house to have an abortion performed. There was also evidence that defendant was partially blind, and tending to show that his mind was weak. The girl lived for 10 days after the assault, and was heard to say that she was going to die, and that defendant had murdered her.

T. M. Argo, for appellant. The Attorney General, for the State.

**FURCHES, J.** The defendant was indicted for the murder of Iana Wimberly, pleaded not guilty, was convicted of murder in the first degree, and appealed to this court.

The defendant introduced no evidence, and asked in writing that the following instructions be given: "(1) Even if the jury shall find as a fact that George Mills inflicted the wounds of which Iana Wimberly died, and they shall find that she died of those wounds, yet you cannot find him guilty of murder in the first degree, unless you shall also find that the act was the result of deliberation, premeditation, and a design formed beforehand. (2) The jury have a right to inspect the prisoner whom and whose care they have in charge, and, if they shall believe from his appearance and all the evidence that he is incapable of meditating, premeditating, or preforming intelligently a design, they cannot find him guilty of murder in the first degree, though they should further find that he inflicted the wounds, and that she died of them. (3) Though the jury should find that the defendant inflicted the wounds upon the deceased, and that she died of those wounds, yet they cannot find him guilty of murder in the first degree unless they shall also find that there was deliberation, premeditation, a preformed, deliberate design in his own mind to do the act."

The court refused the instructions asked in so far as they are not embraced in the charge as given, which was in writing, and as follows: "(1) Murder is when a person of sound mind and discretion unlawfully killeth any reasonable creature in being and under the peace of the state, with malice aforethought, entire, express, or implied. (2) By sound mind and discretion is meant that the one doing the killing has a will or legal discretion. (3) Malice is a wicked intention to do the injury, and is of two kinds,—express malice and implied malice. Express malice is when a party evidences an intention to commit the crime. Implied malice is when a person commits an act unaccompanied by any circumstances justifying its commission; the law presumes he has acted advisedly, and intended the consequences produced by his act. (4) Every one over the age of 14 years is presumed by law to be of sound mind and discretion until the contrary is proven, and the burden is on the defendant in this case to

satisfy you, but not beyond a reasonable doubt, that he is of sound mind and discretion. (5) By the law of North Carolina, murder is divided into murder in the first degree and murder in the second degree; the punishment of murder in the first degree being capital, and in the second, imprisonment in the penitentiary for a term of years." Chapter 85, Laws 1893, the act dividing murder into two degrees, was here read to the jury. "(7) Your inquiry in this case is: First. Is Iana or Iana Elizabeth Wimberly dead? Second. If yes, did the defendant kill her? Third. If he did kill her, what were the circumstances under which he did the act which produced her death? And, before the defendant can be convicted of murder, the burden is on the state to satisfy you beyond a reasonable doubt of the truth of the first two propositions, and that the killing was one under such circumstances as to make it murder in the first or second degree, under what I shall tell you will be murder in the first and murder in the second degree. (8) Every presumption is in favor of the innocence of the defendant; the only presumption against him being that he is of sound mind and discretion, and hence responsible for his acts. (9) The state relies upon circumstantial evidence to convict the defendant of murder. Circumstantial evidence is not inherently as strong or satisfactory as direct and positive evidence. Still, if it convinces a jury beyond a reasonable doubt, it would be their duty to rely upon it, and to render a verdict of guilty; but if, after weighing all the circumstances relied on and which are proven to the satisfaction of the jury, there is any reasonable way by which they can account for the death of Iana Wimberly without saying that the defendant killed her, it would be their duty to acquit him. (10) The law implies malice in every willful and deliberate and premeditated killing; so that if you find that the defendant and Iana Wimberly started to Jinks' for a leopard plant, and they passed by the Vaughan house, and the defendant, with the gun rack or a like heavy instrument, in pursuance of a design previously formed, inflicted upon the head and face of Iana Wimberly 5 or 6 blows, fracturing her skull, and otherwise injuring her, from which injuries she died, the law presumes the malice, and it will be murder in the first degree. But malice is not implied from the mere killing with the gun rack or other like deadly weapon; the killing must have been done willfully, deliberately, and with a preconceived intention. (11) Where two persons agree to commit a felony, each is responsible for the act of the other, provided it be done in pursuance of the original understanding or in furtherance of the common purpose. Hence (12), if you find that the defendant agreed together with A. J. Wimberly and Julia Atwater and others to take Iana Wimberly to the Vaughan house for Julia Atwater to produce an abortion on her, pro-

ducting an abortion being a felony, and an abortion being as follows: 'Every person who shall willfully administer to any woman either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug, or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother, and every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine drug or anything whatsoever with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes,'—and the defendant, in pursuance of that agreement, carried her to the Vaughan house to effect that purpose, and Julia Atwater killed her in the attempt to produce the abortion, the defendant being present, aiding and abetting, it would be murder in the first degree, if he knew the nature of the act he was doing and that the act was wrong. (13) If you find that the defendant agreed together with A. J. Wimberly and Julia Atwater and others to take Iana Wimberly to the Vaughan house for Julia Atwater to produce an abortion,—and I have just explained to you what is an abortion,—and the defendant, in pursuance of that agreement, carried her to the Vaughan house to effect that purpose, and Julia Atwater was not at the house, and the defendant killed her because of a preconceived, willful, and deliberate purpose to kill her unless the abortion was produced, it would be murder in the first degree; or if he attempted to produce an abortion, and killed her in the attempt, it is murder in the first degree; or if he attempted to kill her with laudanum, procured previously for that purpose, and failing in that, and in pursuance of a plan previously conceived, willfully and deliberately killed her with the gun rack or a like deadly weapon, it is murder in the first degree. (14) If you find as a fact that defendant inflicted the wound upon Iana Wimberly from which she died, but he did not do it deliberately, willfully, and with premeditation, it is murder in the second degree. (15) If you find that he inflicted the fatal wounds, the jury have a right to look at the defendant, and to consider his appearance, together with the evidence which has been introduced; and if his appearance, with such of the evidence as the jury believe, satisfy you that he did not know the nature of the act he was doing, or that it was wrong to do it, he would not be guilty. If his appearance and the evidence which you believe satisfy you he knew the act he was doing was wrong, but he was not of sufficient mind to be capable of deliberate premeditation, he would be guilty of murder in the first degree. (16) If you find the defendant and Iana Wimberly went to

the Vaughan house, and some one else struck the fatal blows, and this defendant had nothing to do with it, as told by him to A. J. Wimberly, if you believe Wimberly, he is not guilty of anything." (17) The court then summed up the evidence, pointing out to the jury the bearing it had on the commission of the deed, the contention of the state, the contention of the defendant, the absence of motive, the fact that the defendant had a right to rely upon the evidence of the state for his defense as much as though he had introduced evidence himself.

There were no exceptions to the charge further than to a failure to give the instructions asked by the defendant. There was a verdict of guilty of murder in the first degree, and judgment of death pronounced, after overruling motion in arrest of judgment and motion for a new trial. Defendant appealed.

It is not contended by the state that the court below gave the instructions in the language in which they were asked. But it is contended they were given in substance and effect, and that is all the law required to be done. *Bethea v. Railroad Co.*, 106 N. C. 279, 10 S. E. 1045, and many other cases. And, upon a careful examination of his honor's charge, it seems to us that this is true; that in substance and effect the court did give defendant's instructions. The three instructions asked by defendant are very nearly the same, except that the second instruction asked his honor to charge the jury that they had the right "to inspect the prisoner," which was given. In our opinion, the tenth, fourteenth, and fifteenth paragraphs of his honor's charge did give in substance and effect the prayers of defendant; and, if they did, there being no other exception, and no error appearing in the record, we must affirm the judgment of the court below. But we have carefully examined the whole charge of the court, and are of the opinion that it is full and fair to the defendant; and, if it does not give in substance and effect the prayers asked by the defendant (as we think it does), that it is a correct exposition of the law of this state as it now exists, under the statute of 1893, dividing murder into two degrees. *State v. Fuller*, 114 N. C. 885, 19 S. E. 797, where this act was fully and ably discussed in the opinion of the court by Justice Avery, and in the dissenting opinion of Justice Clark.

There is no error. Let this opinion be certified, to the end that the sentence of the court may be executed.

(116 N. C. 131)

COX v. MCGOWAN.

(Supreme Court of North Carolina. Feb. 26, 1895.)

DEED OF INFANT—RATIFICATION—DESCRIPTION.

1. Where an infant conveys land, and, upon coming of age, takes up the old deed, and re-conveys by another, in affirmance of it, the original deed is thereby rendered valid ab initio.



2. A deed by defendant described the land conveyed as being "bounded on the \* \* \* south \* \* \* by the lands of C., being the part of the McG. land conveyed by him [McG.] to [the mortgagor], and containing 87 acres, more or less." Before the execution of the deed defendant and C. exchanged certain of their lands, in order to straighten the division line forming defendant's southern boundary. *Held*, that the description included the land conveyed to defendant by C., the specific reference to the southern boundary controlling the general reference to the land as conveyed by McG.

Appeal from superior court, Pitt county; Bynum, Judge.

Ejectment by Sarah Cox against J. B. McGowan. Judgment in part for plaintiff, and from that part of the judgment in favor of defendant plaintiff appeals. Reversed.

A portion of the land involved was conveyed to defendant by an infant, who, upon coming of age, took up the original deed, and executed another in affirmance of it.

Jarvis & Blow, for appellant. Jas. F. Moore, for appellee.

AVERY, J. The plaintiff, Sarah Cox, claims through a purchaser at a foreclosure sale under a mortgage deed executed by the defendant, J. B. McGowan, to one W. H. Cox, wherein the land conveyed is described as "a certain tract of land in the county of Pitt, bounded on the north by the land of S. F. Worthington, on the east by the lands of T. A. McGowan, and on the south and west by the lands of Henry Carey; being the part of the Burton McGowan land conveyed by him to James H. McGowan, and containing eighty-seven acres, more or less." The action is brought for possession, and the land declared for in the complaint is described in the same way as in the deed, except that the second description after the words "land conveyed" is omitted. Prior to the execution of the mortgage, Henry Carey, whose name is mentioned as adjacent owner in the deed, had aliened one and a half acres of his original tract to James B. McGowan, who had conveyed in exchange therefor the same amount of the land previously conveyed to him by Burton McGowan. This had been done in order to straighten the division line between the two; the result being that the line of J. B. McGowan on the south was not the same, when the mortgage deed was executed, in March, 1891, as when Burton McGowan had previously conveyed to him. Carey was not 21 years of age when he executed the deed to the acre and a half, in 1889, but executed another deed for the same, in fulfillment of a promise then made to ratify on arriving at full age, in October, 1891, but after the execution of the mortgage. The deed, being a voidable, executed conveyance, might have been ratified without the execution of another deed. *Turner v. Galther*, 83 N. C. 362 et seq. But that, as an act of affirmance, when done, had relation back, so as to make the original deed valid ab initio, instead of void. 10 Am. &

Eng. Enc. Law, pp. 647, 648, note 1; *McCormac v. Leggett*, 8 Jones (N. C.) 425.

The plaintiff contended that, under the first of the two descriptions, the one acre and a half on which W. H. Cox had erected his improvements passed by the mortgage deed, in March, 1891, the line of Henry Carey, at that time, having been so altered by the exchange as to run south of it. The defendant insisted that the reference to the Burton McGowan deed was equivalent to inserting its calls as a second description in the mortgage deed; and, if that were not so, that the two descriptive clauses might be construed together, so as to give effect to both, and make the two consistent, by adopting the Carey line, described in the Burton McGowan deed, instead of the division line established by the exchange. All rules adopted for the construction of deeds tend towards one objective point. They embody what the law, founded on reason and experience, declares to be the best means of arriving at the intention of the parties. 3 Washb. Real Prop. 428, 429. The intention, of course, relates to the time when the deed is delivered; hence, course and distance, or even what is considered in law a more certain or controlling call, must yield to evidence, if believed, that the parties, at the time of the execution of a deed, actually ran and located a different line from that called for, such evidence being admissible to show the description of the line to be a mistake. *Buckner v. Anderson*, 111 N. C. 575, 16 S. E. 424; *Cherry v. Slade*, 3 Murph. 82; *Baxter v. Wilson*, 95 N. C. 137; *Stanly v. Green*, 12 Cal. 148; 3 Washb. Real Prop. 435. In support of the position stated, we find that Tiedman, in his exhaustive work on Real Property (section 828), lays down the rule as follows: "Contemporanea exposito est optima et fortissima in lege." In construing deeds, courts endeavor to place themselves in the position of the parties at the time of the conveyance, in order to ascertain what is intended to be conveyed; for, in describing the property, parties are presumed to refer to its condition at that time, and the meaning of their terms of expression can only be properly understood by a knowledge of their position, and that of the property conveyed." The familiar rule that the course of a stream called for as a boundary is to be determined by showing the location at the date of the conveyance is referred to as one illustration of the practical operation of the rule.

While there was no proof of a survey or actual marking out of the boundary at the date of the mortgage deed, the foregoing authorities have been cited to show the recognition of the principle that parties are considered, in law, as intending that whatever is understood to be the true line at the date of the deed shall govern. 3 Washb. Real Prop. 435. In March, 1891, J. B. McGowan was bound by his deed, till it should appear whether Carey would repudiate his on arriv-

ing at full age. Carey's conveyance was then voidable, but when ratified, in October, 1891, the exchange made in 1889, to all intents and purposes, became valid. The new south line created by the exchange was the true line referred to as a boundary in the first of the two descriptions, and therefore the second description, which was inconsistent, could not govern. Where a deed contains two irreconcilable descriptions of the entire boundaries of a tract of land, or of a single line, calls for more stable monuments, such as the lines of other tracts, or well-known natural objects, will be adopted, rather than course and distance. 3 Washb. Real Prop. 424; *Buckner v. Anderson*, 111 N. C. 572, 16 S. E. 424; *Proctor v. Pool*, 4 Dev. 370; *Shaffer v. Hahn*, 111 N. C. 11, 15 S. E. 1033. In doubtful cases, the rule that the construction must be favorable to the grantee will prevail, or the maxim that the first description in a deed is presumed to express the true intention of the parties may be invoked to tip the nodding beam. *Vance v. Fore*, 24 Cal. 436. But, whether a specific description comes before or after a general designation, it must prevail, upon the underlying principle that the law will always demand the production of the highest evidence, and, as between two descriptions, will prefer that which is most certain. In *Carter v. White*, 101 N. C. 30, 7 S. E. 473, the court held that the first description, "known as Walker's Island," must yield to a more specific one, by metes and bounds, which did not include the whole island. The boundaries, as set forth in the first description in the mortgage, are the lines of the three adjacent tracts, which, it was admitted, completely surrounded W. H. Cox's place. As we have seen, the parties are presumed to have contracted with reference to the then existing boundaries. After laying down the rules that the true line originally run, old marked lines, or the lines of adjacent tracts, may be proved to vary course, or extend or diminish distance, Chief Justice Taylor, in commenting upon them in *Cherry v. Slade*, *supra*, said that all of the rules were founded "upon the same reason," "the design of all being to ascertain the location originally made." The location originally made must have conformed to the true boundaries then existing. Carey did not then own the one acre and a half, but had conveyed it by a deed, since made valid, so as to remove his line to the south of it, and make the first specific description include it within the J. B. McGowan tract.

Looking beyond our own adjudications, we find that in the case of *Dana v. Bank*, 10 Metc. (Mass.) 250, where, under the first description, the land was completely surrounded by a street, lines of adjacent tracts, and a river, the supreme court of Massachusetts held (as did this court in *Carter v. White*, *supra*) that such a specific description prevailed over a more general one, because it

was more definite, not because it was first given in the deed. But that case is more completely in point here, since the second description there set forth was, "being the same set off to the representatives of the late William S. Crook, deceased, in the division of the estate of Enoch Crook, deceased, recorded with Middlesex Probate Records, b. 177, p. 97, &c." While, in our case, it is admitted that the Burton McGowan deed did not include the acre and a half in controversy, the calls of that deed are not given in the statement of the case, nor is any reference made to the registry, or directly to the deed, for a more perfect description. But in *Dana v. Bank*, *supra*, the more general description refers to the book and page of the record, as exhibiting the whole deed. The description, which calls for lines of other tracts, we can see, fixes the boundaries by what are considered stable and certain monuments, then existing, and is to be preferred to one that is more general, even where the more general designation of the lines can, by reference to other deeds, be made more specific. It is true that in numerous cases, which we need not cite, it has been held that the reference in one deed to another makes it competent to introduce the conveyance referred to in evidence, for the purpose of showing that the original instrument offered is not void for vagueness in the descriptive clause; but it does not follow that there is any conflict between that rule and the one invoked in the decision of this case, that the general designations, such as "known as the 'Brown Place,'" or "known as the 'Mt. Vernon Place,'" though susceptible of location by proof *alunde*, must yield to a more specific description, which marks out the boundaries as lines of adjoining tracts, streets, or rivers, or designated corners, with course and distance, either preceding or following that which is less definite in the same instrument. The parties are presumed to have intended to be governed by the description which they make specific, where it is in conflict with another.

We think that there was error in the ruling of the court below. The judgment is reversed. Let judgment be entered for the plaintiff below.

(116 N. C. 199)

In re FREEMAN et al.

(Supreme Court of North Carolina. March 5, 1895.)

NOTE OF MARRIED WOMAN—RIGHTS OF TENANT BY CURTESY.

1. A note signed by husband and wife jointly is executed with the husband's written consent, within Code, § 1826, requiring his written consent to certain contracts of the wife.

2. In a proceeding by a father as tenant by the curtesy and his son as heir at law of the deceased wife and mother, to sell land formerly the property of the mother, to satisfy a mortgage thereon executed by the father and mother jointly, where the consideration of the mort-

gage was used to benefit the land, equity will not require the curtesy interest of the father to bear the whole burden of the debt, but will require the mortgage to be discharged out of the entire proceeds of the sale, and the value of the father's present interest to be ascertained and paid out of the balance.

Appeal from superior court, Wayne county; Bynum, Judge.

Petition by R. M. Freeman and R. M. Freeman, Jr., by his next friend, for the confirmation of a sale of land. The title to land vested in R. M. Freeman, Jr., as the only heir at law of his mother, subject to the life estate of his father, R. M. Freeman, as tenant by the curtesy. From a judgment ordering a sale of the land, and that the curtesy interest of R. M. Freeman in the proceedings be first applied to the satisfaction of a mortgage lien on the property, and, if such curtesy interest was not sufficient to satisfy the mortgage, that the balance be paid out of the amount due R. M. Freeman, Jr., petitioner R. M. Freeman appeals. Reversed.

Aycock & Daniels, for appellant.

AVERY, J. The note, being in form a joint contract of husband and wife, was, within the meaning of the statute,<sup>1</sup> executed with his written consent. *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998; *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567. While she did not specifically charge her separate personal estate, or enter into a contract in any way enforceable against her, by merely signing such a note as is described in the record sent up, she did afterwards bind the land conveyed in the mortgage deed executed by her husband and herself. *Farthing v. Shields*, 106 N. C., at page 299, 10 S. E. 998; *Thurber v. La Roque*, 105 N. C. 311, 11 S. E. 460; *Williams v. Walker*, 111 N. C. 604, 16 S. E. 708. She might have so incumbered her own land to secure a debt of the husband, created for, and inuring solely to, his benefit. *Shinn v. Smith*, 79 N. C. 310; *Newhart v. Peters*, 80 N. C. 166. Here, however, it is found as a fact that the money which was the consideration of the note was paid to her, and was expended by her in building a house, which, of course, enhanced the value of the land sold. It was competent and pertinent, as between the parties interested, to inquire into the consideration. *Flaum v. Wallace*, supra; *Jeffrees v. Green*, 79 N. C. 330.

The wife died, leaving as her only heir at law the infant petitioner, R. M. Freeman, Jr., who, with his next friend, appointed by the courts, joins his father, R. M. Freeman, tenant by the curtesy, in the petition to sell the land. The sole question presented by the appeal is whether the mortgage

debt, which is a lien upon the land, is to be first discharged out of the purchase money arising from the sale of the land, and then the present value of the husband's life estate in the residue ascertained, and paid to him, or whether the present value of his life estate in the whole fund is to be first determined, and the whole, or so much of it as may be necessary, applied to the payment of the debt, in exoneration of the interest of the heir at law. The wife was not surety for the husband, and her infant heir at law cannot invoke the aid of the principle approved in *Weil v. Thomas*, 114 N. C. 197, 19 S. E. 103, for the reason that his mother did not mortgage her land to secure a debt created by the husband for his own benefit, but to procure money to be expended on the improvement of her separate real estate. The right of the wife to secure the payment of money expended in the improvement of her own land, by conveying it by a mortgage deed, in which the husband joins, and with privity examination of herself, cannot be questioned, as was said by the present chief justice in *Jeffrees v. Green*, supra, "except upon the theory that a feme covert cannot sell or charge her separate estate for her own benefit, or the improvement of her own property." The consideration of the debt having inured to the enhancement in value of the very tract of land now sold, it would be inequitable, when the purchase money comes into court for division between her husband, as tenant by the curtesy, and her heirs at law, to devote so much of it as is due him in lieu of his life estate to the payment of the unpaid balances on the note, on the ground that she, as surety, had pledged her property for his debt. *Atkinson v. Richardson*, 74 N. C. 455. Such a ruling would be founded upon a theory clearly contradictory of the facts explicitly found by the court as the basis of the decree. For the reasons given, the judgment must be reversed, and judgment entered below in accordance with this opinion. Reversed.

(116 N. C. 205)

LANGSTON et ux. v. WEIL et al.

(Supreme Court of North Carolina. March 5, 1895.)

RES JUDICATA.

Where the judgment of the clerk sustaining a demurrer for misjoinder, and dismissing a complaint, in special proceedings before him, is affirmed on appeal to the judge, and an appeal from the judgment of affirmance is not perfected, a subsequent motion to divide the action is properly overruled, as the matters involved are res judicata.

Appeal from superior court, Wayne county; Winston, Judge.

Action by Daniel Langston and wife against H. Weil & Bro. From a judgment for defendants, plaintiffs appeal. Affirmed. The plaintiff Elizabeth Langston, upon in-

<sup>1</sup> The statute referred to is Code N. C. § 1826, providing that, with certain exceptions, the written consent of the husband must be given to contracts of the wife affecting her property.

formation and belief, alleges: "(1) That the late K. W. Langston died on the — day —, 1864, having made no will, and being seised in fee of the following tract of land [describing it], and one other tract adjoining [describing it], all of the above-mentioned tracts being the same conveyed by T. T. Hollowell, administrator, to H. Well & Bro. (2) That at the time K. W. Langston died he had no children, and his only heirs at law were the children of his deceased brother, G. Langston, and Mrs. Lane, his sister, who had six children, the plaintiff Elizabeth being one of them, and was married at the time the said Mrs. Lane died, and her husband is still living. (3) That Mrs. Lane remained in possession of the land after the death of said Langston until the — day of May, 1880, when she died. (4) That said K. W. Langston left a widow, who is now living in Wilmington, N. C. (5) That Hollowell was appointed administrator of Langston, deceased, on April 22, 1865, and on — day filed a petition to sell the land of the late Langston for assets to pay debts. No process or summons was served on the heirs of Grafton Langston or Mrs. Lane, nor has either of them appeared in the so-called 'petition.' (6) That the late Langston had sufficient personal property to pay the debts of his estate. (7) That Hollowell, administrator, in pursuance of this ex parte decree, pretended to sell the land, and on December 29, 1870, made a deed to defendant Well, which is made a part of this complaint." "(9) That said Well, well knowing that said S. H. Denmark [mortgagor], had no power to mortgage this land to him for the purpose of aiding him in cultivating a crop for the year 1891, and in pursuance of power of sale contained in this mortgage, sold the land to one David J. Ezzell, and made deed to him. (10) That said Ezzell, well knowing that Well had no power to make a deed to him, notwithstanding this fact, made a deed to said Well & Bro. (11) That all of the above-mentioned deeds were made to Well & Bro. on account of the authority of said Hollowell, administrator, to sell the same. (12) That defendants took possession of the land in 1880, with full knowledge of all the facts set forth in this complaint. (13) That Denmark, well knowing that he had no power to make a deed to defendants, notwithstanding this fact, and under the right obtained by purchasing the land from Hollowell, made a deed to defendants. Wherefore plaintiff demands judgment that the petition of Hollowell as administrator aforesaid, and the confirmation thereof, to sell lands specified in the complaint, be set aside; that all the deeds specified in the complaint to defendants be canceled; and for such other and further relief," etc.

Demurrer. "Defendants demur: (1) For that the clerk has no jurisdiction of the

cause of action set out in the complaint to set aside the final decree and other orders in a special proceeding to sell land for assets. (2) The clerk has no jurisdiction of the cause of action set out in complaint to cancel certain deeds referred to therein. (3) For that the complaint fails to state facts sufficient to constitute a cause of action, in that it asks to set aside a final decree and other orders made in a certain proceeding before the clerk in 1865, upon the ground that plaintiff, who was then an infant, and a necessary party to said action, was not served with process. (4) For that, upon the facts stated in the complaint, the remedy of plaintiff is by motion in the original proceeding, and not by a new action. Wherefore defendants pray that the proceeding be dismissed," etc.

The proceeding was thereupon dismissed by the clerk, and the plaintiffs appealed to the judge. "The judgment of the clerk is sustained. [Signed] Bynum, Judge," etc. And the plaintiffs appealed. Plaintiffs' counsel move to amend, at September term, 1894, by dividing the case into two actions,—one before the clerk to set aside a final decree obtained in the late court of pleas and quarter sessions to sell lands to pay debts, upon the ground that there was never any service upon or appearance by plaintiffs or any person under whom they claim; the other before the judge in term to cancel and declare null and void the several conveyances specified in the complaint through which defendants claim title to the land. This motion was refused by the clerk, and upon appeal the following judgment was rendered by Winston, J.: "This cause coming on to be heard upon motion of plaintiff to divide the case into two actions (as set out in the above motion to amend), and it appearing to the court that heretofore a demurrer has been filed and sustained, and judgment rendered dismissing this proceeding, it is now adjudged that said motion to divide be denied."

Allen & Dortch, for appellees.

PER CURIAM. Special proceeding, in which defendants demurred to complaint filed before the clerk. The clerk sustained the demurrer, and ordered that proceeding be dismissed. On appeal, Judge Bynum, on the 3d of July, 1894, sustained the ruling of the clerk. From this last judgment the plaintiffs appealed to the supreme court, but did not perfect the appeal. At September term, 1894, of the superior court of Wayne county, plaintiffs moved before Winston, judge presiding, for leave to divide the action into two. The court refused the motion on the ground that the matters involved in the controversy were res adjudicata. The judgment of the court below is affirmed.

(43 S. C. 311)

NEW ENGLAND MORTGAGE SECURITY  
CO. v. KINARD et al.

## Appeal of SIMMS.

(Supreme Court of South Carolina. March 18,  
1895.)REFERENCE — MODIFICATION OF ORDER—SALE BY  
MASTER.

1. An order of reference to a master in chancery is an administrative order, which does not adjudge the rights of the parties, and which may be reviewed or changed by a succeeding judge for cause shown.

2. Where a special master is appointed to take and report to the court certain testimony in a case pending, the master being adjudged disqualified, and a sale is afterwards ordered under the report of the special master, it is within the power of a succeeding judge to declare the master qualified to make such sale, and that the authority of the special master ended with the taking and reporting the testimony.

Appeal from common pleas circuit court of Barnwell county; D. A. Townsend, Judge.

Appeal by W. G. Simms from an order issued by the lower court reviewing and modifying an order appointing the appellant special master in the matter of the New England Mortgage Security Company against W. J. Kinard and James E. Davis. Appeal dismissed, and order sustained.

W. H. Townsend, for appellant. A. H. Patterson, John T. Sloan, Jr., Allen J. Green, H. P. Green, and J. J. Brown, for respondents.

POPE, J. In order that the appeal herein may be correctly apprehended, it will be necessary to make a statement of matters that preceded the orders and judgment from which the appeal is entered. The appellant, W. G. Simms, is the clerk of the circuit court for Barnwell county, in this state, while the respondent is the master for that county. At the March term, 1892, of the court of common pleas for Barnwell, and when the action of the New England Mortgage Security Company as plaintiff against W. J. Kinard and James E. Davis as defendants was regularly called at that term, an order, of which the following is a copy, was passed, namely: "On motion of Messrs. Green and Sloan, plaintiff's attorneys, it is ordered that it be referred to W. Gilmore Simms, clerk of this court, as special master (the master being disqualified), to take the testimony upon all of the issues raised by the pleadings in the above-stated case; and that he report the same to this court. I. D. Witherspoon, Presiding Judge." In pursuance of this order, W. G. Simms, Esq., as special master, held a reference, took the testimony, and reported the same to the court of common pleas. At the July term, 1894, of said court the above-named plaintiff, upon said report and the pleadings, applied to the court for a decree of foreclosure and sale. And in the proposed draft of decree inserted the name of

Mr. Simms, as special master, as the officer to make the sale. Mr. A. H. Patterson, the master for Barnwell county, requested the presiding judge, Judge Townsend, to insert his name as the officer to make the said sale instead of Mr. Simms as special master, claiming, as a matter of right pertaining to his office, that he was the proper person to make the sale. The circuit judge reserved his decision on this point, but on the 2d day of August, 1892, filed the following order: "The case comes before me on a motion to appoint the special master to sell the lands involved in the action. It is claimed that the master is disqualified by an order of Judge Witherspoon, passed in April, 1892. [This order has already been copied in this opinion.] The master contends that he was disqualified at the date of said order, and that said order was passed without any facts upon which to base it; that it was one of several orders signed at the same time, and all drawn alike, upon a typewriter, in three of which he was disqualified, but that in this case he was qualified; and that this order was signed under a mistake or misapprehension. The master further contends that, as W. G. Simms, Esq., has taken the testimony, and reported the same, as directed by said order, his duties as special master are at an end in this case. The law is plain as to what is referred to the master. The trouble is covered by the said order. It is not appealed from. But then it must be remembered that the master, whom it affects mostly in its results, was not a party to the action, and could neither appeal from it nor move to set it aside. He would be equally powerless in any other cause if the parties to the action should see fit to pass an order adjudging his disqualification. It becomes interesting, then, to find out what is his remedy in such cases. I shall not undertake to say whether Judge Witherspoon meant to adjudge the master disqualified generally, or only as to the taking of the testimony. I have before me two officers of the court, each contending that he should sell this land. I think the master is entitled to sell it, unless he is now disqualified. It is therefore ordered, adjudged, and decreed that W. G. Simms, Esq., clerk of this court, show cause before the judge of the second circuit, at his chambers, in Aiken, S. C., at 12 m., on the 10th day of August, 1894, or as soon thereafter as counsel can be heard, why it should not be referred to the master for Barnwell county to sell said land, and that Master A. Howard Patterson be permitted to submit at such hearing such proofs in the form of affidavits or otherwise as he may be advised will tend to disprove the allegation of disqualification, or to establish his qualification to sell said land. It is further ordered that a copy of this order be forthwith served upon W. G. Simms, Esq., and A. H. Patterson, Esq. It is further ordered that on or after the filing

of his decision by his honor, the judge of the circuit court, in the hearing before ordered, plaintiff's attorneys have leave to apply at chambers to the judge of said circuit for a judgment of foreclosure and sale as prayed for. D. A. Townsend, Presiding Judge." At the hearing before Judge Aldrich in pursuance of the foregoing order, W. Gilmore Simms, Esq., as special master, in his return to the rules, showed for cause why A. H. Patterson, as master, was disqualified from making the sale: (1) That by the order of Judge Witherspoon as presiding judge said master had been adjudged disqualified to act in the cause, and the respondent had been appointed to act as special master in the cause; (2) that the order of Judge Witherspoon had not been appealed from, and that it is not competent for one circuit judge to review the order of another circuit judge; (3) that it is not competent for Mr. Patterson, as master, to intervene in this cause, and question the appointment of the special master herein; (4) that by his appointment as special master the respondent is clothed with all the powers of the master in this cause, and should be directed to make the sale under the decree of the court. The matter was heard by Judge Aldrich on this return and the affidavits submitted by Mr. Patterson. He decided that the order of Judge Townsend construed the order of Judge Witherspoon as directing Mr. Simms to take the testimony upon all the issues raised by the pleadings, and report the same to the court, and Judge Aldrich holds that Mr. Simms has complied with that order. Judge Aldrich further construes the order of Judge Townsend as deciding that Judge Witherspoon's order does not apply to or affect the sale of property, which sale the law requires to be made by the master, unless he is disqualified by law. Judge Aldrich then decides that the master is not disqualified from selling, under the testimony heard by him. He therefore made a decretal order providing that the master, Mr. Patterson, should sell. At the hearing before this court all the parties to the action and the attorneys for Mr. Simms and Mr. Patterson himself agreed to the following statement being added to the "case," to wit: "The court having intimated a doubt as to whether the parties to the original action had not a right to be heard before Judge Aldrich in the proceedings under Judge Townsend's order, which order is one of the grounds of appeal, it is agreed that the following statement be added to the 'case': (1) The answer of the original defendant to the original suit was withdrawn, and the plaintiff applied for judgment as stated in the brief. (2) The plaintiff had notice of the filing of Judge Townsend's order, and waived the right of appearance before Judge Aldrich, and hereby consents that this court determine the questions raised by this appeal."

The following are the grounds of appeal

presented by Mr. Simms: "(1) That his honor, Judge Townsend, erred in making said order requiring W. Gilmore Simms, the appellant herein, to show cause before the Hon. James Aldrich, circuit judge, why it should not be referred to the master of Barnwell county to sell said land; (a) because, by the order of Judge Witherspoon, dated April 1, 1892, said master was adjudged disqualified to act in this cause, and this appellant was appointed special master in this cause; (b) because said order of Judge Witherspoon has not been appealed from, and the action of Judge Witherspoon in adjudging said master disqualified and in appointing a special master could not be reversed by another circuit judge; (c) because said master could not intervene, and question the appointment of a special master in this cause; (d) because, by virtue of his appointment as special master, the appellant is clothed with all the powers of master as to said cause, and should be directed to make the sale under the order of the court in this action. (2) That his honor, Judge Townsend, erred in holding that the order of Judge Witherspoon did not appoint the appellant as special master generally, and vest him with all the powers of master as to this cause, but that his appointment as special master expired upon his taking and reporting the testimony in the case. (3) That his honor, Judge Aldrich, erred in holding that he could not consider the effect of Judge Witherspoon's order appointing this appellant special master in this cause."

If we have seemed to cumber the opinion of the court with quotations from the different orders which have entered into the cause while on circuit, it may be explained that we have done so in gentle consideration for the two worthy court officials, who have differed in judgment as to a matter of principle, and not because of the small sum of money involved. It may be profitable in this inquiry to determine the character of the order of Judge Witherspoon, which order is the basal rock upon which this contention is bottomed. When the plaintiff and the defendant had raised certain questions or issues of law and fact by their pleadings, and the action was called up regularly in its appropriate calendar by Judge Witherspoon, he was informed, in effect, by counsel, that they would not ask the circuit judge, as a chancellor, to hear the cause; that they wished an order of reference. Is not an order of reference, granted upon the pleading and by consent, an administrative order? It is no wise adjudges the rights of parties. It is like a rule of survey of any other direction preparatory to trial. If it be purely an administrative order, then it may be altered by a succeeding judge, upon good cause shown. We apprehend, however, that these observations do not dispose of the matter to which appellant wishes our attention. On the contrary, the appellant greatly relies as the basis

(43 S. C. 266)

## SIREs et al. v. SIREs et al.

(Supreme Court of South Carolina. March 6, 1895.)

TESTAMENTARY POWERS—ESTATE UNDER WILL—  
CANCELLATION OF DEED.

of his contention that under the statutes of this state, if a master is disqualified from official service in a cause, and the court so determines, a special master may be appointed by the presiding judge, who shall, as to that cause, be clothed with all the powers of master. Rev. St. § 789. Certainly, Judge Witherspoon, as presiding judge, did expressly hold in his order of reference that the master was disqualified, and, after so holding, did appoint Mr. Simms as special master. The appellant contends that the discretion is by the statute vested in the circuit judge presiding when the question occurs as to the disqualification of the master, and that such discretion, once exercised by him, cannot be interfered with by his successor as presiding judge, but, if erroneous, can only be corrected by appeal. A very serious question lies closely related in this matter, viz. whether an order made by a circuit judge as presiding judge can displace an official without some right of inquiry in that official as to the basis of that judgment. It may be seen that an official might suffer serious loss most unjustly unless some hearing is given to that official before such a serious step is taken by a presiding judge. Very fortunately that question need not be considered in this case, for it seems to us that in construing the order of Judge Witherspoon we must look at its character, and, having done so, it is clear that he intended merely and entirely to pass an administrative order for the taking of the testimony in the cause, and so report the testimony to the court. When this was done, his successor as presiding judge was master of the situation, so to speak. In this very cause the defendants withdrew their answer, thus leaving the plaintiff free to apply to the court for the full relief as demanded in the complaint,—a final judgment. It was then virtually a wiping out of the labors of the special master, and the necessity of his appointment, and thus it was competent for the master to call the court's attention to his supposed rights in the premises. It is manifest from the record that great care was taken to finally settle the respective claims of the master and the special master. There is no complaint from Mr. Simms that the testimony before Judge Aldrich did not demonstrate that Mr. Patterson was not disqualified. We think the foregoing views answer all the grounds of appeal herein. It is ordered that the appeal be dismissed, and the orders below in the circuit court appealed from be sustained.

McIVER, C. J. I concur in the result.

GARY, J. I concur in the result. Even if an order of reference generally is merely administrative in its nature, still there are cases in which the granting of such order would affect a substantial right of a party by depriving him of a particular mode of trial to which he might be entitled by law.

1. In a will devising testator's estate to the widow for life or widowhood, the income therefrom to be received to her own use and for the support of the minor children, a power to sell and convey any or all of the estate "in such manner, upon such terms and conditions, and to such person or persons as she may deem best," and invest the proceeds in other property, and a further general power of appointment by her will of the property or its proceeds, which are to be divided among the children after her death, do not empower her to convey the property upon a nominal consideration or by way of gift.

2. An unexecuted general power of appointment by will, conferred upon a life tenant, will not enlarge the life estate into an absolute estate.

3. An action to cancel a recorded deed executed to one cotenant pursuant to a power in a will, as being unauthorized by such power, and without consideration, and fraudulent as against the other cotenants whose rights are prejudiced thereby, is maintainable by them although they are not in possession, and there has been no actual ouster.

4. In such action plaintiffs may demand judgment on the law side of the court for an amount alleged to be due them from the grantee in such conveyance, and may also ask relief on the equity side from the fraud which they allege will render their action fruitless.

5. The absence from a complaint to cancel a conveyance for fraud of a formal demand for judgment for an amount claimed to be due plaintiffs from defendant will not prevent a judgment from being rendered therefor on the law side of the court, where the complaint contains other allegations sufficient to warrant its rendition.

Appeal from common pleas circuit court of Colleton county; T. B. Fraser, Judge.

Action by Thaddeus W. Sires and others against Samuel W. Sires and others to cancel a deed executed pursuant to a power of sale in a will as being unauthorized by such power, and fraudulent and void as against plaintiffs. From a decree that the deed be canceled the defendant Samuel appeals. Affirmed.

The following are the decree and exceptions:

"This case was heard by me at the term of the court held in February, 1893, on the pleadings and testimony taken before me in open court. The action has been brought to cancel a deed, the proper execution of which is, however, not admitted in the complaint, purporting to have been executed by Martha M. Sires, the widow and executrix of Peter J. Sires, deceased, and conveying to Samuel W. Sires, one of the defendants, the tract of land described in the complaint. Samuel W. Sires is one of the children of Peter J. Sires and Martha M. Sires. The consideration of the conveyance, as stated in the said deed, is three dollars, and the deed is, therefore, on its face voluntary. The plaintiffs claim that they and the defendants, including Samuel W. Sires, are the persons entitled under

the said will as tenants in common, as remainder-men, Martha M. Sires having died without having executed the power of appointment given to her by the will of Peter J. Sires, deceased. The copy of the will is filed with the complaint, and it is only necessary to refer to it. I hold that under the will Mrs. Sires took only a life estate, with power to appoint by will to whom the estate should go at her death, which power she has failed to execute; that she has a power to sell any portion of the estate, and to invest the proceeds arising from such sale, said investments to be also subject to the power of appointment; that on failure to execute the said power all the property was to go to the remainder-men, as provided in the will. Mrs. Sires had no power to sell for a mere nominal consideration, which seems not to have been paid; and the evidence is not sufficient to convince me that there was any other consideration for the deed. If, indeed, any services were rendered to her by her son, Samuel W. Sires, and for which any payment was expected by either of them, the testimony falls sufficiently to show that these services were the true consideration of the deed. I am therefore of the opinion that the deed of Martha M. Sires to Samuel W. Sires, which does not even profess to be the execution of a power of sale, is in fraud of the rights of the remainder-men under the will, and is null and void, as conveying any interest in the land inconsistent with the rights of the remainder-men. If possession on the part of the plaintiff were necessary to enable him to maintain this action, then the possession of Samuel W. Sires, one of the tenants in common, is sufficient. 'The cancellation of the deed does not of itself directly establish plaintiffs' title, and put him in possession of the land; but it enables him, if necessary, to assert his title, and obtain possession.' In *McMeeken v. Edmonds*, 1 Mills, Oh. 295, it is said: 'Nothing is more common than that parties should come into this court to set aside a fraudulent deed preparatory to a trial at law.' The purpose of this action at law was to obtain possession of the premises covered by the fraudulent deed. The other remainder-men in this case can neither enjoy the tenancies in common, nor obtain partition of the land until this deed is out of the way. It is therefore ordered and adjudged that the said deed is, and is hereby declared, fraudulent and void, and that the defendant, Samuel W. Sires, do deliver up the same to the clerk, to be canceled by him, and put on the record of the same in the register's office. It is ordered that the defendant, Samuel W. Sires, do pay the costs of this action."

Exceptions: "(1) For that the presiding judge was in error in holding that the deed of Martha M. Sires to Samuel W. Sires was 'on its face voluntary,' the same reciting a consideration of three dollars. (2) For that the presiding judge was in error in holding

that Martha M. Sires took but a life estate in the lands of her husband, Peter J. Sires, under the will of the said Peter J. Sires. (3) For that it was error to hold that Martha M. Sires had no power to sell the lands devised under the will of the said Peter J. Sires for 'a mere nominal consideration.' (4) For that it was error to hold that the consideration mentioned and recited in the deed of conveyance from Martha M. Sires to Samuel W. Sires 'seems not to have been paid.' (5) For that it was error to hold that there was no consideration for the making of the deed of Martha M. Sires to Samuel W. Sires. (6) For that the presiding judge was in error in holding that the said deed of Martha M. Sires to Samuel W. Sires was without consideration, and fraudulent and void. (7) For that it was error not to hold that possession on the part of the plaintiffs was necessary in order to sustain the action herein. (8) For that it was error to hold that, if possession was necessary on the part of the plaintiffs, the possession of Samuel W. Sires was sufficient; it being shown that the possession of Samuel W. Sires was of such a hostile and adverse character, extending over such a long period, as to work an ouster. (9) For that the presiding judge was in error in holding that one cotenant, against whom there has been no ouster, can bring a suit of this character against any other cotenant. (10) For that it was error to hold that the 'other remainder-man in this case can neither enjoy the tenancy in common nor obtain partition of the land until this deed (Martha M. Sires to Samuel W. Sires) is out of the way.' (11) For that it was error to order that the deed of Martha M. Sires to Samuel W. Sires be delivered up and canceled."

John D. Edwards and Fishburne & Gruber, for appellant. Howell, Murphy & Farrow and O. C. Tracy, for respondents.

GARY, J. This action was commenced in the court of common pleas for Colleton county for the purpose of cancelling a deed of Martha M. Sires, dated August 12, 1878, upon the ground that said deed is fraudulent and void, having been executed, as it was alleged, for the purpose of defeating a trust claimed to have been created by the last will and testament of Peter J. Sires, and that the same was a cloud upon the title of the complainants to a certain tract of land described in the complaint. The complaint alleges that the title to the land in dispute is now vested in fee simple in the plaintiffs and defendants in the proportions set forth in the complaint. This allegation is denied by the defendant Samuel W. Sires, who sets up in his answer title in himself to said land by adverse possession. The complaint does not allege who is in possession of the land. His honor, Judge Fraser, who tried the cause without a jury, sustained the allegations of the complaint as to the question of fraud,



and ordered the deed canceled. The defendant Samuel W. Sires appeals from said decree upon numerous exceptions, which, together with the decree, will be set forth in the report of the case.

Peter J. Sires, in his last will and testament, says: "I give, devise, and bequeath all my estate, real and personal, to my beloved wife, Martha M. Sires, for and during the term of her natural life or during her widowhood. She to receive the income thereof to her own use, and for the maintenance, support, and education of the minor unmarried children by my marriage with my said wife, in such amount, proportions, and shares to each as she may think proper, with power to my said wife to sell, dispose of, and convey all or any portion of my said estate in such manner, upon such terms and conditions, and to such person or persons as she may deem best, with power also to invest the *proceeds* of any such sale in other property or funds, the *income* of which to be applied as hereinbefore provided; and it is my will that, in the event of the marriage of my said wife again, she shall only be entitled during her life to an equal share with my said minor unmarried children of the income of my said estate, and of the *income* of the *proceeds* from such part as may have been sold. And it is also my will, and I do hereby provide, that my said wife shall have power to dispose of, limit, and appoint my said estate, and the *proceeds* of any part thereof that may have been sold, in and by her last will and testament, duly executed, to such person and persons, and for such estate and estates, and with such provisions, limitations, and conditions as she may think proper, and, in the event of the death of my said wife without having made and executed such last will and testament, then it is my will that my said estate, and the *proceeds* of such of it as may have been sold, shall go to and be equally divided between and among such children by my marriage with my said wife as may be living at the time of her death," etc. (*Italics ours.*) The words "with power to my said wife to sell, dispose of, and convey all or any portion of my said estate in such manner, upon such terms and conditions, and to such person or persons as she may deem best," when construed in connection with the other parts of the will, especially with the words which we have italicized, show that it was the intention of the testator to confer upon the life tenant, Martha M. Sires, power to sell, but not to dispose of and convey said property as a gift. A gift of the property would have defeated one of the objects of the testator's will, which was that the income from the property should not only be used for the benefit of the widow, but also for the maintenance, support, and education of the children therein described. The will shows also that the testator contemplated that either the original property or that purchased with the

proceeds derived from a sale of the original property would be in the possession of the life tenant, Martha M. Sires, at the time of her death; and, in case she failed to dispose of it by her last will and testament, the testator provided that it should descend to the children described in his will.

The next question for consideration is whether the land was sold or conveyed as a gift. The deed recites a consideration of three dollars (the receipt of which is therein acknowledged). The presiding judge, in his decree, says: "Mrs. Sires had no power to sell for a mere nominal consideration, which seems not to have been paid, and the evidence is not sufficient to convince me that there was any other consideration for the deed. If, indeed, any services were rendered to her by her son, Samuel W. Sires, and for which any payment was expected by either of them, the testimony falls sufficiently to show that these services were the true consideration of the deed." The circuit judge heard the witnesses testify; therefore his opportunities for judging as to their credibility were greater than those possessed by this court. After a careful reading of the testimony, we agree with the circuit judge in his finding of fact as to the consideration upon which the property was conveyed. The consideration of three dollars expressed in the deed is nominal and formal. The property was therefore conveyed as a gift.

The next question that naturally suggests itself is as to the effect of such conveyance as a gift. A sale implies a consideration, and, when the power is given to sell, and the person conveys without a consideration, or one merely nominal, this constitutes a breach of the trust, and none of the participants therein can take anything by such conveyance. To sustain the position that a power to sell is not fulfilled by the conveyance of the property as a gift, it is only necessary to refer to a few authorities. *Rabb v. Flenniken*, 29 S. C. 278, 7 S. E. 597; *Park's Adm'r v. Society* (Vt.) 20 Atl. 107; *Fronty v. Godard*, Bailey, Eq. 517.

Appellant contends that under the provisions of the will Martha M. Sires took a greater estate than simply a life estate. In the case of *Pulliam v. Byrd*, 2 Strob. Eq. 134, it appears that the testator, in a single sentence in his will, disposed of his property as follows: "My will and desire is that, after all my just debts are paid, that all my property, real and personal, remain in the hands of my beloved wife during her natural life, and that she shall have the disposal of one-half of it at her death." The court says: "Upon what appears to this court to be a correct construction of this will, the wife took an estate in the whole property, which, by the terms of the will, is limited to her life, with a general power of appointment as to the other moiety, without restriction as to time or mode for the exercise or execution of that power. And, if the estate had not

been limited to her life, there is no doubt that she would have taken an absolute interest in one moiety, for the proposition is undeniable that a devise or bequest to one generally and indefinitely, with an unlimited power of appointment, gives an absolute estate. But, though the view taken by the chancellor in his decree is not unsupported by authority, it appears from the general current of decisions and the opinion of eminent jurists that where there is a gift to one for life, with a general power of appointment, the power of appointment, though general, does not enlarge the life estate into an absolute interest, and nothing passes under the clause conferring the power, unless it be executed. As was said by Sir William Grant in the case of *Bradly v. Westcott*, 13 Ves. 453: "The distinction is perhaps slight which exists between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will. But the distinction is perfectly established that in the latter case the property vests. A gift to A. and to such persons as he shall appoint, is absolutely property in A. without any appointment. But if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment to entitle that person to anything." This manner of stating the proposition is in conformity with the opinion of this court, and the distinction drawn, though narrow and refined, is fully sustained by the decided cases. It is unnecessary to enlarge upon a question, the decision of which rests so entirely upon authority." In the light of the cases the life estate of Mrs. Sires was not enlarged into that of an absolute estate, and it was necessary to execute the power of appointment so as to dispose of the property under the will.

The appellant contends that the presiding judge was in error in not holding that possession on the part of the plaintiffs was necessary to sustain the action herein; also that there was error in holding that one cotenant, against whom there has been no ouster, can bring a suit of this character against any other cotenant. The acceptance by Samuel W. Sires of the deed of conveyance, and placing it on record, was notice that his claim to the land was hostile to that of the other cotenant. If the land was owned by the parties as tenants in common, then the action of Samuel W. Sires was an act of wrong, and entitled the parties to seek relief in equity from the alleged fraud upon their rights. The views which we entertain on this subject are expressed in the case of *Miller v. Hughes*, 33 S. C. 541, 12 S. E. 419, in which Chief Justice McIver says: "The foundation of a cause of action in such a case is a fraud, and if the plaintiff, after alleging the fraud, makes further allegations, showing that his rights are impaired or destroyed by the perpetration of the fraud, then he states a cause

of action. Of course, the mere fact that his debtor has perpetrated a fraud, even of the grossest character, gives him no cause of action; but when he alleges facts tending to show that his rights are injuriously affected by such fraud, then he states a complete cause of action, which, if established, will entitle him to relief. \* \* \* But fraud is peculiarly a matter of equitable cognizance, and, when fraud is alleged, and the further allegation is made that such fraud is injurious to the creditor's rights, it seems to us that a court of equity has jurisdiction of such a case. In such a case the creditor does not ask the aid of the court of equity upon the ground that he can obtain no relief at law, but his claim to the aid of equity is based upon the fraud which has been practiced upon him, and from which the court of equity has jurisdiction to relieve him. It is not universally true that a plaintiff must show that he has no plain, adequate remedy at law before he can invoke the aid of a court of equity, for there are some cases in which the jurisdictions are concurrent, and fraud is one of those matters. \* \* \* It is further urged that the claim of the plaintiffs, being a plain legal demand, should first be established by a judgment at law before the aid of equity can be invoked. Whatever embarrassments this might have offered under our former system of judicature, when law and equity were administered by different tribunals, cannot be felt now, under our present system, especially after the Code has provided that both legal and equitable causes of actions may be united in the same complaint. We do not see, therefore, why the plaintiffs may not demand judgment for the amount alleged to be due them on the law side of the court, and in the same action ask relief on the equity side from the fraud which they allege will render their action fruitless. The fact that in the complaint there does not seem to be any formal demand for judgment for the amount due them by the defendant Hughes is of no consequence, provided the complaint contains other allegations, as we think it does, sufficient to warrant such judgment. The exceptions embodying these objections must therefore be overruled." As hereinbefore stated, the complaint alleges that the title to said lands in fee simple is now in the plaintiffs and defendants in the proportions set forth in the complaint. This allegation is denied by the defendant Samuel W. Sires, who sets up, in his answer, title to said land by adverse possession. A legal issue is thus raised, which the parties have the right to have tried by a jury, unless a jury trial is waived in the manner provided by law. The case should therefore be placed on calendar 1 for the purpose of such trial, unless such trial be waived. *McMahan v. Dawkins*, 22 S. C. 320. It is the judgment of this court that the judgment of the circuit court be affirmed, and that the case be remanded to the

court of common pleas for Colleton county for such further proceedings as may be necessary to carry out the views herein announced.

(91 Va. 726)

**BROWN v. EPPS, Serjeant.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. Feb. 14, 1895.)

**CONSTITUTIONAL LAW—TRIAL BY JURY—JURISDICTION OF JUSTICE OF THE PEACE.**

Code 1887, § 4106, as amended by Acts Assem. 1893-94, p. 430, provided that justices of the peace shall have concurrent jurisdiction with the county and corporation courts in petit larceny and other misdemeanors whenever the accused elects to be tried by said justice, and is not in conflict with Const. art. 1, § 10, which provides "that in all capital or criminal prosecution a man hath a right to \* \* \* a speedy trial by an impartial jury," as provision is made for a trial by jury on appeal to a higher court in case of conviction before the justice. Reversing *Miller v. Com.*, 14 S. E. 161, 342, 979, 88 Va. 618.

John Brown, being detained by the serjeant of Richmond under a mittimus from a justice of the peace, applied to the supreme court of appeals for a habeas corpus. Writ refused.

Coalter & Wise and Chas. W. Dunston, for plaintiff. R. Taylor Scott, Atty. Gen., for respondent.

KEITH, P. John Brown filed a petition complaining that he was unlawfully detained in custody by Charles H. Epps, serjeant of the city of Richmond, and praying for a writ of habeas corpus from this court, which was awarded. The serjeant answers that he holds Brown by virtue of a mittimus from J. J. Crutchfield, police justice for the city of Richmond, which is appended to the return, and made a part thereof. Brown, by counsel, demurs to this return as insufficient in law, and for cause of demurrer claims that section 4106 of the Code of Virginia of 1887 (as amended by Acts Leg. 1893-94, p. 430) and sections 4107 and 4108 of the Code are null and void, as being repugnant to section 10, of article 1 of the constitution of Virginia, which declares "that in all capital or criminal prosecution a man hath a right to demand the cause and nature of his accusation, to be confronted with his accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." The case of *Miller v. Com.*, reported in 88 Va. 618, 14 S. E. 161, 342, 979, was decided upon the law as set out in sections 4106-4108 of the Code, and the amend-

ment to section 4106 found in Acts Assem. 1893-94, was designed to cure the defect which this court declared to exist in that section on account of its repugnancy to the constitutional provision just quoted. The amendment consists in inserting after the words "conservators of the peace" the words, "whenever the person charged with any of the offences hereinafter mentioned elects to be tried by such justice," so that the act now reads: "The several police justices and justices of the peace of this commonwealth, in addition to the jurisdiction exercised by them as conservators of the peace, whenever any of the persons hereinafter mentioned elects to be tried by such justice, shall have concurrent jurisdiction with the county and corporation courts of the state of all cases of assault and battery not felonies, petit larceny," etc. Counsel for the petitioner contends that this amendment does not cure the vice, and therefore it will be proper to examine first into the true construction of the statute prior to its amendment, and then to consider the effect of the words introduced by the legislature in the amendment referred to.

Cases involving the jurisdiction of justices of the peace under this and similar statutes have been frequently before this court, and in every instance, save in the case of *Miller v. Com.*, 88 Va. 618, 14 S. E. 161, 342, 979, the validity of the judgment based on the statute has been upheld. See *Thomas' Case*, 22 Grat. 912; *Read's Case*, 24 Grat. 618; *Wolverton v. Com.*, 75 Va. 910; and *Harrison v. Com.*, 81 Va. 491. Inasmuch, however, as it does not appear that the constitutional question here under consideration was presented to the court in any of those cases, it is contended that they are not authorities binding upon us, and it is conceded that their weight as authority is impaired for the reason stated. It does appear, however, that the question of jurisdiction was considered by the court, and, indeed, underlies the exercise of jurisdiction by all courts in all cases, whether specifically presented or not; so that, where it appears that courts of all grades in the state from justices of the peace to this court have gone on uninterruptedly for many years to exercise jurisdiction under a statute, and that during all that time there has been no doubt entertained nor question raised as to the constitutionality of the law, when all this has been done in the presence of an able and inquisitive bar, a strong presumption is raised that the attack has not been made upon the constitutionality of the law, because, in the judgment of the courts and of the profession, no such ground of objection existed. The same class of cases has been considered in our sister states, notably in the cases of *Jones v. Robbins*, 8 Gray, 329; *Shafer v. Mumma*, 17 Md. 331; *Beers v. Beers*, 4 Conn. 535; *Moundsville v. Fountain*, 27 W. Va. 205; *City of Emporia v. Volmer*, 12 Kan. 622; *Wong v. City of Astoria*,

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

13 Or. 538; *Moore v. State*, 22 Tex. App. 117; *Byers v. Com.*, 42 Pa. St. 89; *McGinnis v. State*, 9 Humph. 48. The states whose decisions are here quoted base their jurisprudence upon the common law derived from the same fountains from which ours flows, and their decisions, which are evidence of the common law among them, are strongly persuasive, at least, of the common law as it exists here. Contemplating for a moment the situation in the colonies at the time of the Revolution, we find that the evils complained of by them were the same, the means taken to redress them and guard against their recurrence were identical; therefore their adjudications are entitled to great influence in the construction of similar statutes in our own states. In some of the cases cited prosecutions were for petit larceny, in some for keeping houses of ill fame, and in others for less serious violations of the law. The case from 22 Tex. App. is a very curious one in this: that the court reversed the judgment of the lower court because it had compelled the accused to go before a jury when the statute authorized a trial by a court without a jury, and the prisoner had demanded to be tried in accordance with the statute. The Texas constitution is almost identical in its terms with ours. The offense charged there was an aggravated assault and battery and the court was unanimous. The principle of all these cases is that a statute which confers jurisdiction upon a justice of the peace to try such offenses as are embraced in section 4106 of the Code are constitutional, provided, by a simple procedure, a trial by a jury can be had on appeal to a higher court. 3 Am. & Eng. Enc. Law, p. 731, and 4 Am. & Eng. Enc. Law, pp. 812, 813. The law is so stated by Bish. Cr. Proc. § 893; Sedgw. St. Const. Law, c. 497. In the case under consideration, not only is the procedure simple, but it is an absolutely free and unfettered right of appeal. The prisoner is brought before the justice. The warrant makes known to him the cause and nature of the accusation against him. He is confronted with accusers and witnesses. He is permitted to call for evidence in his favor. He is not compelled to give evidence against himself, and a judgment is rendered against him. If he feels that that judgment is just, he submits to it; if aggrieved by it, he appeals; and by the assertion of his right of appeal the whole force and effect of the judgment is destroyed. That which, by his assent, implied from his silence, would have been a final judgment, pleadable in bar to any future prosecution for the same offense, has, by his act, become of no effect, and he stands as free as before his arrest, subject only to the requirement that he must give bond for his appearance in the appellate court. Now, what is the substance of all this? Does not the determination of the defendant—in which determination he is an absolutely free

agent—wholly set at naught the judgment just rendered against him, and transfer the controversy to another forum, and convert the proceedings before the justice into a proceeding preliminary to a trial which is thereafter to take place in the appellate court, and divest it of all similitude to a final trial? It seems to me that, looking to the reality, and not the form, of things, to their substance, and not to the names by which they are called, that is the conclusion to which we are inexorably driven. Follow the accused one step further, when in obedience to his recognizance, he presents himself before the trial court, under section 4108, and there we find that the language of the statute is, "The accused shall be entitled to a trial by a jury in the same manner as if he had been indicted for the offence in said court;" that is to say, he has the same guaranties thrown around him to secure to him a fair trial by an impartial jury as is given to all other persons accused of crime, and he stands before that jury innocent until his guilt is proved. But it is said that the prisoner is entitled to a speedy trial, and in the *Miller Case*, so often cited from 88 Va. and 14 S. E., the word "speedy" would seem to be considered as equivalent to "immediate," which would have a tendency to limit the discretion of the legislature in prescribing the stages through which a prosecution should pass from the arrest to the conviction of the prisoner. I do not understand the word to have been so used in the constitutional provision which is now being inquired into.

Up to a recent date the procedure in the enforcement of criminal law, beginning with the arrest of the accused, and passing through the various stages to his final trial before a jury, has been more elaborate, and therefore more dilatory, than at present. Until recently the initial step was either the warrant of arrest from the justice of the peace, or a bench warrant from a court, issued upon an information, or upon a presentment or indictment of a grand jury. The office of the bench warrant was to cause the apprehension of the accused, who was then to be taken before a justice of the peace to be examined. By the justice he was sent on to an examining court, and by the examining court was acquitted or remanded for trial. Compare this elaborate procedure with the simplicity of the present day. The accused is arrested, is examined by a justice, is sent to a grand jury, and is then put upon his trial; or, if the prosecution begins with the indictment or presentment, he is tried at once, without an examination before a justice. The utmost simplicity prevails, while every constitutional right is carefully preserved, and the prisoner is secured a "speedy trial before an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty." To my mind, the legislature has taken ample and most satisfactory steps to secure to the

accused his constitutional right of a "speedy trial," not by limiting or confining the legislation as to the mode of procedure by which it has been thought wise to guard at once the rights of the prisoner and the interests of the commonwealth, but by providing that there shall be no undue delay in taking the successive steps in the procedure. Thus, in section 4001 the accused is discharged from imprisonment "if a presentment, indictment, or information be not found or filed against him before the end of the second term of the court at which he is held to answer," unless the failure is due to certain causes set out in the statute, and which need not be here enumerated; and, "if he be charged with a felony he shall be forever discharged if four terms of the county, corporation or hustings court shall pass without a trial," unless the failure to try be for reasons specified in the statute, and which must be made to appear of record. These are means which the legislature has thought sufficient to secure a "speedy trial" within the meaning of the constitution; that is, a trial without delay. If it be said that the statute last cited refers only to felonies, the reply is that that statute, almost in its present form, may be traced back to the birth of our constitutions, and gives much color to the idea that runs through many adjudged cases that the protection of the constitutions was intended only to apply to the graver classes of offenses, such as treason and felony.

I should have no difficulty in declaring section 4106 of the Code of 1887 constitutional were it a case of first impression; but, as I before observed, that statute came under judgment before this court in the very recent case of *Miller v. Com.*, Judge Lewis delivering the opinion, and was held to be repugnant to the constitutional provision above cited. I entertain for the learned judge who delivered that opinion the greatest respect, and I differ from him with a most unaffected distrust in the correctness of my own judgment; and when his position appears to be fortified by the supreme court of the United States, always entitled to the highest consideration, and its force in this case heightened, to me at least, by the estimation in which I hold the justice who delivered its opinion in *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, I feel that distrust greatly intensified. *Callan v. Wilson* passes upon the constitutionality of an act of congress which conferred upon the police justices of the District of Columbia powers very similar to those granted justices of the peace by section 4106, but there, to my mind, the similarity between the two cases ends. The constitution of the United States is a source and grant of power to the congress of the United States. It is an enabling, and not a restraining, instrument. Congress can do nothing except what the constitution, either directly or by reasonable construction, authorizes it to do; while the legislature

of Virginia possesses all legislative power not prohibited by the fundamental law. By the constitution of the United States (article 3, § 2, subsec. 3) it is declared that "the trial of all crimes except in cases of impeachment shall be by a jury." A jury, therefore, is an essential, an indispensable requisite, an integral part of every court held under the authority of the government of the United States for the trial of all crimes. There can be no trial in those courts of a person accused of crime without a jury, by virtue of the plain and unambiguous language above quoted. The presence of a jury becomes, then, a jurisdictional question, and Justice Harlan was well warranted in saying in *Callan v. Wilson* "that a judgment of conviction not based upon a verdict of guilty by a jury is void," under the laws of the United States. The case of *Callan v. Wilson* refers also to article 6 of the amendments of the constitution, and the learned judge seems to find a sufficient support for the conclusion reached in the language there used, which is as follows: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." It may be well to inquire here why the sixth amendment to the constitution was adopted. Certainly it was not necessary in order to secure a trial by a jury; that had already been done, as we have seen, by article 3, § 2, subsec. 3, of the constitution, as originally framed, in language plain and emphatic. "The trial of all crimes except in cases of impeachment shall be by a jury" is the direct and positive mandate of article 3, § 2, subsec. 3, while the sixth amendment says "that in all criminal prosecutions a man shall enjoy the right to a speedy and public trial by an impartial jury"; the provision first quoted putting it beyond the power of congress to create a court for the trial of criminal offenses without a jury, while the language of the amendment recognizes the right of the accused to the enjoyment of a trial by a jury, a right which he could waive if congress saw fit by law to permit him to do so and this amendment stood alone. He could waive the right either expressly or by conduct upon his part necessarily implying a purpose to do so. The sixth amendment, therefore, could not have been intended to secure a trial by a jury.

It is equally certain that it was not the intention of those who insisted on its adoption to weaken or impair the right of trial by a jury. The motive for its adoption is therefore to be looked for in the other provisions

of the amendment. For instance, that the accused shall enjoy the right to a jury trial in the state or district in which the crime shall have been committed, which district shall have been previously ascertained by law; the right to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense. It was to imbue these rights into the organic law—rights not less sacred than that of a trial by jury; rights, indeed, necessary to the complete enjoyment of all the benefits of a trial by jury—that the sixth amendment was adopted. It does not alter or affect in any way the construction of article 3, § 2, subsec. 3. It is a part of the constitution, it is true, entitled to the same weight as other provisions of the constitution, “to be construed and applied in harmony with all the provisions of that instrument.” See *Polindexter v. Greenhow*, 114 U. S., at page 286, 5 Sup. Ct., at pages 903, 962. The language of our bill of rights differs from each and both of these provisions. It does not declare that “the trial of all crimes shall be by a jury”; it does not declare that “the accused shall enjoy the right to a trial by an impartial jury,” but its language is “that a man hath a right to a speedy trial by an impartial jury,”—that is, he has a legal claim to a trial by a jury. A trial by a jury is his privilege. The existence of the presence of a jury is not made a jurisdictional fact without which a court is not duly organized for the trial of criminals, as is the case in all courts of the United States.

Hitherto I have considered this case upon the law as found in the Code of 1887, and it has seemed to me that prisoners had not been denied, under the law as it then existed, any of their constitutional rights; that the proceeding against them before the justice was in the nature of the jurisdiction exercised by an examining court, unless acquiesced in by them, and it was merely a preliminary, and not an unreasonably dilatory preliminary, to the final trial by jury, to which the prisoner had a free and unfettered right, with every guaranty and protection thrown around him to enable him to submit his case to an impartial jury of his country; that, in its essence, the judgment of the justice rested upon the implied assent of the accused, because one word of objection upon his part annulled the judgment rendered, and transferred the controversy to another forum; and I have been constrained to the conclusion that this statute in no wise denied or abridged the constitutional rights of the citizen. If this effect is to be attributed to the failure upon the part of the prisoner to make objection to the exercise of the jurisdiction by the justice by appealing therefrom, a fortiori would his express election to be tried by the justice have that effect. That a prisoner may waive many of his constitutional rights is beyond a doubt. The right to a

trial by a jury is only one among the several rights enumerated in section 10 of article 1 of the constitution. They all stand upon an equal footing. They are all necessary to the complete enjoyment of that personal liberty which is our birthright, and which it is the duty, not only of the courts, but of every citizen, to jealously guard. They are all designed, the one not more than the other, to safeguard the accused in all criminal prosecutions, so that no man may “be deprived of his liberty except by the law of the land or the judgment of his peers.” He cannot be compelled to give evidence against himself, and the law which would require him so to do would be unconstitutional. And yet it is clear that he may waive this immunity. See *Cullen's Case*, 24 Grat. 624. And so, also, it is declared by text writers and adjudged cases that a prisoner charged with a misdemeanor may waive a trial by a jury, where the waiver is expressly authorized by the legislature. I therefore have no difficulty in holding that the act as it now stands is constitutional. It is for those who question the validity of the statute to show that it is invalid. It is not denied that there is a strong presumption in favor of the constitutionality of the law, and in every case, if the law admits of two constructions, by one of which its constitutionality may be sustained, while upon another it would be declared unconstitutional, the courts are held down to accept that construction which maintains its validity. It is said “that to accord to the accused a right to be tried by a jury in an appellate court after he has been once fairly tried otherwise than by a jury in a court of original jurisdiction, and sentenced to pay a fine, or be imprisoned for not paying, does not satisfy the requirement of the constitution.” This language is used by Justice Harlan in the case of *Callan v. Wilson*, and is cited with approval by Judge Lewis in *Miller v. Com.*, 88 Va., and 14 S. E. For the reasons already given, I do not consider this judgment as authority in construing the constitution of Virginia, and I must say, also, that to my mind it does not show a full appreciation of the value of a jury as an instrumentality in the administration of justice. Long experience with juries has satisfied me that all the encomiums passed upon them have done them no more than justice, but, if it be true that the judgment of the justice, rendered, it may be, upon other evidence than that adduced before them in the face of the law which requires them to try the prisoner as though upon an indictment, and to consider him innocent until he is proven guilty; if I say, in the face of that plain duty under the law, a jury is so easily swayed and influenced in its judgment, and is so incapable of being controlled by the law and evidence before them,—then my estimate of the value of jury trials must be reconsidered. My experience, however, is that, while juries have faults, those faults do not lie in the direction

of ready subservience to authority. They are very much more apt to disregard the direct instructions of the court presiding at the trial than to attribute any, even the slightest, weight to the judgment of the justice. But, even if it were so, grant that the jury is prejudiced by the judgment of the justice, is that the fault of the law? The law declares that the prisoner shall not be so prejudiced. If a jury, in disregard of the law, visits upon the prisoner the consequences of the judgment from which he has appealed, it is due not to any vice in the law, but to the infirmity of human nature; but I think those who have had a large experience with juries would be ready to acquit them of any such imputation, and would decline to share the distrust in the integrity, intelligence, and impartiality of juries manifested by those who indulge the apprehension which seems to be indirectly expressed in the paragraph last quoted from *Callan v. Wilson*. The former conviction could not be said to constitute an impairment of the right of trial by jury, unless it worked a prejudice to the prisoner; and with a free and unfettered appeal to a jury it could work no prejudice to the accused unless the jury, recreant to its sworn duty under the law, disregarding the plain mandate of the statute, heedless of the instructions of the court, should try him, not upon the law and evidence before them, but upon the judgment of the justice which had been annulled and effaced. This apprehension appears to me to be strained and fanciful in the extreme, and must rest as its ultimate support upon a distrust in the integrity of that tribunal which has been for centuries regarded as the great bulwark of the liberties and immunities of the citizen against encroachment from any quarter. A weak defense it would prove were it so ignorant, so feeble, or so corrupt. We are therefore of opinion that the writ of *habeas corpus* should be denied, and that the prisoner should be remanded to the custody of the serjeant of the city of Richmond.

(93 Ga. 579)

## ROUNSAVILLE et al. v. MCGINNIS.

(Supreme Court of Georgia. March 19, 1894.)

WRONGFUL LEVY OF EXECUTION — SUIT TO RESTRAIN VENUE—COUNTY OF CREDITOR'S RESIDENCE—SHERIFF AS JOINT TRESPASSER.

1. Where, in an action for the recovery of personal property, judgment was rendered against the defendant and one who was ostensibly security upon his statutory bond, given under section 3419 of the Code, the court rendering judgment having jurisdiction of the case and the judgment being valid on its face, an execution duly issued thereon will protect the sheriff levying the same upon the property of the security, whether the bond was genuine or not. It follows that, if the bond was forged, the sheriff is not, by reason of making such levy, a trespasser, either separately or jointly, with the plaintiffs in the execution. A suit for trespass brought in the county of the sheriff's residence, against him and the plaintiffs in execution, the latter being residents of another county, is

thus not maintainable, in so far as the question of jurisdiction depends upon the defendants in the action being suable as joint trespassers.

2. Nor is jurisdiction over the nonresident defendants maintainable on the theory of a "pending proceeding," the levy of the execution and other ministerial acts to effect a sale not being a "pending proceeding," within the meaning of section 4183 of the Code.

3. The joint action against the sheriff and the nonresident defendants for trespass being without merit as against the former, and without jurisdiction as against the latter, a prayer for injunction contained in the petition against proceeding with the levy should be denied, more especially as no suit whatever, either at law or in equity, is requisite to prevent the enforcement of the levy on the ground that the bond was a forgery as to the ostensible security. A mere affidavit of illegality would be available for that purpose, the security never having had his day in court on the question of forgery.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Petition by V. B. McGinnis against Rounsaville & Bro. to restrain the enforcement of a judgment and execution, and asking for a recovery of damages for a wrongful levy. Judgment for plaintiff, and defendants bring error. Reversed.

Irwin & Bunn, for plaintiffs in error. John W. Akin, for defendant in error.

SIMMONS, J. Houseal and Treadway commenced a statutory action for the recovery of personal property against Sims & Auchmuty, in Haralson county, and made the usual affidavit to hold to bail. The property was seized by the sheriff of that county, and a replevy bond was executed by the defendants, and the name of McGinnis as surety was signed thereto by his son. Judgment was rendered against Sims & Auchmuty as principals, and against McGinnis as surety, on the bond. Execution issued thereon, and was assigned by the plaintiffs to Rounsaville & Bro., of Floyd county, who had it levied upon land of McGinnis in Bartow county. McGinnis thereupon filed his petition for injunction in the latter county, against the sheriff of that county and Rounsaville & Bro., seeking to restrain the enforcement of the judgment and execution above alluded to, on the ground that he had never signed the bond upon which the judgment was founded, nor authorized his son to sign it, and had never heard of the case nor the bond until after the judgment was rendered. He prayed also for the recovery of damages against the sheriff and Rounsaville & Bro. as joint trespassers. A restraining order was granted, and at the hearing the judge decided that the same be continued until the termination of the cause. The defendants excepted to this decision, and to the refusal of the judge to hold that the superior court of Bartow county had no jurisdiction of the case, and to his not holding that the plaintiff had a complete and adequate remedy at law without the intervention of equity jurisdiction.



1. It appears from the record that the judgment against McGinnis upon the replevy bond was rendered by a court having jurisdiction of the case, and was valid upon its face. Code, § 3419. This being so, the execution issuing from that judgment would protect the sheriff in levying upon the property of McGinnis, one of the defendants in execution, whether the bond in question was genuine or not. It follows that the sheriff was not, by reason of making the levy complained of, a trespasser either separately or jointly with the plaintiffs in execution. The sheriff not being a trespasser, and the plaintiffs in execution not being residents of the county in which the sheriff resided, a suit for trespass against them in that county was not maintainable, in so far as the question of jurisdiction depended upon their being suable as joint trespassers.

2. It was contended that jurisdiction over the nonresident defendants was maintainable upon the ground that the petition was filed to stay a "pending proceeding," within the meaning of section 4183 of the Code, which declares: "All bills shall be filed in the county of the residence of one of the defendants, against whom substantial relief is prayed, except in cases of injunctions to stay pending proceedings, when the bill may be filed in the county where the proceedings are pending, provided no relief is prayed as to matters not included in such litigation." Under this section jurisdiction may be entertained against a nonresident of the county if the proceeding sought to be stayed is a suit instituted by him in a court of that county; but we do not think the levy of an execution and other ministerial acts to effect a sale are a "pending proceeding," within the meaning of this section. The only cases we have found in which this court has held that a petition to restrain a levy could be maintained against a nonresident are the cases of *Wright v. Railroad Co.*, 64 Ga. 794, and *Mayo v. Renfro*, 66 Ga. 408, which are clearly distinguishable from the case now under consideration. In the first of those cases the execution was for taxes due the state, and was issued by an officer of the state in Fulton county, and levied by an officer of the state in Bibb county. The court held that there was equity in the bill, and, as the state could not be sued, the bill might be filed in either county against either of these officers; and, the wrong being about to be perpetrated in Bibb county by an officer residing in that county, the court of that county was the better entitled to the jurisdiction. In the other case referred to the execution was issued by the governor of the state, and levied by the sheriff of Washington county; and this court held that the superior court of that county had jurisdiction to enjoin the levy, because the sheriff resided in that county, and nobody else could be sued, and that damage could be arrested only by restraining him. So it will be seen that juris-

diction was entertained in these cases upon their own peculiar facts, which are very different from the facts in the present case.

3. Having shown that the action was without merit as to the sheriff, and could not be maintained against the nonresident defendants for want of jurisdiction as against them, it follows that the prayer for injunction against proceeding with the levy should have been denied, more especially as no suit whatever, either at law or in equity, was necessary to prevent the enforcement of the levy on the ground that the bond was a forgery as to the ostensible surety. A mere affidavit of illegality would have been sufficient for that purpose, inasmuch as the surety had never had his day in court on the question of forgery. Judgment reversed.

### COLEMAN v. STATE.

(34 Ga. 85)

(Supreme Court of Georgia. June 4, 1894.)

CRIMINAL LAW—IMPEACHMENT—RECORD OF CONVICTION—ORDER OF TRANSMISSION—FAILURE TO ENTER—BURGLARY.

1. The record of the conviction of a witness of larceny is admissible in evidence to impeach him.

2. As the act creating the city court of Macon (Acts 1884-85, p. 470) invests it with jurisdiction over all misdemeanors committed in the county of Bibb, it is a court of general jurisdiction as to such misdemeanors, and the requirements touching the transmission of indictments from the superior to the city court are only regulations for the exercise of that general jurisdiction. Hence, notwithstanding the requirement that when an indictment for a misdemeanor is transferred from the superior to the city court the order of transmission shall be entered on the minutes of both courts, a certified transcript from the minutes of the city court of the record of a conviction for a misdemeanor in that court upon a transferred indictment is not rendered inadmissible in evidence because there was a failure to enter the order of transmission on the minutes of that court, it affirmatively appearing by the minutes of the superior court that such order was in fact duly passed.

3. The evidence fully warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Moses Coleman was convicted of burglary, and brings error. Affirmed.

Jas. H. Blount, Jr., for plaintiff in error.  
W. H. Felton, Sol. Gen., for the State.

LUMPKIN, J. Upon trial of Coleman for the crime of burglary, in the superior court of Bibb county, one Stevens testified as a witness in his behalf. For the purpose of impeaching this witness, the state offered in evidence a record from the city court of Macon of his conviction of the offense of larceny from the house. This record was admitted by the court over two objections made by the accused. One of the objections was that a witness could not be impeached in this manner, even if the record was in all respects regular. It has been settled by



two decisions of this court that this objection was not well taken. *McGruder v. State*, 71 Ga. 864; *Railroad Co. v. Homer*, 73 Ga. 251. And see *Doggett v. Simms*, 79 Ga. 257, 4 S. E. 909. The other objection was that, the indictment against Stevens for larceny from the house having been transferred from the superior court of Bibb county to the city court of Macon, the latter court did not acquire jurisdiction of the case, because the requirements of section 31 of the act creating the city court were not complied with, it not appearing in the transcript from the city court that the order transferring the case had been entered on the minutes of that court, and the law being that the order of transmission should be entered upon the minutes of both courts. In all other respects the transcript from the city court was complete. It consisted of an indictment against Stevens for larceny from the house of goods of the value of less than \$50; a plea of not guilty; verdict of guilty; and sentence of the court. The state also introduced the minutes of the Bibb superior court, showing the return of this indictment, and an order duly passed transferring the case to the city court; so there can be no doubt that the case was properly and legally transferred from the superior to the city court. After passing the order transferring the case, the superior court had no further jurisdiction over it. By the force and effect of this order, the jurisdiction was immediately vested in the city court. Under the act (cited in the headnote) creating the city court of Macon, that court is invested with jurisdiction over all misdemeanors committed in the county of Bibb, and it is therefore a court of general jurisdiction as to such misdemeanors. The requirements touching the transmission of indictments to it from the superior court are merely regulations for the exercise of that general jurisdiction. This is especially so as to the requirement that the city court shall enter the order of transmission upon its own minutes. We therefore are satisfied that the city court had jurisdiction over the indictment against Stevens, and that it had sufficient legal authority to try and dispose of the case. Therefore the objection to the record of Stevens' conviction with which we are now dealing was properly overruled by the court. On the merits the evidence was amply sufficient to sustain the verdict of guilty rendered against Coleman, and a new trial was properly refused. Judgment affirmed.

(94 Ga. 83)

## OLIVER v. STATE.

(Supreme Court of Georgia. June 4, 1894.)

## CRIMINAL LAW—STATEMENTS OF ACCUSED AT PRELIMINARY TRIAL.

A statement made by the accused upon his commitment trial is admissible against him upon his trial in the superior court, but when

such statement has been reduced to writing, as required by law, the writing is the highest and best evidence of what the accused did state. The presumption being that the magistrate did his duty, and reduced the statement to writing, parol evidence as to what the accused stated is, in the absence of proof that the statement was not in fact reduced to writing, or that the same has been lost or destroyed, inadmissible.

(Syllabus by the Court.)

Error from superior court, Houston county; C. L. Bartlett, Judge.

Charlie Oliver was convicted of a crime, and brings error. Reversed.

W. B. Dew, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., for the State.

LUMPKIN, J. There is but one question of law in this case requiring notice at our hands. One of the grounds of the motion for a new trial alleged that the court erred in admitting, over the objection of counsel for the accused, the testimony of one Davis as to what the prisoner stated on his commitment trial, "It not having been shown that the written statement was lost, and it being presumed that the statement was put in writing." There can be no doubt that a statement made by the accused upon his commitment trial is admissible against him upon his trial in chief. *Dumas v. State*, 63 Ga. 600. But when such statement has been reduced to writing, as the law requires, the writing is the highest and best evidence of what the accused did state. It being the duty of the committing magistrate (Code, § 4733) to reduce the statement to writing, it will be presumed, in the absence of any proof to the contrary, that he did so; and therefore, unless it be shown that the statement was not in fact reduced to writing, or that the same has been lost or destroyed, parol evidence as to what the accused stated is inadmissible. This court has decided definitely that, when the magistrate has reduced the statement to writing, that paper is the highest and best evidence as to what the statement was. *Cicero v. State*, 54 Ga. 156; *Daniel v. State*, 65 Ga. 199. These rulings are distinctly supported by the text of Whart. Cr. Ev. (9th Ed.) § 667. The author says: "Where the prisoner voluntarily confesses before the examining magistrate, and where it is the duty of the latter to take the examination in writing, when such is done, the writing alone, if producible, is evidence of the confession, and the writing cannot be varied by parol proof,"—citing numerous authorities, among them *Rex v. Jacobs*, 1 Leach, Cr. Cas. 309, in which it was held that: "Parol evidence cannot be given of the examination of prisoners taken before the magistrate; for it must be intended that it was put in writing, as the law requires." See, also, the note to this case on page 310. Also, 1 Tayl. Ev. § 399, in which it is laid down that: "Parol evidence cannot be received of the statement of a prisoner before the magistrate, where the

examination has, in conformity with [the statute], been reduced into writing, and subscribed, and returned by the justice." So we think the law is well settled both as to the presumption that the magistrate did his duty in reducing the statement to writing, and that in such case the writing itself is the highest and best evidence of the prisoner's statement. We very readily grant a new trial in this case, because, under the evidence, the conviction was, to say the least, of exceedingly doubtful propriety. In this we all agree. Speaking for myself only, I do not hesitate to declare positively that, in my opinion, the verdict of guilty was manifestly wrong, and under the evidence it ought never to have been rendered. Judgment reversed.

(93 Ga. 316)

**HUDSON v. EAST TENNESSEE, V. & G. R. CO.**

(Supreme Court of Georgia. June 11, 1894.)

**AMENDMENT OF DECLARATION — RAILROAD COMPANY—INJURY TO PERSON ON TRACK.**

The declaration, with the amendment which was disallowed, if not without it, contained a good cause of action, and the court erred in not allowing the amendment, and in dismissing the action.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Mary Hudson against the East Tennessee, Virginia & Georgia Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

The following is the official report:

Action was brought to recover of the railroad company the value of the life of Hudson, a minor son of plaintiff, 18 years old, unmarried and childless, who contributed to her support, she being dependent on him for the same. Defendant moved to dismiss the declaration as setting forth no cause of action. The court announced that he would sustain the motion, whereupon plaintiff offered an amendment. This the court refused to allow, on the ground that there was nothing in the declaration to amend by; and dismissed the case. To these rulings the plaintiff excepted. The declaration alleges that on February 25, 1891, Hudson was in defendant's yard, where he had been working for several days to learn the yard, by the license, permission, and consent of defendant. He was not employed by defendant, but was allowed and permitted by it to stay in the yard, that he might learn the yard, and do odd jobs without pay, and had been promised a regular job by defendant. He had just stepped off of one track in the yard to avoid a moving train, and had stepped upon another track, and was watching a train of the Atlanta & Florida Railroad that was moving through the yard, when defendant's servants in charge of a switch engine suddenly and without notice or warning to

him "kicked" a freight car back on the track on which he was standing, and it ran over him, and produced such injuries that he died in a short time. Defendant's servants were negligent in "kicking" the car back, instead of moving it in the regular manner, by pushing it with the engine, and in not seeing Hudson on the track when they ought to and could have seen him if they had looked. Neither the conductor, engineer, nor fireman of the engine was on the lookout, and had put no one else on the lookout. The train hand whose duty required him to be on the front or forward end of the train when moving was out of his place, and on the end of the car nearest the engine, and did not try to look to see whether any one was standing on the track. All of said acts and omissions constitute gross and criminal negligence, and show a wanton disregard of the life of Hudson, who was entirely free from fault, and in no way contributed to the cause of his death. He was standing, when the car was "kicked" back, sufficiently far from the end of it for the crew of the engine to have seen him, and had been standing on the track long enough for them to know that he was on the track. He did not know, and could not have known, that it was their intention to move said car, or "kick" it over the ground he occupied. The spot where he was killed was adjacent to the stopping place of the Atlanta & Florida and defendant's passenger trains, and was the public landing place where the passengers of said trains embarked and disembarked; and there was a constant bypath used by the public, with the knowledge and acquiescence of the defendant, over the track at the spot where Hudson was killed. At the time he was killed, an Atlanta & Florida passenger train was at said point; and, by reason of all the foregoing facts, a greater duty was imposed on defendant to exercise care and caution in moving trains along at this point. The amendment offered but disallowed alleges that when Hudson stepped upon the track on which he was killed, to avoid the Atlanta & Florida train, his attention was attracted by said train, and the din and clatter in the yard and the hissing of steam on said train, and he was looking at it; and that the employes in said yard constantly walked or stood on said track, and the public frequently stood there; and the servants of defendant in charge of the train that killed him knew these facts.

E. M. & G. F. Mitchell and Arnold & Arnold, for plaintiff in error. Dorsey, Brewster & Howell, for defendant in error.

SIMMONS, J. Under the facts alleged in the declaration and the amendment thereto, the court erred in sustaining the demurrer. The court ought to have allowed the jury to pass upon the question whether the company was negligent in "kicking" the cars at

so public a place as the one described in the declaration, and upon the question whether there was negligence on the part of the plaintiff, who was an employé of the company, barring his right to recover. These questions are more appropriate for the jury than for the court. See 4 Am. & Eng. Enc. Law, p. 935, and authorities cited. Judgment reversed.

(93 Ga. 600)

**MONTGOMERY et al. v. PAYNE.**

(Supreme Court of Georgia. March 19, 1894.)

**CLAIM BY MORTGAGOR'S WIFE—EVIDENCE—RELINQUISHMENT OF RIGHTS—ESTOPPEL.**

1. In the trial of a claim case involving the title to an undivided one-fifth of a tract of land, the claim having been filed by the wife of the defendant in a mortgage *fi. fa.*, it was error to reject, when offered by the plaintiff in *fi. fa.*, a deed older than the mortgage, which deed was made by the husband, under the provisions of section 1969 et seq. of the Code, conveying the entire tract for the purpose of securing a debt to another creditor, there being on the deed an entry, signed by the wife, in these words: "After having been made acquainted with the contents of the foregoing deed, and being fully informed of its purpose and the object intended to be accomplished thereby, I, Sallie L. Payne, do hereby voluntarily, and of my own free will and accord, consent thereto."

2. It was also error to reject a deed, made before the execution of the mortgage, by which this other creditor reconveyed without warranty, save as to himself, his heirs, executors, and administrators, the tract of land in question to the husband alone; and also to reject evidence tending to show that after the mortgage was executed the wife had applied for a homestead in the tract as the property of her husband, it appearing that the wife had inherited an undivided one-fifth of the land from her father's estate, but that she and her husband had lived upon it together for many years.

3. The evidence in question, while not sufficient to absolutely estop the wife from asserting title against the executors of the mortgagee, was admissible in determining the question of title made by the issue in the claim case.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Proceeding by John Montgomery and others, executors, against one Payne, under a judgment of foreclosure upon certain land, in which Mrs. Payne interposed a claim to the undivided interest in the land. Judgment for claimant, and plaintiffs bring error. Reversed.

Dabney & Fouché and J. S. Fouché, for plaintiffs in error. Dean & Smith, for defendant in error.

**SIMMONS, J.** Mrs. Payne inherited an undivided one-fifth of the land in dispute from her father. In 1878 her husband made to John M. Berry a warranty deed conveying the premises in dispute to secure a loan under section 1969 et seq. of the Code. On this deed was indorsed a statement in writing, signed by Mrs. Payne, that, after having been made acquainted with the contents of the deed, and being fully informed of its purpose, she, of her own free will, consent-

ed thereto. In 1883, Berry reconveyed the premises to Payne, and the conveyance was recorded on the day it was dated. Payne afterwards, on the 17th of January, 1884, gave to Thomas Berry a mortgage on the same land, and, Payne failing to pay at maturity the note to secure which this mortgage was given, the mortgage was foreclosed, and the land levied upon under the judgment of foreclosure; and Mrs. Payne interposed a claim to an undivided interest in the land. On the trial of the claim, the plaintiff offered as evidence the deed to John M. Berry, with the written indorsement of Mrs. Payne thereon, above referred to, and also the reconveyance by John M. Berry to Payne of the same premises. The plaintiff also offered to prove that, after the mortgage to Thomas Berry was executed, Mrs. Payne applied for a homestead in this land as the property of her husband, but that, on account of objection by the husband, the application was never acted upon. The court, on objection of the claimant, ruled this evidence inadmissible, and the plaintiff assigns error thereon. We think the evidence was admissible. While it was not sufficient to absolutely estop Mrs. Payne from asserting title against the mortgagee, it was admissible in determining the question of title made by her in the claim case. It was admissible for the purpose of showing that the title to the premises in dispute was in Payne at the time the mortgage was executed, and that his wife, the claimant, had knowledge of the state of the title at that time. The deed from Payne to John M. Berry might have estopped her from claiming the land as against John M. Berry, but we cannot say that it would have the same effect in favor of Thomas Berry. Whether it would or not might depend upon her knowledge of the facts and the knowledge Thomas Berry may have had of the true state of the title, and upon whether he acted upon the admissions made by her or not. The deed of John M. Berry reconveying the premises to Payne, and its record, would tend to show notice on the part of the wife that the title was in him at the time the mortgage was executed. Her application to the ordinary for a homestead in the land would also tend to show that she recognized the title of her husband in the whole tract. Judgment reversed.

(93 Ga. 619)

**LINDSAY v. WARNOCK.**

(Supreme Court of Georgia. March 26, 1894.)

**SPECIFIC PERFORMANCE—SUFFICIENCY OF CONTRACT—PART PERFORMANCE.**

Where, by a written contract, the owner of a tract of land stipulated to convey to the other contracting party a half interest in all the minerals that the latter might find, open, and develop "to the extent that it will justify the employ of labor," with timber and water for mining purposes, the other party stipulating in the writing to prospect the land within a specified time at his own expense, and the lat-

ter having complied with this stipulation, and discovered, opened, and developed a mineral of unknown name, but of sufficient value to justify the employment of labor in mining the same, equity will, at his instance, compel the former to specifically execute his contract to convey in accordance with its terms. There was no want of mutuality in the terms of the contract as set forth in the writing, and the failure to sign the writing by the party who performed his undertaking is of no consequence, after full performance on his part.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Bill by W. F. M. Lindsay against J. M. Warnock for specific performance. From a judgment for defendant, plaintiff brings error. Reversed.

T. W. Alexander, for plaintiff in error. Wrights & Harper, for defendant in error.

SIMMONS, J. Warnock entered into a written contract with Lindsay in which it was stipulated that if Lindsay should find on certain land of Warnock between January 7, 1891, and August 27, 1891, any minerals that would justify the "employ of labor," Warnock would convey to Lindsay a half interest in all the minerals that Lindsay might find, open, and develop "to the extent that it will justify the employ of labor," with timber and water for mining purposes; it being also stipulated therein that Lindsay should prospect the land at his own expense, and should not stop work over 30 days, unless providentially hindered. The writing was signed only by Warnock. On November 11, 1891, Lindsay filed an equitable petition praying for specific performance of Warnock's contract to convey a half interest in the minerals discovered on the land, and for an injunction to restrain Warnock from selling the land or the mineral interest therein. In his petition he alleged, in substance, that in pursuance of the contract he went forward, and at great expense and labor opened tunnels and shafts on the land to the extent of 65 feet, about 5 feet wide and 6 feet in height; that his labor was rewarded by discovering, within the time specified in the contract, valuable metal and minerals, the technical names of which were not known to him, in a ledge or vein 15 or 20 feet wide and 8 or 10 feet thick, extending across the tract of land described; that he also discovered a peculiar medicinal water, which he and others had found to be wonderfully effective in the cure of dyspepsia, rheumatism, and other diseases, which he had had analyzed by the state chemist, and which was pronounced by him to be unusually strong mineral water, remarkable for the amount of mineral held in solution, etc.; that the mineral discovered was of great value, and that petitioner had opened and developed the mine to such an extent as to justify the employment of a great number of hands in mining for said mineral, and in the shipment and transportation thereof. On de-

murrer by the defendant, the petition was dismissed for want of equity. We think there was equity in the petition. According to the allegations therein, Lindsay had fully performed his part of the contract, and had discovered on the land a mineral which he alleged was of sufficient value to justify the employment of labor, as contemplated by the contract; and we think, under the allegations in the petition, he is entitled to have a specific performance of the contract. Whether the mineral discovered is of value or not was not to be decided in the negative on demurrer, because the demurrer admits that it was valuable, and would justify the employment of labor in developing it. The record discloses that the judge of the court below put his decision in this case on the decision in the case of Peacock v. Deweese, 73 Ga. 570, and dismissed the petition on the ground of want of mutuality in the contract, the plaintiff not having signed it. That case, however, is different in its facts from the present case. In that case it appeared that the plaintiff was not really bound to do anything at all under the terms of the contract. There was no want of mutuality in the terms of the contract in this case, and, the plaintiff having fully complied with his part of it, his failure to sign it was of no consequence. Code, §§ 1950, 1951. He paid in full, in the precise way appointed by the contract, for the conveyance which he now seeks to obtain. Judgment reversed.

(24 Ga. 1)

#### MILLER v. STATE.

(Supreme Court of Georgia. April 2, 1894.)

CRIMINAL LAW—CONFESSIONS—INSTRUCTIONS—HOMICIDE.

1. That a fellow prisoner in jail with the accused, who was charged with murder, asked him about the killing, and "told him he better tell the truth; the white folks were going to break somebody's neck,"—did not, as matter of absolute law, render inadmissible confessions then and there made, in the presence and hearing of fellow prisoners only; the trial court ruling them *prima facie* competent, and in its charge leaving the jury to determine whether they were in fact made, and instructing them properly upon their effect on condition that they appeared to have been free and voluntary.

2. After charging the jury substantially in the terms of the statute as to the prisoner's statement, there was no error, when charging the law of reasonable doubt, or upon other principles of law applicable, to instruct the jury that they should try the case by the evidence, or in failing to charge that they should consider the prisoner's statement along with the evidence. *Vaughn v. State*, 16 S. E. 64, 88 Ga. 731. In the case of *Washington v. State*, 13 S. E. 131, 87 Ga. 12, where a recommendation as to the practice in such cases was made, the facts were entirely different from those of the case at bar.

3. There was no error requiring a new trial in any of the charges complained of as to admissions, confessions, corroboration of the same, reasonable doubt, the prisoner's statement, and recent possession by the accused of goods which were in the possession of the deceased at the time of the homicide; the evidence warranted the verdict, and this court will

not overrule the discretion of the trial judge in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Henry Miller was convicted of murder, and brings error. Affirmed.

R. L. Anderson and W. J. Grace, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

SIMMONS, J. Henry Miller was indicted, jointly with one Boston, one Bird, and two Troutmans, for the murder of John Braswell. Miller was tried separately, and was found guilty. He made a motion for a new trial, which was overruled, and he excepted.

1. One Mosley testified that while he and one Bugg were confined as prisoners in the same cell with Miller, after the preliminary trial of Miller, Bugg asked Miller, "What about the killing?" and said, "he better tell the truth; the white folks were going to break somebody's neck,"—whereupon Miller said that he shot Braswell, and Bird cut his throat; that Boston was present, but had nothing to do with it; that he (Miller) threw the gun away in the woods and went on home; that he got home just about day, and put into his trunk the flour which was taken from it at the time he was arrested. The first ground of the motion for a new trial assigns error upon the refusal of the court below to rule out this testimony, it being contended that Bugg's remark to the accused that he had better tell the truth, etc., rendered what was said by the latter inadmissible, under that section of the Code which declares that "to make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury." Section 3793. Undoubtedly, the statement to the person charged with crime that he had better tell the truth may, under some circumstances, amount to such an inducement as should exclude a confession made upon the strength of it; but, under the circumstances shown by the evidence in this case, we do not think that in this instance it should as a matter of law be held to constitute such an inducement. Counsel for the plaintiff in error relied upon the case of *Green v. State*, 88 Ga. 516, 15 S. E. 10, in which it was held that the court below erred in not excluding a confession which the accused was led to make by the statement that it might be best for him to tell. In that case, however, this was said to the accused in the presence, and apparently with the sanction, of the sheriff, in whose custody he was at the time, by a person who had arrested him, and whose object evidently was not so much to ascertain the truth as to obtain a confession of guilt; and the accused, in view of the authority exercised by these persons, may have supposed that they were able to render him some aid in

relation to the charge against him, and that it would be to his advantage to follow their advice and make such a statement as they desired him to make. A very different case is presented where remarks of this kind are made to the accused by another prisoner, and in the presence of fellow prisoners only; for while it is true that in this state it is not necessary, in order to exclude a confession induced through hope or fear, that the inducement should have proceeded from a person in authority, it is plain that a remark of this kind, when made by a person in authority, may have an influence in inducing a confession through these motives which it would not have if it came from a source which the accused could have no reason to regard as authoritative. It is not at all likely that the accused in this case, in replying as he did to the inquiry of his fellow prisoner, did so because he supposed he would gain anything, so far as the charge against him, or any punishment on account of it, was concerned, by then and there making a confession, or that it would be worse for him if he did not do so. The statement that the "white folks" were going to break "somebody's" neck, if he understood it as referring to himself, could not have been understood as meaning that they were about to do so then, for there was nothing to indicate that he was in any immediate danger; nor is it likely that he understood what was said as meaning that if he did confess the danger to himself might be averted. This language could, of course, be taken into consideration by the jury in determining what weight should be attached to the admissions in question, and it would be for them to say whether the admissions were thereby rendered involuntary or not; but the circumstances were not such, in our opinion, as would require the court, as a matter of law, to exclude them. We think the proper course was pursued by the court below in holding the admissions prima facie competent, and in his charge leaving the jury to determine whether they were in fact made, and instructing the jury, as he did, upon their effect on condition that they appeared free and voluntary.

2. Complaint is made that the court erred in charging, on the subject of reasonable doubt, to the effect that the doubt must be one growing out of the evidence, and in charging that the jury must try the case by the evidence, without charging further, in immediate connection therewith, that the prisoner's statement should be considered along with the evidence; the effect of this being to exclude a proper consideration of the statement, especially as the jury were instructed in another part of the charge that the statement was not, strictly speaking, evidence. This point is ruled by the decision in *Vaughn v. State*, 88 Ga. 731, 733 (4), 16 S. E. 64, in which this court passed upon a similar assignment of error, and held that

the court below did not err in the instructions complained of. In the opinion of the court in that case it is said: "The jury trying a criminal case are sworn to give a true verdict according to evidence. It is important for them not to confound the prisoner's statement with the evidence, or the evidence with the statement. The statute allows them to give the statement such force as they think proper, and even to believe it in preference to the sworn testimony. In charging them, the court should keep the evidence distinct from the statement, and shape the general tenor of the charge by the evidence alone, and the law applicable to it. For, if the court should mingle evidence and statement together, the jury might find it difficult to separate them, and might fail to understand the import of the instructions delivered from the bench. At some stage of the charge the statutory provisions touching the statement ought to be made known to the jury, and this, as has frequently been suggested by this court, is usually enough to say touching the statement." In the present case this was done, the instructions given on this subject being substantially in the terms of the statute. In the case of *Washington v. State*, 87 Ga. 14, 13 S. E. 131, in which complaint was made of the failure of the court below to call attention to the prisoner's statement in the same connection with certain portions of the charge, this court went no further than to make a recommendation as to the practice in such cases. We did not hold, but on the contrary, disclaimed any intention to hold, that the failure to do so was error.

3. There was no error requiring a new trial in any of the charges complained of; the evidence warranted the verdict, and this court will not overrule the discretion of the court below in refusing to grant a new trial. Judgment affirmed.

(93 Ga. 314)

#### BLANKENSHIP v. STATE.

(Supreme Court of Georgia. April 16, 1894.)

#### INTOXICATING LIQUORS—SALE WITHOUT LICENSE—INDICTMENT.

The statute (Acts 1890-91, vol. 1, p. 128) requiring a license to sell "spirituous, vinous or malt liquors," but not requiring any license to sell all intoxicating liquors, and some intoxicating liquors not being embraced in the description "spirituous, vinous or malt," it was error, on the trial of a person charged with selling by retail spirituous and intoxicating liquors without a license, to instruct the jury that if the liquor sold by the accused was intoxicating, whether it was spirituous or not, he might be guilty. No conviction would be warranted upon such an indictment without evidence that the liquor sold was spirituous, vinous, or malt liquor, or some mixture of one or more of these liquors.

(Syllabus by the Court.)

Error from superior court, Gordon county; T. W. Milner, Judge.

W. L. Blankenship was convicted of selling liquor without a license, and brings error. Reversed.

W. R. Rankin, for plaintiff in error. A. W. Fite, Sol. Gen., for the State.

SIMMONS, J. The plaintiff in error was convicted under an indictment which charged him with selling by retail "spirituous and intoxicating liquors without the license and taking the oath prescribed by law." The sale in question was of a compound called "Dr. Harter's Wild Cherry Bitters," which was shown to be intoxicating, but the ingredients of which were unknown to the witnesses, though it was supposed to contain whisky. The court instructed the jury, however, that, if the liquor sold was intoxicating, they could convict whether it was spirituous or not. We think this was error. The liquors for the sale of which a license is required, under the statute (Acts 1890-91, vol. 1, p. 128), are "spirituous, vinous and malt liquors," and these do not include all intoxicating liquors. A conviction would be improper without evidence that the liquor sold was spirituous, vinous, or malt liquor, or some mixture containing one or more of these liquors. See *McDuffie v. State*, 87 Ga. 687, 13 S. E. 596; *Allred v. State*, 89 Ala. 112, 8 South. 56; *Black, Intox. Liq. § 2*. We cannot express our view of the matter better than by quoting from the language of the court in *Allred v. State*, supra. In that case the accused was charged with a violation of a statute requiring a license for selling "vinous, spirituous, or malt liquors," and the evidence showed that he sold a compound called "Busby's Bitters," which was an intoxicating liquor, but it did not appear that it was composed of or contained either vinous, spirituous, or malt liquor. The court said: "'Spirituous liquors' technically and strictly include all liquors which contain alcohol in appreciable quantities. In this sense, vinous and malt liquors are also spirituous, in that each contains spirits of alcohol. *People v. Crilley*, 20 Barb. 248; *State v. Giersch*, 98 N. C. 720, 4 S. E. 193. But, in ordinary acceptance, the term 'spirituous liquors' imports distilled liquors, and that the term is employed in this sense in the statute under consideration is manifest from the use of the superadded terms 'vinous' and 'malt,' which have no office to perform unless the phrase 'spirituous liquors' is confined to the definition which it has in common parlance, denoting liquids which are the result of distillation. *Attorney General v. Bailey*, 1 Exch. 281. 'Vinous liquors' are such as are made from the fermented juice of the grape. \* \* \* The term 'malt liquors' embraces porter, ale, beer, and the like. \* \* \* Liquor of either class may be intoxicating; but neither class, nor all of them combined, include all intoxicating liquors, beverages, or bitters. A given liquor may, in other words,

be in a high degree intoxicating, and yet be neither spirituous, vinous, nor malt, within the sense of the statute. 'Fermented' or 'hard' cider is an illustration, \* \* \* and there may be many others, so far as the proof in the case at bar and common knowledge to the contrary extend. Certainly we cannot judicially know that 'Busby's Bitters,' though shown to be intoxicating, is or contains either distilled liquor or wine, or 'a liquor prepared for drink by the infusion of malt.' It was for the jury to say whether the bitters proved to have been sold by the defendant was vinous, spirituous, or malt liquor, or contains liquors of either or all of these classes in appreciable quantities. The charge took this inquiry away from them, and required at their hands a verdict of guilty, if they found the liquor to be intoxicating simply, although they might also have believed that, notwithstanding its inebriating qualities, it was not within the terms of our statute. *Com. v. Gray*, 61 Am. Dec. 476; *Com. v. Livermore*, 4 Gray, 20; *State v. Oliver*, 26 W. Va. 422." Judgment reversed.

(93 Ga. 696)

## REID v. ARMOUR PACKING CO.

(Supreme Court of Georgia. April 16, 1894.)

## ATTACHMENT—INSUFFICIENT BOND—DISMISSAL.

1. Where an attachment has been issued, and the defendant, before the term of the court to which the same is returnable, files an affidavit, under the provisions of section 3271 of the Code, for the purpose of having the attachment bond strengthened, this proceeding should not be dismissed because the levying officer was not able to find the magistrate who issued the attachment until after the first day of that term.

2. When the issue presented by the affidavit of the defendant is heard before the magistrate, the burden of proof is on the defendant to show the insufficiency of the bond.

3. Evidence that the surety on the bond returned no property for taxation in the county of his residence, while it might authorize, would not necessarily require, an inference that he was without sufficient property to make the bond good.

(Syllabus by the Court.)

Error from superior court, Richmond county; H. C. Roney, Judge.

Action by Charles R. Reid against the Armour Packing Company. From an order holding that there was error in dismissing the affidavit of defendant as to the insufficiency of the surety, plaintiff brings error. Modified.

S. B. Vaughn and H. Phinlzy, for plaintiff in error. J. B. Cumming and Bryan Cumming, for defendant in error.

SIMMONS, J. On October 6, 1892, Reid sued out an attachment against the Armour Packing Company, a nonresident corporation, returnable to the November term of the city court of Richmond county, giving a bond, with one Robertson as security. The amount

for which the attachment was issued was \$2,500, and the amount of the bond was \$5,000. The attachment was issued by J. M. Posey, a notary public of Richmond county, and on the next day was levied by the deputy sheriff. The attachment was filed in the clerk's office of the city court on October 11th. On the 27th of the same month the defendant's agent made affidavit, under section 3271 of the Code, that the defendant had a good defense to the action, and that the bond given was not good, for the reason that the surety had no visible property out of which the bond could be collected in case of a breach. It does not appear expressly when the affidavit was delivered to the levying officer, but, in the absence of any showing to the contrary, the presumption is and ought to be that it was delivered at once. Upon the affidavit was indorsed a statement, signed by the levying officer, that "I have been unable to deliver the within affidavit and the attachment papers in the case therein referred to to J. M. Posey, because I have been unable to find him in the county. This January 14th, 1893." The papers were finally delivered to him, and he caused the parties to come before him for the purpose of hearing evidence touching the sufficiency of the bond; whereupon the plaintiff in attachment moved to dismiss the affidavit of the defendant because the affidavit was made and delivered to the levying officer too late. The defendant moved that the plaintiff be required to show that the surety on the bond was good and sufficient. The notary ruled that the burden was on the defendant to show this, and the defendant thereupon introduced a certificate from the tax receiver of the county stating that he had examined the books of tax returns, and found that the name of Robertson, the surety, appeared thereon as paying a poll tax and business license for the year 1892, but that he made no return of any property for taxation. The notary ruled that this was insufficient as evidence, and rendered judgment sustaining the motion to dismiss the defendant's affidavit on the ground that it came too late. On certiorari the judge of the superior court held that the notary erred in dismissing the affidavit as to the insufficiency of the bond, and in failing to require a new bond or the strengthening of the original bond; and remanded the case, with direction that, unless the plaintiff should introduce evidence to rebut the showing made by the introduction of the certificate of the tax receiver, new and additional security be required on the attachment bond.

1. We think the judge of the superior court was right in holding that the magistrate erred in dismissing the affidavit. It appears that after the magistrate issued the attachment he left the county for a considerable length of time, and the sheriff was unable to find him until some time in January, and therefore was unable to return the papers to

him "forthwith," as required by section 3271 of the Code. This being so, the delay in returning the papers was not a sufficient reason for dismissing the affidavit. It was contended by counsel for the plaintiff in error that the affidavit made by the defendant in attachment was filed too late, the attachment having been issued on October 6th, and the affidavit denying the sufficiency of the bond not being filed until October 27th. The statute does not prescribe any given time in which the affidavit shall be filed, nor could it do so without injury being likely to result to defendants. The surety on the bond may be perfectly solvent on the day the bond is given, but may soon after become insolvent. If the law required objections to the bond to be made within a few days after the filing of the bond, the defendant, notwithstanding the surety had become insolvent, would be debarred from objecting to the sufficiency of the bond. The defendant in this case resided in Chicago, and it may have been several days before it learned of the attachment, and could appoint an agent, and ascertain whether the surety was solvent or not. No time being fixed by the statute, we think the defendant has a right to file the affidavit denying the sufficiency of the bond up to at least the beginning of the term of the court to which the attachment is returnable, notwithstanding the papers may have been returned to the clerk's office before. When they are returned, and the affidavit is filed with the levying officer, he can, by virtue of his duty to comply with the statute, withdraw the papers, and return them to the magistrate issuing the attachment. The latter is the only person authorized by the statute to inquire into the sufficiency of the bond. The judge of the court to which the attachment is made returnable has no such power. *Lockett v. De Neufville*, 55 Ga. 454; *Gregory v. Clark*, 73 Ga. 546.

2. When the papers are returned to the magistrate who issued the attachment, the defendant in that proceeding, being the moving party, must assume the burden of proof. The magistrate, in accepting the bond, passed upon the sufficiency of the security, and the person excepting to it must show that the security was insufficient.

3. We think the judge of the superior court erred in directing that, unless the plaintiff should introduce evidence to rebut the showing made by the introduction of the certificate of the tax receiver, new and additional security be required on the attachment bond. The law makes it the duty of every citizen to return under oath to the tax receiver of the county in which he resides all the property he has which is subject to taxation therein; and the fact that the security in this case returned no property in the county for taxation might have authorized the magistrate taking the bond to infer that he had none in the county, but it would not necessarily require an inference that he did not

have sufficient property to make the bond good. He may have had ample property in another county. Judgment reversed as to the direction given the magistrate, but affirmed in so far as it orders a new hearing before him.

(94 Ga. 66)

### ROBERTS v. STATE.

(Supreme Court of Georgia. April 16, 1894.)

CRIMINAL PROSECUTION — CONVICT IN PENITENTIARY — PRODUCTION AS WITNESS — APPLICATION TO GOVERNOR — DUTY OF JUDGE.

1. In order for a defendant in a criminal case to take the benefit of the act of September 27, 1883, touching the production of convicts in the penitentiary as witnesses, application must first be made to the governor, as the act prescribes. The observance of that requirement is necessary, and its omission is more than failure in its mere technicality.

2. If section 4027 of the Code applies where the person desired as a witness is imprisoned as a convict in the penitentiary, it imposes no absolute duty on the judge of the superior court to direct or require that the order for producing the convict shall be executed at the expense of the public, even though the applicant for the order be unable from his poverty to defray the expense, and even if the judge, in the exercise of his discretion, might, if he thought proper, make the county chargeable therewith. The constitutional right to have compulsory process for witnesses does not include any right of having them brought into court at public expense, and no such right has been expressly conferred by a statute, except by the act of 1883, above referred to, under which the right is not unconditional, but limited by the sound discretion of the judge, to be exercised on the special facts of the case.

3. The application in the present case being made under the Code, and the judge not having denied the order or process applied for, but having only declined to have it executed at the charge of the county, there was no error.

4. There was no abuse of discretion in denying a new trial on any of the grounds of the motion.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

George B. Roberts was convicted of robbery, and brings error. Affirmed.

The following is the official report:

Roberts was convicted of the offense of larceny from the person of John Wade of certain money. The indictment charged that the crime was committed with one O'Shields, who had been tried, and finally convicted of the crime. Roberts moved for a new trial, and, his motion being overruled, excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also the following: When the case was called for trial, defendant moved for a continuance on account of the absence of two witnesses, to wit, William B. Hall and Porter Stocks, and because the court refused to allow them to be brought into court and sworn in defendant's behalf. These witnesses were in the state penitentiary, from the same court, and, when defendant was put on notice that the case would be called for trial, he presented a petition to



the court, asking that an order be granted allowing these witnesses to be brought into court, to be sworn in his behalf; and defendant alleges that the court erred in refusing to grant the request. The petition referred to alleged, in brief: Defendant will need the testimony of Hall, who is now in the penitentiary. He expects to prove by Hall that Hall is the man who robbed Wade, and defendant not the man, and it was impossible for it to be defendant; that on the night defendant was charged with the larceny Hall robbed Wade; that on that night, December 24, 1892, about 9:30 o'clock, Hall went on Collins street, Atlanta, and met a man, who was very drunk, and did not know where he was; that he had a bundle, and Hall took it from him, and unrolled it, but found it was nothing but some old overalls; that Hall took him by the arm, and started to walk towards Decatur street; that he (Wade) gave Hall a dollar, and insisted on his getting some whisky; that the barrooms were closed, and he gave Wade a drink out of a bottle he (Hall) had in his pocket, and kept the dollar; that Wade was beastly drunk, and he caught hold of Wade, and kept him from falling; that Wade pulled a large pocketbook out of his hip pocket, and then tried to put it back, saying he had plenty of money; that Hall got the money from Wade before he got it back in his pocket, and Wade was so drunk he did not know what he was doing; that they came up Decatur street to Loyd, and separated, etc.; and that he afterwards heard of two men being arrested for robbing a man on Decatur street, and on the same night he robbed a man, and knew they were charged of the same crime he had committed. The petition further alleged that Porter Stocks is a material witness for the defense, and is also confined in the penitentiary; that he can prove by Stocks that on O'Shields' return to the jail, after testifying on the last trial of petitioner, O'Shields stated to Stocks that he had sworn falsely against petitioner, and that petitioner was not guilty, but that O'Shields did so because he thought it would be an advantage to him in the case in which he had been convicted; that petitioner has been confined in jail about nine months, and has therefore not had an opportunity for making and accumulating money; that he has no property, and is in no way able to pay the expenses of bringing these witnesses to and from the penitentiary. He prayed that an order be granted directing the sheriff to go to the penitentiary and bring them into court as witnesses. The presiding judge declined to grant the prayer of the petition, because O'Shields has escaped from jail, and cannot be found, and Stocks' evidence is only to discredit O'Shields, and he cannot be a witness. Further, because Hall, commonly called "Skinny Hall," was known to the judge officially, the judge having presided in his trial, and sentenced him to the peniten-

tiary for several offenses. In these trials he confessed to his guilt in one or more cases, where the evidence demonstrated his confession was to relieve the other defendants, he having been already convicted. He is in such condition no jury would believe him. To bring him from where he is, is difficult and expensive, and will give him an opportunity to escape. Knowing the utter uselessness of his evidence, the judge felt it his duty not to put the expense of such a proceeding upon the county, but, notwithstanding, if the county or state could be relieved of the expense, would order him brought. Because of newly-discovered evidence showing that Hall and Lanier, whose testimony was the only direct testimony against movant, committed perjury, the evidence otherwise not being sufficient in law to warrant the jury in finding a verdict of guilty. In support of these grounds of the motion movant produced the affidavit of Griggs, to the following effect: On the night of December 24, 1892, he was at Carrie Clarke's house, on Collins street, Atlanta, and saw Wade there in the early part of the night. He saw Wade in the parlor, and in a little while missed him, but in a half hour or an hour he returned, and remained in the parlor probably an hour or more. It was at least 9:30 or 10 o'clock before Wade left. Deponent cannot be sure as to the exact time, but is pretty certain it was about this time. Deponent left the house about the same time, and went up Collins to Decatur street, and up Decatur street towards the central part of the city. Near Loyd street he met Roberts, and was with him until about 12 or 1 o'clock, when they parted, and saw each other no more during the night. Deponent never saw Wade after he saw him at Carrie Clarke's until he saw him during the trial. Deponent never thought of these facts being of value to Roberts, and never communicated them to Roberts nor either of his counsel until after the trial. [According to the evidence for the state, Roberts left the house of Carrie Clarke, in company with Wade and O'Shields, some time in the early part of the night of December 24, 1892, the time being probably between 9 and 10 o'clock; that they walked up on Decatur street, and Wade gave Roberts some money to get something to drink; that Roberts came back with a bottle, from which Wade took two drinks, and knew nothing more until the next morning about 6 or 7 o'clock, when he found he was out on the East Tennessee Railroad, sitting on the end of a cross-tie, with his money all gone; that he had the money in his hip pocket when he gave Roberts the change to go for the whisky, the change being taken from some loose money he had in another pocket, etc. Lanier testified that he saw Roberts and O'Shields with Wade, who was staggering around, and heard Roberts say, "Where is that bottle? Where is that bottle?" and Roberts fumbled around and pulled out the pocketbook, and

dropped it, and it was picked up (witness could not say which picked it up), and Roberts and O'Shields went through an alley, and the man they robbed staggered around there. Hall testified, among other things, that he was down at the jail, in Porter Stocks' cell, and in Porter Stocks' presence Roberts said that he (Roberts) was guilty of the crime, and O'Shields had nothing to do with it; that he (Roberts) was a thief, but was too slick to get caught; that they were sitting in Porter Stocks' cell, and Stocks told Hall that he (Stocks) had bet with Roberts that Roberts would be convicted, and Roberts said, "Yes, Porter, I am a thief, but I am too slick to be caught;" that Roberts said O'Shields had nothing to do with it; that O'Shields got a "cut" out of it, but he was the man that got the "dough," etc.] Defendant also produced the affidavit of Ed. Camp that he heard Dan. Hall say in a crowd, in front of the courthouse on Hunter street, on the day of the last trial of Roberts, and after the verdict finding him guilty was rendered, that he (Hall) got O'Shields to swear that O'Shields and Roberts robbed Wade on the night of the 24th of December, 1892, and failed on the first trial to convict the damned son of a bitch, Roberts, but he did not fail to convict him this time (meaning the second trial), when he (Hall) got Lanier to swear that he saw them when they did it. Also the affidavit of Porter Stocks that Roberts never at any time had any conversation with Hall and affiant, or with Hall alone, in regard to the guilt or innocence of Roberts in the case, except as to the bet that affiant and Roberts had. Affiant bet Roberts, after O'Shields had been found guilty, and after he found O'Shields was going to swear against Roberts, that Roberts would be found guilty; and when Hall was in affiant's cell this bet was brought up, and the fact of the same was simply mentioned. Hall, Roberts, O'Shields, and affiant were never at any time in the cell of affiant, together, when the case of Roberts was talked of. Roberts never did say in affiant's presence that he was guilty, but always that he was not guilty. Never said he was a thief and was too slick to be caught. Never said he got the money. In fact none of the conversation referring to the guilt of Roberts, or to his acknowledgment of the same, in the evidence of Hall on the trial, which affiant has read, ever did occur in affiant's presence, or in his cell in his presence. Also the affidavit of defendant that he did not know of the facts sworn to in the affidavit of Griggs, nor that he could prove the same by Griggs, until after the trial; nor did he know that he could prove by Stocks and Camp the facts sworn to in their affidavits until after the trial, and had no way of knowing the same. No affidavit of defendant's counsel appears in the record.

Hulsey & Bateman, for plaintiff in error.  
C. D. Hill, Sol. Gen., for the State.

SIMMONS, C. J. 1. Roberts was indicted for the offense of robbery. When he was arraigned for trial he moved for a continuance on the ground of the absence of two witnesses, Hall and Stocks. The court refused to continue the case, and this is one of the grounds of his motion for a new trial. It is recited in this ground of the motion for a new trial that when the defendant was put on notice that the case would be called for trial on a certain day he presented a petition to the court asking that an order be granted allowing these witnesses to be brought into court, to be sworn in his behalf. The petition alleged that Hall and Stocks were convicts in the penitentiary, and set out facts the accused proposed to prove by them, which, if true, appear to be material. The presiding judge declined to issue the order to have the witnesses brought from the penitentiary, for reasons assigned by him, which will be found in the official report. One of the reasons was that he felt he ought not to put upon the county the expense of bringing these witnesses from the penitentiary. He offered, however, to issue the order, and have them brought into court, if the defendant would relieve the county of this expense. Whether the judge erred in refusing to issue the order except on the terms proposed by him is the controlling question in the case. The plaintiff in error contends that his petition asking the court to order the witnesses to be brought from the penitentiary to testify was founded on the act of September 27, 1883 (Acts, p. 106), and that, having complied with the provisions of that act, the judge erred in not granting the order. We do not think he complied with that act. The act requires the petition to be addressed, not to the judge of the superior court, but to the governor; and, if the judge approves the petition, the act commands the governor to issue his order to the person having charge of the convict to deliver him to the sheriff of the county in which the convict is desired as a witness. Addressing the petition to the governor is not a mere technicality; it is a matter of substance. The governor has control of all convicts confined in the penitentiary of this state, and the records in the executive department or in the office of the principal keeper of the penitentiary disclose where each convict is confined. The legislature may have been of the opinion that it would be better for the governor to issue the order than for the trial judge to do so. Whatever may have been the reason for the requirement, it prescribed the terms on which the application should be granted, and, unless these terms were complied with, the judge was not compelled to grant the application under this act.

2. It was contended that under Const. art. 1, § 1, par. 5 (Code, § 4997), which declares that every person charged with an offense against the laws of this state shall have compulsory process to obtain the testimony

of his own witnesses, and under section 4027 of the Code, which declares that "any judge of the superior court may issue his order to any officer having any person in his custody lawfully imprisoned, to produce such person before his court for the purpose of giving evidence in any criminal cause therein, without any formal application or writ of habeas corpus for that purpose," the judge had the power, and it was his duty, to grant the order prayed for by the defendant. If section 4027 applies where the person desired as a witness is imprisoned as a convict in the penitentiary, it imposes no absolute duty on the judge to direct or require that the order for producing the convict shall be executed at the expense of the public, even though the applicant for the order be unable, from his poverty, to defray the expense, and even if the judge, in the exercise of his discretion, might, if he thought proper, make the county chargeable therewith, the constitutional right to have compulsory process for witnesses does not include the right of having them brought into court at public expense. On the subject, see *State v. Kennedy*, 20 Iowa, 372; *State v. Waters*, 39 Me. 54; *Ex parte Marmaduke*, 91 Mo. 228, 4 S. W. 91; *Willard v. Superior Court* (Cal.) 22 Pac. 1120. No right of charging the public with the expense of bringing such witnesses into court has been expressly conferred by statute, except by the act of 1883, above referred to; and under that act the right is not unconditional, but is limited by the sound discretion of the judge, to be exercised on the special facts of the case.

3. Treating the application in the present case as having been made under section 4027 of the Code, and the judge not having denied the order or process applied for, but having only declined to have it executed at the charge of the county, there was no abuse of discretion in refusing the application.

4. After a careful review of the other grounds of the motion for a new trial, we do not think the court abused its discretion in overruling them all. Judgment affirmed.

(93 Ga. 819)

### BLACKER v. DUNLOP.

### DUNLOP v. BLACKER.

(Supreme Court of Georgia. June 18, 1894.)

**HOMESTEAD — APPLICATION BY WIFE — IMPLIED CONSENT OF HUSBAND — DEED OF PREMISES TO BENEFICIARY — EFFECT — PARTITION BY TENANTS IN COMMON.**

1. An application for a homestead, made in 1873 by a wife, in which she set forth the name of her husband, and alleged that he refused or neglected to apply for a homestead, that he was the head of a family consisting of petitioner and two minor children, and that he desired, under the provisions of the constitution and an act to provide for the setting apart of homestead of realty and personalty, approved October 3, 1868, to have laid off and set apart, to be exempt from levy and sale, a homestead for the use of said family, on or out of one undivided half interest in all of a described tract of land, sufficiently

indicated that the property out of which the homestead was sought belonged to the husband; and there being no evidence that he appeared before the ordinary, and objected to the proceeding, by plea or otherwise, his assent thereto is presumed.

2. Whether a deed of gift conveying homestead premises in fee to the sole beneficiary for the time being of a homestead be good or bad with respect to conveying the ultimate estate in the premises after all homestead right has terminated, the deed cannot be asserted against that right so long as the homestead is on foot and operative, whether in behalf of the original beneficiaries or in favor of new beneficiaries added to the family by a second marriage and the birth of children after the deed was made.

3. A voluntary partition by tenants in common, where partition could be constrained by legal process, will, unless fraudulent or grossly unequal, be upheld as between the parties thereto and their privies in estate, after long acquiescence by such parties, accompanied with a several possession in conformity to the partition, though the interest of one of the cotenants was covered by and embraced in a homestead duly set apart prior to such partition, and which has not yet terminated.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Action by Mary W. Blacker against H. C. Dunlop. On the judgment both parties bring bills of exception. Reversed on the bill of exceptions brought by plaintiff, and affirmed upon that brought by defendant.

Geo. Westmoreland and Dorsey, Brewster & Howell, for plaintiff. Candler & Thomson, for defendant.

SIMMONS, J. 1. It appears from the record that, in 1873, a homestead in certain property, including the land in dispute, was set apart by the ordinary of Fulton county upon the application of Mrs. Mary M. Blacker, the first wife of Charles B. Blacker. On the trial of the present case the record of the homestead proceedings was admitted in evidence by the court below, over the objection of the defendant that the homestead was invalid because the application did not show out of whose property the exemption was sought, and to this ruling the defendant excepted. The application, it is true, does not in so many words say from whose property the exemption is sought, but we think there is enough in it to put any one reading it upon notice that it refers to property of the husband. It is alleged therein that the petitioner's husband, whose name is given, refuses or neglects to apply for a homestead; that he is the head of a family, consisting of petitioner and two minor children; and that he desires, under the provisions of the constitution and an act to provide for the setting apart of homestead, approved October 3, 1868, to have laid off and set apart, to be exempt from levy and sale, a homestead on or out of one undivided half interest in the land therein described. Taking these allegations together, we think they indicate sufficiently that the homestead is claimed in this land as property of the hus-

band. There being no evidence that the husband appeared before the ordinary, and objected to the proceeding, by plea or otherwise, his assent thereto will be presumed. *Bowen v. Bowen*, 55 Ga. 182; *Linch v. McIntyre*, 78 Ga. 209. As will be seen from an examination of the cases relied upon by counsel for the plaintiff in error on this point, the application in each of those cases was different from the application in this case. Besides, the party attacking the homestead right in this case was claiming under the husband, as in the case of *Linch v. McIntyre*, supra, and did not stand upon the footing of a creditor of the husband, as was pointed out in that case.

2. The record shows that the first wife died leaving one child as sole beneficiary of the homestead. A deed from Blacker to this child, dated a few days before his second marriage, was introduced in evidence, and it was contended by the plaintiff that the deed was antedated. It was sought to be shown by this deed that the second wife had no interest in the property, inasmuch as the father had conveyed it to the sole beneficiary. This court has repeatedly held that the homestead continues as long as there are beneficiaries, or as long as the head of the family has a wife or minor children. This being true, the head of the family cannot convey the premises to one of the beneficiaries or to any one else, and deprive the other beneficiaries of the use of the estate, whether they be the original beneficiaries or new beneficiaries added to the family by a second marriage and the birth of children after the deed was made. What effect the deed of gift to the sole beneficiary will have after the homestead right has terminated it is not now necessary to decide. What we do decide is that it cannot be asserted against that right so long as the homestead is on foot and operative, whether in behalf of the original beneficiaries or in favor of new beneficiaries added to the family by the second marriage.

3. After the homestead was set apart in the undivided tract of land, Blacker and his cotenant partitioned the tract, Blacker taking one portion, and his cotenant the other. This was done shortly after the homestead was set apart. It appears that after Blacker married his second wife he carried her to his home, which was upon the land which had been partitioned to him, and lived with her for several years, and finally left her. She remained in possession of that portion of the land until Dunlop purchased it from Mrs. Blankenship, to whom Blacker had made the deed of gift as sole beneficiary. Dunlop by some means had ousted the tenant of Mrs. Blacker, whereupon she brought this action to recover the homestead from Dunlop. On the trial of the case the trial judge charged the jury, in substance, that the partition was illegal, and that, if Mrs. Blacker recovered at all, she could only recover an undivided

interest in the whole tract; that, inasmuch as she had only sued for half of it, she could only recover an undivided interest in that half. We are of the opinion that either of these cotenants could have constrained a partition by process of law, and, inasmuch as they did voluntarily what the law would have compelled them to do, the partition made between themselves will be upheld as between them and their privies in estate, after a long acquiescence in such partition by the parties making it, accompanied with a possession by each of the parties in conformity to the partition, unless the partition was fraudulent or grossly unequal; and this is true notwithstanding the interest of one of the cotenants was covered by and embraced in the homestead set apart prior to such partition, and which was not yet terminated. No fraud or injustice in the partition is complained of in this case. It appears that the land was fairly and equally divided, and the partition was acquiesced in for a long number of years. Under this state of facts a court of equity will recognize, ratify, and adopt the partition made by the parties themselves, and place the homestead estate upon that half of the land given to the homesteader in the partition, and remove it from the other half given to his cotenant. For these reasons, we think the court erred in his charge to the jury on this subject. Judgment is reversed on the bill of exceptions brought here by Mrs. Blacker, and affirmed upon the bill of exceptions filed by Dunlop.

(94 Ga. 112)

#### FOLSOM v. HOWELL et al.

(Supreme Court of Georgia. June 30, 1894.)

AMENDMENT OF PETITION—EFFECT—SUBSEQUENT DEMURRER—ADMINISTRATOR'S SALE—MISREPRESENTATIONS AS TO BOUNDARIES.

1. A demurrer to a petition as amended opens the merits of the whole pleading to a fresh adjudication, and a conditional order of dismissal made on the hearing of a previous demurrer to the original petition concludes nothing. Thus, where a petition was heard on a demurrer thereto, and the presiding judge passed an order, not dismissing the petition, but declaring that it would be dismissed unless amended within a given time so as to make it good in law, this judgment was not final upon the merits, but the whole petition was open for amendment within the time limited, and another demurrer afterwards filed to the petition as amended should have been overruled if the petition as a whole set forth a cause of action, whether the matter contained in the amendment aided it or not.

2. If administrators, in selling land as the property of their intestate, represented the boundaries thereof as extending along certain lines from point to point, giving the length of each line, and thus misrepresented the extent and contents of the tract, whereby they were enabled to sell, and did sell, at a fixed price per acre, a tract of land containing 38 $\frac{1}{10}$  acres as a tract containing 50 acres, receiving payment accordingly, the purchaser was defrauded in so far as the money paid represented the price of the deficiency, whether the administrators knew their representations were false or not, provided the representations were accepted and

treated by the purchaser as true, and he acted and relied upon them in making his purchase, paying his money, and receiving the conveyance. If the administrators did not know where the true boundaries of the tract were, they should not have taken upon themselves to point out the same, or make any definite and positive representation concerning them which the state of their knowledge did not enable them to make with verity and correctness. While the doctrine of caveat emptor would charge the purchaser with looking out for the title which the decedent had to the tract offered for sale as his, it would not charge him with looking out for the boundaries of that tract when the administrators undertook to locate and point them out, thus professing to know them sufficiently to enable them to furnish this information to purchasers, instead of leaving the latter to their own resources in acquiring the information.

3. The plaintiff is entitled to no land not embraced in his purchase, although some of the tract actually owned by the decedent may have been excluded therefrom.

4. The petition seems to be open to the objection of misjoinder of parties defendant, and direction is given that it be dismissed as to Mims and Alexander.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by L. B. Folsom against Albert Howell and another, as administrators of Clark Howell, and others. The petition was dismissed as to the administrators, and plaintiff brings error. Reversed.

The following is the official report:

Folsom filed his petition against Howell and Woodward, as administrators of Clark Howell, and Alexander and Mims, to reform a deed, and for other purposes. A demurrer was interposed by the administrators, and on August 16, 1893, the presiding judge, upon hearing the demurrer, ordered that the petition be dismissed as to the administrators, unless the plaintiff should by appropriate amendments, filed within 30 days, make the same good in law. No exception was taken to this ruling. Within the 30 days plaintiff filed an amendment. The administrators demurred to the petition as amended, and this demurrer was sustained, and the petition as amended dismissed as to the administrators. Folsom excepted.

The original petition alleged: On the first Tuesday in March, 1890, petitioner purchased 50 acres of land, in the southeast corner of land lot 153 of the Seventeenth district of Fulton county, from Howell and Woodward, as administrators of Clark Howell, at public administrators' sale, within the legal hours of sale, at auction to the highest bidder, before the courthouse door of said county, in two adjoining tracts of 25 acres each, according to the plat exhibited by them at the sale, paying \$50 per acre for one tract and \$42 per acre for the other tract. He paid them the full amount of the purchase money, and they executed to him a deed to the land, a copy of which is annexed. Several months afterwards he had the land surveyed, and discovered for the first time that instead of 50 acres, as described in the deed and plat, there were only  $33\frac{9}{10}$  acres there; that

if the land extended north from the south line of the land lot 1,710 feet, as described in the deed, it would lap over on the lands of Holbrook, Hughes, and Osborne 520 feet to get the 50 acres and make the shortage, which the estate of Clark Howell did not own, and which the administrators had no right to sell or convey, or receive purchase money for. At the same time it was discovered that said administrators' deed should have conveyed to petitioner, instead of 1,275 feet west from the southeast corner of the land lot, 1,418 feet west from the southeast corner, which is the true distance from the southeast corner west to the center of the south line of said land lot, and which was owned by said estate, and included in the order of sale granted by the court of ordinary for the sale of said land by the administrators, and in the advertisement of the sale under such order at which petitioner purchased, so that the deed should really have been for a tract commencing at the southeast corner of the land lot and running thence west, along the land-lot line, to the center of the south line of the land lot, 1,418 feet, and extending north the same width 1,186 feet, to the land of Holbrook, Hughes, and Osborne, containing  $38\frac{1}{10}$  acres. He duly informed the administrators of said shortage, and upon investigation they admitted there was a shortage, and promised to reform the deed and make it conform to the true metes and bounds and dimensions of the tract as above shown, but have failed to do so. Alexander and Mims own the land adjoining said tract on the west, and although their land, as described in their deed, extends only to the middle of said land lot along said south line thereof from the west towards this land, and they have had no possession further east than the middle of such line, which is 1,418 feet from each the southwest and southeast corners of the land lot, they claim  $138\frac{5}{10}$  feet more, to a point on said south line only 1,275 feet west from said southeast corner to an old stone, which is not the true corner, although for a while it was believed to be the center of said south line, but which is really  $138\frac{5}{10}$  feet east of the center as above shown, and to which  $138\frac{5}{10}$  feet they have no title, and have never had possession, but which properly belongs to petitioner, and ought to be included in his deed from the administrators, and the title thereto quieted in him as against Alexander and Mims, or any one claiming under them. Petitioner has overpaid, as above shown, the administrators for said land, to wit, for  $11\frac{4}{10}$  acres, at the average price of \$48 per acre, and which they should be required to refund to him, with interest since March 4, 1890. He prayed for process against Howell and Woodward, as administrators, and against Alexander and Mims; that it be decreed that the administrators' deed to him be reformed so as to convey the true and proper tract as above

shown, instead of the tract as described in the deed, which they had no right or authority to make; that said administrators be required to properly convey the tract as above shown it really is, and ought to have been conveyed, including  $138\frac{5}{10}$  feet above described; that judgment be rendered against Howell and Woodward, as administrators, in favor of petitioner, for the \$525, with interest; that the title to said strip of  $138\frac{5}{10}$  feet by 1,186 feet above described be quieted in petitioner, and decreed to be in him, and Alexander and Mims and all persons claiming under them be enjoined from claiming title to the same; and for general relief. Attached as an exhibit was the administrators' deed, which, so far as material, was: It was dated March 4, 1890. It recited the order of the court of ordinary to sell the real estate of the deceased. The land conveyed was described as "In land lot number 153 of the 17th district of Fulton county, being lots numbers two and three of the subdivision of the property of said Clark Howell, deceased, as per plat exhibited on day of sale (said plat on file at office of G. W. Adair), commencing at a point on the southeast corner of land lot 153, and running thence north, along the line 153 and 146, 1,710 feet, thence west 1,275 feet, thence south 1,710 feet to the south line of land lot 153, thence east 1,275 feet to the beginning point,—containing fifty acres of land, be the same more or less." The consideration was stated as \$2,500, in hand paid to Howell and Woodward, as aforesaid, by Folsom; and it was stated that said administrators sold and conveyed to Folsom, his heirs, etc., "the said land, according to the \* \* \*, containing by estimation fifty acres, be the same more or less," etc.

The demurrer to this petition was: There is no cause for action which entitles petitioner to recover against the defendants the administrators. There is no legal cause of action set out, and nothing in law which would entitle petitioner to recover against these defendants. There is no reason why said defendants should be joined with the two other defendants, and no recovery can be had against them for the matters set out in the petition, so far as the allegation therein which related to Alexander and Mims.

The amendment to the petition alleged: The land described in the petition does not lie on any particular road, but back, out of sight, in woods and hills, and is unimproved, except a small clearing without any buildings, the rest being in virgin forest and thick undergrowth and in hills and valleys, so that it cannot be seen all over from any standpoint. The boundary lines at the time of the administrators' sale were imaginary, through thick woods and underbrush, up and down hills, and were not marked out, so that no man not thoroughly familiar with the lines could find the tract, or form any judgment as to its size or shape, without a com-

petent survey. Petitioner, though informed about where the land was, was not familiar with it or its boundaries. Both the administrators were very familiar with and had known the land well for many years, and had each owned tracts adjoining it, and had every opportunity of knowing all about it, while petitioner had no such opportunity or knowledge, and they well knew he was not familiar with the land. They publicly represented at the sale that they had divided the tract into two parcels, each containing 25 acres, and had their crier to so announce at the sale, in the presence of one or both of them, before the bidding began. They exhibited at the same time a carefully prepared printed plat, which they represented to be the true shape and size of the land, which plat was in the form and style of those taken from actual surveys, but no survey had been made, and the plat was false, though well calculated to deceive, and did deceive, plaintiff, who believed it to be true and from an actual survey. The land was put up for sale by the acre, and bids asked for and received and cried by the acre from various bidders, including plaintiff, and both parcels were knocked down to him, the highest bidder, one at \$50 per acre and the other at \$12 per acre. Both the administrators were and are prominent, of high standing in the community, and he relied upon their representations on that account, as well as upon their superior knowledge of the land, and so paid them the full amount of \$2,300 for full 50 acres and received from them their deed prepared by them, waiving nothing, but supposing in good faith it to be a good and correct deed to the land. A copy of the deed is attached to the original petition. He recorded the deed, and procured the county surveyor to mark out the boundaries according to it, when, to his surprise, he then discovered that the deed was grossly wrong; that the tract was not shaped as described therein, and that the tract only contained  $38\frac{5}{10}$  acres, of which Alexander and Mims claimed  $3\frac{1}{2}$  acres, as shown in the original petition, leaving a shortage of  $11\frac{1}{10}$  acres, which, at the average price of \$46 per acre, makes \$521.40 excess overpaid, and if the  $3\frac{1}{2}$  acres should be allowed Alexander and Mims it will make \$685.40 excess. The excess should be paid back to petitioner by said administrators, with interest, and they should reform the deed so as to describe the land properly. He was actually misled, deceived, and defrauded by said conduct and misrepresentations of the administrators at the sale, without fault on his part. The deficiency in the land is too great, and works unconscionable injury and hardship on him, and is against equity and good conscience. He further shows that the deed ought to be reformed because it does not conform to the order of sale and the advertisement under which the sale was made, copies of which are annexed. He further

alleges that as the sale was made for distribution among the heirs of the estate, one being the administrator Howell, and another of the heirs being the wife of Woodward, the greater reason exists why plaintiff should have the relief he seeks by this proceeding against said administrators. Therefore he prays, in addition to the prayers of the original petition, that if it be decided that the deed should not be reformed so as to describe the tract of land as it actually is, as shown in the original petition, then that the deed be reformed so as to conform to the order of sale and advertisement; and that, if it be decided that the administrators are not liable to plaintiff as such administrators, then that they be held liable as individuals to him for said excess of purchase money, and judgment be rendered accordingly against them in his favor for the same, with interest; that the true dividing line between said tract of land and that of Alexander and Mims be ascertained and fixed by decree in this case; and for general relief.

The petition of the administrators for leave to sell showed that the estate of the deceased consisted of various tracts of land, among them "fifty acres in the southeast corner of L. lot 153, adjoining the lands of J. M. Alexander, Garrett, and A. P. Woodward." The order for sale recited that it appeared that it was necessary for the purpose of division and distribution that the land be sold, and gave the administrators leave to sell for said purpose "the land fully described in said petition." The advertisement was of the sale of various tracts of land as the property of the deceased, and among them "fifty acres in the southeast corner of land lot number 153, adjoining the lands of J. M. Alexander, Garrett, and A. P. Woodward." In both the petition and the advertisement the land was stated as being in the Seventeenth district of Fulton county. The advertisement stated that the sale was for purposes of division.

Demurrer to the petition as amended was upon the grounds of the former demurrer, and specially as follows: (1) The deed set out contains the contract, is the highest and best evidence of the same, and shows the contract. Under it, petitioner bought, by the tract, 50 acres of land, more or less, and if he did or did not get it the administrators have no concern. The estate they represent cannot be made to refund, nor can they be made individually liable, unless they distinctly expressed their intention to be personally liable under the deed and contract therein made. (2) The land, according to the metes and boundaries as expressed in the deed, amounts to the number of acres sold; the number of feet north and south is 1,710, and east and west 1,275, which amounts to 50 acres and 8 poles; and, if the title is not good to it, petitioner got all he was entitled to, just the interest the estate had. The administrators cannot bind the es-

tate by any warranty in any conveyance or contract made by them, and are not personally bound by the deed, because the intention of their personal liability to petitioner is not distinctly expressed therein. (3) The deed cannot be reformed to change the number of feet in any direction, to make it less one way and more another, because to do so would show a deficiency in acres, and give some ground to petitioner in his cause, and would make a cause of liability by the change when none before existed. The court construes and enforces contracts, and does not make them; therefore it cannot grant this relief as prayed for. (4) The administrators sold, as they had a right to do, by the plat, and petitioner must hold by the deed, and it expresses what it is. No judgment of any court has declared the title to the property therein conveyed defective, and for all it appears the title is perfect, and petitioner has a complete legal title therein. (5 and 6) There is no cause of action set out which would entitle petitioner to recover, or would authorize the court to grant the relief sought, or the judgment prayed against the estate, or against the administrators personally; and, as to the reformation of the deed, no allegation in the petition is sufficient to authorize the court to do so. (7, 8, and 9) There is no equity in the petition; there is a misjoinder of parties, and, as to Alexander and Mims, an adequate and complete remedy at law to locate and establish the lines; and these defendants demur specially as to the joinder of Alexander and Mims.

John L. Hopkins & Sons and Lewis & Green, for plaintiff in error. Thos. W. Latham and Candler & Thomson, for defendants in error

SIMMONS, J. The facts material to an understanding of the case appear in the official report. The headnotes, read in connection with these facts, will be sufficiently understood without further elaboration. In support of the principle ruled in the second headnote, see 2 Warv. Vend. 973, 974. Judgment reversed, with direction.

(94 Ga. 1207)

#### CONSTITUTION PUB. CO. v. WAY.

(Supreme Court of Georgia. June 30, 1894.)

ACTION FOR LIBEL—JOINT PLAINTIFFS—RIGHT TO STRIKE ONE PLAINTIFF—LIABILITY OF NEWSPAPER—OFFER OF SPACE FOR DENIAL—EFFECT.

1. Where a joint action for libel was brought by two plaintiffs, one of them could be stricken, and the action proceed in behalf of the other. An amendment effecting this, but not otherwise changing the declaration, was no cause for a continuance.

2. Although the original plaintiffs were described in the declaration as "J. M. & Fred W. Way," the declaration complained of an injury done to them personally by the publication of the alleged libel, and not of an injury inflicted upon them as a firm or partnership, no firm or



partnership being alleged or mentioned, and the declaration charging that the libel tended to blacken and destroy the petitioners' reputation for honesty, virtue, and integrity, and expose them to public hatred, contempt, and ridicule, as well as to damage them in their business, and the libelous matter being such as would seriously injure reputation, apart from any business or any vocation whatever.

3. Where a publication is libelous of two persons, so that each of them would have a right of action against the libeler irrespective of the existence of any partnership between them, that the libel attributes to them a firm name is no obstacle to maintaining a several action by either for the publication of the libel.

4. An offer of the publisher of a newspaper, made pending a suit against him for a libel, to open the columns of the paper to the plaintiff for any explanation or statement he wishes to make, counts for nothing on the trial of the action.

5. The court did not err in admitting or excluding evidence, in charging the jury, or in refusing to charge as requested, nor in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by J. M. and Fred W. Way against the Constitution Publishing Company. A judgment was rendered in favor of J. M. Way, and defendant brings error. Affirmed.

Dorsey, Brewster & Howell, for plaintiff in error. Broyles & Son, for defendant in error.

**SIMMONS, J.** 1-3. J. M. and Fred W. Way brought an action for libel against the Constitution Publishing Company. On the trial of the case the court allowed an amendment striking the name of Fred W. Way, and permitted the case to proceed in the name of J. M. Way, over the objection of counsel for the defendant that the amendment made a new and distinct cause of action as well as a new and distinct party, it being contended that the action as it originally stood was an action by a firm or partnership, and that the amendment converted it into an action by an individual. Counsel for the defendant also moved for a continuance, on the ground that they were not prepared to meet the case made by the amendment, having prepared to defend against a firm, and not against an individual. The court did not err in allowing the amendment, nor in overruling the motion for a continuance. Although the plaintiffs were described in the declaration as "J. M. & Fred W. Way," it was not alleged that these persons composed a firm or partnership; and the declaration complained of an injury done to them personally by the publication of the alleged libel, and not of an injury inflicted upon them as a firm or partnership. It alleged that the libel tended to blacken and destroy the petitioners' reputation for honesty, virtue, and integrity, and expose them to public hatred, contempt, and ridicule, as well as to damage them in their business; and the libelous matter was such as would seriously injure reputation, apart from any business

or any vocation whatever. Each of the plaintiffs, therefore, had a right of action against the libeler, irrespective of the existence of any partnership between them; and the fact that the libel attributed to them a firm name was no obstacle to maintaining a several action by either for the publication of the libel. An action brought by them jointly could be amended by striking one of them, so as to proceed in behalf of the other only.

4. It was complained that the court erred in charging that "a mere offer on the part of the defendant company to allow the plaintiff to make a statement in their paper, or allow him the use of their paper (if any such offer was made after this suit was filed), cannot be considered as mitigation of damages or for any other purpose." There was no error in this charge. Such an offer is not a withdrawal or retraction of the libel. It is much the same thing as if one who has said of another, "This man is a thief," should offer to say, "He says he is not a thief." Where no retraction is published, the parties who have published the libel, by making such an offer, say, in effect: "We will let you say in our newspaper that you deny the charge we make, and we will let the public judge between us." It would be going very far to say that this is such reparation or such an evidence of good faith as should entitle the wrongdoer to a reduction of the damages. If a prompt retraction of the charge is published, thus in some degree repairing or attempting to repair the wrong, the law allows this to be taken into consideration by the jury as a ground for reducing the damages; and even then, it has been held, the retraction must be made or offered before the person libeled has sought redress in the courts. *Association v. Tryon*, 42 Mich. 549, 4 N. W. 267. Where the publishers of a great newspaper have sent out to the world the statement that a man has defrauded his creditors, and has run off to escape them and the police, who are in pursuit of him, and it turns out that the statement is false and without foundation, and they do not retract it, but wait until after the injured party has brought suit against them, and then offer him merely the privilege of denying it himself in their newspaper, this is certainly very feeble reparation of the wrong.

5. The evidence warranted the verdict, and the court did not err in its rulings upon the admission or exclusion of evidence, in charging the jury or in refusing to charge as requested, nor in overruling the motion for a new trial. Judgment affirmed.

(94 Ga. 636)

**COLLINS v. WILLIAMSON.**

(Supreme Court of Georgia. July 23, 1894.)

CONSTRUCTIVE TRUST—ENFORCEMENT.

One who, at the instance of a vendee of land who was in possession under a bond for ti-



ties with none of the purchase money paid, bid off the land at a sheriff's sale, under a parol agreement with the vendee, the defendant in execution, that he would buy in the land, advance the money, and take the sheriff's conveyance to himself for the benefit of such vendee, and who, while bidding was in progress, discouraged bidding by another by stating that he was bidding in behalf of the vendee, holds as trustee for the latter such title as he derived from the sheriff, and on being paid or tendered in due time the amount of his bid, and all other moneys advanced by him in consequence of his purchase, with interest thereon, may be compelled by decree to convey the premises to said vendee by release or quitclaim deed.

(Syllabus by the Court.)

Error from superior court, Emanuel county; H. D. D. Twiggs, pro hac Judge.

Action by T. C. Collins against Solomon Williamson. Judgment for defendant, and plaintiff brings error. Reversed.

The following is the official report:

Collins by his petition alleged: He bought from one Henderson, trustee, a tract of land for \$600, giving his three promissory notes, each for \$200, therefor, taking bond for titles. Henderson traded one of the notes to Thomas Camp, and another to Ella Salter. Camp obtained judgment, and a *fi. fa.* issuing thereon, the land was sold thereunder at sheriff's sale to Solomon Williamson for \$166. When the bidding was going on at this sale, and before it began, there was an arrangement by which Williamson was to buy the land and take the sheriff's deed, and hold possession of the deed as security for the amount paid by him, but petitioner was to have the deed when he paid Williamson the money paid out with interest; the agreement being that Williamson was to act as petitioner's friend, and not in his own behalf. As soon as Williamson obtained the deed he claimed the land as his own, and refused to accept the money with the legal interest thereon, as he agreed to do, which has been tendered to him by petitioner; petitioner going ahead, and paying up the balance due on the execution, and taking it up. Afterwards Mrs. Salter obtained judgment, and had the land levied on, Williamson filed a claim, and the land was found subject, and for the first time a deed under the bond for titles was filed in the clerk's office, and petitioner, thinking to allow the land to be sold again so he could obtain the same by purchase after the fraud of Williamson in his first agreement, rested easy; but, instead of the land selling, Williamson had the deed taken from the clerk's office, it being never returned to the clerk, and compromised the Salter *fi. fa.*, at what amount petitioner does not know. The other note for \$200, and the balance on the Camp *fi. fa.*, were paid by petitioner on the parol agreement made by him with Williamson. He has at various times offered, and still offers, to pay Williamson every dollar, with legal interest thereon, all of which Williamson refuses, but claims the land as his own. Under the parol agreement between peti-

tioner and Williamson, the former was to remain in possession, pay off and discharge the remaining purchase-money notes against the land, and in pursuance of this agreement has remained in possession and has placed on the land valuable improvements, and has carried out in good faith the agreement to pay the balance of purchase money. Petitioner prayed that the sheriff's deed to Williamson be canceled; that the amount of money expended by Williamson, with the legal interest thereon, be paid by petitioner to Williamson, and thereupon the sheriff's deed be declared void; that peaceable possession be decreed; and for general relief. The answer of Williamson need not be set out. The case was tried, and, after the introduction of the evidence for petitioner, defendant moved for a nonsuit, upon the ground that, as the agreement was in parol concerning the sale of land, it came within the statute of frauds. The court granted the motion, and petitioner excepted. Collins testified: "I bought the land from Henderson, paying him part of the purchase money, and giving my three notes for the balance. It was worth at least \$1,200 when I purchased it. I put my son in possession under an agreement to sell him 100 acres, and that when I paid him the balance of the purchase money I would cause Henderson to make him a deed to it. The hundred acres was never run off or divided from the balance of the tract, nor was any price agreed upon between us for the hundred acres. I allowed him to remain on the land until about a year ago, when he moved off. Henderson sold one of my notes to Camp, who sued it to judgment, and execution thereon for \$200 was levied upon the land. No deed to me was filed in the clerk's office before the sheriff's sale, which was made October 7, 1884. I had to get some friend to buy the land in for me or to pay off the execution. Williamson, my neighbor, consented to bid off the land, take the deed, and give me a deed when I paid him his money back; it being part of the agreement that I should pay off the balance of the purchase money due on the land when the notes matured. He and I attended the sale together, and he bid off the land for me as agreed upon, for \$160, and the sheriff made him a deed to it. When the second purchase-money note fell due, Salter, to whom Henderson had transferred it, sued it to judgment. Henderson filed the deed to me in the clerk's office. Williamson paid the money on the *fi. fa.*, for how much I was never able to find out, and took up the papers. Williamson did not demand possession of the land, and I have had possession ever since through my son, as above stated. After said sale my son put two houses on the land of the value of \$150, and cleared several acres, and fenced some, which was worth \$50. Before the sheriff's sale, also, my son put valuable improvements on the

land. Both before and after said sale I cut timber on the land, and neither my son nor myself have ever been disturbed in my possession. At one time I tendered Williamson \$100, and at another \$800, to get his money out of. When I offered him the money, and demanded a deed, he said he would study about the matter, but did not claim either time that the land was his. I paid off the balance of the purchase money as agreed." There was other evidence for petitioner to the effect: While the bidding was going on at the sheriff's sale one Coleman made a bid, and Williamson asked him not to bid against him (Williamson), as he was bidding the land off for Collins. Coleman did not bid any more. One Bazemore intended going to the sale and bidding, but saw Williamson, who told him that he (Williamson) was going to bid off the land for Collins, so Bazemore did not attend the sale. When the sheriff served Williamson with a copy of the petition in this case Williamson told him that it was true that he (Williamson) bought in the land for Collins, but that Collins had never paid him for it.

Hines, Shubrick & Felder and F. H. Safold, for plaintiff in error. Williams & Smith, for defendant in error.

PER CURIAM. Judgment reversed.

(98 Ga. 778)

**MAY MANTEL CO. v. UNITED STATES BLOWPIPE CO.**

(Supreme Court of Georgia. June 30, 1894.)  
AMENDMENT OF DECLARATION — PAROL EVIDENCE — COST OF WORK — CONTRACT FOR PIPING — INADMISSIBLE FOR PURPOSE DESIRED — EFFECT.

1. As to amending the declaration, this case is ruled by the case of *Tumlin v. Furnace Co.* (March term, 1894) 20 S. E. 44, and cases cited.

2. The written contract between the parties stipulating that the work done should be paid for at so much per pound for the material used and so much per hour for the labor, evidence that the plaintiff, by its agent who made the contract in its behalf, represented that all the cost would not exceed a specified sum, was inadmissible, the necessary effect of it being to qualify or vary the terms of the writing in their application to the undisputed facts.

3. The evidence in the record shows that the plaintiff complied with the contract on its part, and that the reason why the defendant did not continue to obtain results such as were obtained at first was that the fan failed, and, this failure having occurred after performance by the plaintiff was complete, and the contract not imposing on the plaintiff any duty or responsibility touching the continuous efficiency of the fan, the facts in this regard present no defense whatever to the action, either as to the whole or any part of the demand.

4. There was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by the United States Blowpipe Company against the May Mantel Company.

Judgment for plaintiff, and defendant brings error. Affirmed.

R. J. Jordan, for plaintiff in error. Hall & Hammond and L. P. Skeen, for defendant in error.

SIMMONS, J. 1. The United States Blowpipe Company brought its action against the May Mantel Company on an open account in the statutory form, attaching a bill of particulars thereto. Subsequently the plaintiff offered to amend the declaration by setting out a written contract between it and the defendant, showing that the articles sued for in the bill of particulars had been agreed on in the written contract. The defendant objected to the amendment on the ground that it introduced a new cause of action, the suit having been brought on an open account, and no reference being made to a written contract. The court allowed the amendment, and error is assigned thereon. This point is ruled by the decision in the case of *Tumlin v. Furnace Co.* (March term, 1894) 20 S. E. 44. Under that decision, there was no error in allowing the amendment.

2. The written contract above referred to stipulated that the plaintiff was to receive 18 cents per pound for the piping, 40 cents per hour for the mechanics furnished, and one-fourth their railroad fare both ways between Cincinnati and Atlanta. On the trial the defendant offered to prove that the plaintiff's agent who made the contract represented that the entire cost of the work would not exceed a specified sum. This was objected to by counsel for the plaintiff, and the court ruled that such evidence was inadmissible, as varying the written contract. There was no error in so holding. The necessary effect of such evidence would be to qualify or vary the terms of the writing in their application to the undisputed facts.

3. Under the contract, the plaintiff was to furnish and put in place piping for the purpose of carrying off shavings and dust from certain machinery of the defendant, and was also to put in place an exhaust fan, furnished by the defendant, which was to be connected with the piping so as to supply air to drive the shavings, etc., through the pipes. The defendant pleaded that the work had failed to come up to the contract, and evidence was introduced to show that several days after the piping and fan had been put in place, and while being used for the purpose intended, the pipes began to choke up with shavings, and, when relieved, would soon become choked up again, so that they could not be used for that purpose. This, however, it appeared, was due to the failure of the fan furnished by the defendant to supply enough air to drive the shavings through the pipes, and not to any defect of the pipes themselves; and it appears that when the work was completed by the plaintiff and accepted by the defendant, and for

several days after, the fan operated satisfactorily. It does not appear that the failure of the fan to continue working as it did as first was due to any fault of the plaintiff, and the plaintiff did not warrant that it would continue to work satisfactorily. The failure to do so having occurred after the plaintiff had performed its contract, and the contract not imposing on the plaintiff any duty or responsibility touching the continuous efficiency of the fan, the facts in this regard present no defense whatever to the action, either as to the whole or any part of the demand. The evidence warranted the verdict, and there was no error in refusing to grant a new trial. Judgment affirmed.

(93 Ga. 712)

**RAGAN v. CHICAGO PACKING & PROVISION CO.**

(Supreme Court of Georgia. April 23, 1894.)  
RECOVERY OF PERSONAL PROPERTY—BAIL—INABILITY TO PRODUCE PROPERTY.

Under the act of 1879 (Code, § 3420a), touching the liberty of the citizen in proceedings requiring bail in actions for the recovery of personal property, while no discharge is warranted unless the reasons shown for the nonproduction of the property are satisfactory, it is not requisite that an existing physical impossibility to produce the property should be the result of misadventure or of blameless conduct on the part of the defendant, but, if it existed at all when the process was sued out, and continues to exist without any fault or misconduct committed by the defendant since that time, it should be deemed satisfactory. Inasmuch as by section 3418 of the Code a plaintiff, in order to require bail, must make affidavit "that the property is in the possession, custody, or control of the defendant," anything which shows with full certainty that this affidavit was not true in fact should be deemed a satisfactory reason for not producing the property, unless it affirmatively appears that since the plaintiff's affidavit was made the defendant has acquired the power to produce it.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action by the Chicago Packing & Provision Company against N. L. Ragan in bail and trover. From an order refusing to discharge defendant, who had been arrested, he brings error. Reversed.

Jesse W. Walters and Harrison & Peeples, for plaintiff in error. D. H. Pope, for defendant in error.

**SIMMONS, J.** The Chicago Packing & Provision Company sued out process of bail and trover against Ragan for certain car loads of meat, which it had shipped to him. It appears that Ragan was not to have possession of the meat until a draft drawn by the plaintiff on the defendant, payable to the order of Hobbs & Tucker, had been paid. By an arrangement with Hobbs & Tucker, Ragan got the meat without paying the draft. Ragan was a merchant, and in the course of his business disposed of some of

the meat, and was disposing of the rest of it, when a petition in equity was filed against him, and a receiver was appointed to take charge of all of his assets, including the meat on hand. After this the bail process was issued, and Ragan arrested. He petitioned the judge of the superior court to discharge him, under the provisions of section 3420a of the Code. That section declares, in substance, that when a person arrested under this process shall, by reason of his inability to give security, be held in imprisonment, it shall be lawful for him to make his petition in writing, on oath, to the judge of the circuit in which suit is pending, in which he shall state that he is neither able to give the security required by law nor produce the property, and that he can furnish satisfactory reasons for its nonproduction, and traverse the reasons stated in the defendant's affidavit for bail. It requires a copy of this petition to be served upon the plaintiff, and makes it the duty of the judge, after five days' notice, to proceed in a summary way to hear evidence upon the facts contained in the petition; and, if he finds that the petitioner can neither give security nor produce the property, and that the reasons for its nonproduction are satisfactory, he shall discharge the petitioner upon his own recognizance, conditioned for his appearance to answer the suit, but otherwise he shall recommit him to custody. The hearing was had as provided for by this section. At the hearing the petitioner stated all the facts, and showed conclusively that he could not produce the meat, because part of it had been sold and delivered to his customers, and the other part had been taken charge of by the receiver; that he was utterly without means to pay for the meat, and that he depended on his friends to obtain the necessities of life. The court held, in substance, that, as Ragan had wrongfully obtained possession of the meat, he must pay for it, or give security for the price of it, or be recommitted to jail. It was admitted by counsel for the defendant in error, in his argument in this case, that Ragan was in bad financial condition, and could not return the property; but he insisted that Ragan's inability to do this or give bond and security is not a sufficient ground for his discharge; that it does not matter how poor and impecunious a man is, if he got possession of the property wrongfully, and made away with it, he must pay for it, or give security for it, or else remain in jail. We do not think this is the meaning of the section referred to. In our opinion, it means exactly the reverse. It means that, even if a man does obtain possession of personal property illegally and wrongfully, and disposes of it, he may, upon being required in a proceeding of this kind to produce the property or give security therefor, be discharged if he gives the judge satisfactory reasons for his inability to do so; and it is not necessary for him to show

that the property was lost by misadventure, or by blameless conduct on his part. If he is unable, at the time process is sued out, to comply with the requirements of the law in regard to producing the property or giving security, and his inability to do so continues without any fault or misconduct on his part since that time, this must be deemed a satisfactory reason. Section 3418 of the Code requires the plaintiff, before he can have bail process issued, to make affidavit that the property is in the possession, custody, or control of the defendant. Anything which shows with full certainty that this affidavit is not true in fact should be deemed a satisfactory reason for not producing the property, unless it affirmatively appears that since the affidavit was made the defendant has acquired the power to produce it. The affidavit made in this case to procure the bail process stated that the property was then in the possession, custody, or control of Ragan. We think the facts disclosed by the record show conclusively that the affidavit was unfounded. Some part of the meat had been sold and consumed; the other part was in the hands of the court, and not in the possession, custody, or control of Ragan. This should have been a satisfactory reason to the court for discharging him. To give the statute the construction contended for by counsel for the defendant in error might amount to perpetual imprisonment of an insolvent and impecunious man. There would be no way, in some cases, of his obtaining his discharge, without payment of the money, or giving security for the property. The object of the statute allowing the remedy of bail trover is to secure the property, or payment of the price therefor, and not to punish the debtor for illegal acts in obtaining the property. For that the law provides another remedy. Judgment reversed.

(34 Ga. 523)

**MOORE et al. v. PEACOCK.**

(Supreme Court of Georgia. April 23, 1894.)

**HOMESTEAD—RIGHTS OF MINORS IN PROFITS.**

All rents and profits arising out of homestead lands, except those consumed while the homestead estate is on foot, belong to the owner of the realty out of which the homestead was carved. After minor beneficiaries have arrived at majority, they cannot maintain an action against one who wrongfully excluded them from the possession during their minority, and took the rents and profits for his own use. Their right as beneficiaries having become extinct by lapse of time, they have no claim as beneficiaries, and consequently no title, legal or equitable, on which they can recover.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Action by Mary A. Moore and others against L. M. Peacock, administrator of one Rozar. Petition was dismissed on demurrer, and plaintiffs bring error. Affirmed.

The following is the official report:

The petition shows that on July 21, 1875, lot of land 123, in the Nineteenth district of Dodge county, was set apart as a homestead to Elizabeth Jane Moore, now deceased, who was then living in a state of separation from her husband, and plaintiffs being then minors. They have reached their majority within the last four years. They were the beneficiaries of the homestead, and were entitled to the enjoyment of the same, and the profits, possession, use, and occupation thereof, but were wrongfully deprived of the enjoyment of the same, the profits thereof, and the possession, use, and occupation of said lot by Rozar during his lifetime, and during the 14 years from 1876 to 1889 he received the profits of the land for said time, of the value of \$100 per year, which his administrator, the defendant, refuses to pay.

Delacy & Bishop, for plaintiffs in error. E. A. Smith, for defendant in error.

PER CURIAM. Judgment affirmed.

(33 Ga. 775)

**HENDERSON, County Treasurer, v. PARRY.**

(Supreme Court of Georgia. June 11, 1894.)

**OFFICIAL STENOGRAPHERS—COMPENSATION.**

The phrase, "taking down the testimony," as used in section 4696b of the Code, and in the act of October 12, 1885, providing for the compensation of official stenographic reporters, embraces the whole process of reproducing the testimony of the witness in ordinary and intelligible writing, when necessary to comply with the law, including both the stenographic notes taken by the reporter and the translation of these notes and writing out the same in ordinary language. Where there is no conviction so as to make it legally necessary to record the evidence, the process of taking down is complete without writing out the stenographic notes, and hence, in such cases, the compensation of the reporter should be limited to the time occupied in making his notes.

(Syllabus by the Court.)

Error from superior court, Newton county; R. H. Clark, Judge.

Mandamus by H. L. Parry against John T. Henderson, county treasurer. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Mandamus was made absolute against the county treasurer, requiring him to pay to the official stenographer of the circuit the sum of \$45, as required by a previous order of the judge of the circuit, and the treasurer excepted. The order which had been refused payment was preceded and accompanied by the affidavit of the stenographer to the correctness of the account; and by the certificate of the judge that the stenographer was employed five days in taking down the testimony in the criminal case therein described; that at the same term when the conviction took place the judge had granted the stenographer an order on the county treasurer for \$30 to cover his services for two days, and that he was entitled to a balance

of \$45 for three days' services, which sum the treasurer was ordered to pay out of the county funds upon presentation of the order. The facts alleged by the treasurer in answer to the mandamus nisi were admitted to be true. These are that the stenographer was engaged two days in taking down the testimony in stenographic notes, and three days in transcribing the same; that the order for \$30, covering two days' services, had been paid; and that the treasurer had refused to pay the order for the balance of \$45, because, as he contends, the compensation of \$15 per day is limited to the days actually engaged in taking down the testimony in stenographic notes in the courthouse, and does not include the time taken in transcribing them.

E. F. Edwards, for plaintiff in error. Glenn & Maddox, John S. Candler, and Marshall J. Clarke, for defendant in error.

SIMMONS, J. The headnote in this case, read in connection with the official report, will be sufficiently understood without further elaboration. The construction given to the statute, as announced in the headnote, we are satisfied is correct, and is the one which has generally been placed upon it by the circuit judges of the state. Judgment affirmed.

(38 Ga. 777)

RAGLAND, County Treasurer, v. PALMER.  
(Supreme Court of Georgia. June 11, 1894.)

STENOGRAPHER'S FEES.

As ruled in *Henderson v. Parry* (this day decided) 21 S. E. 144, a judge of the superior court may allow the official stenographic reporter compensation at the rate of \$15 per day for services actually rendered in writing out the stenographic notes taken down in the trial of felonies resulting in convictions; but the judge has no authority to allow compensation for such services before they are rendered, nor to allow compensation for writing out the stenographic notes in case of a mistrial.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Mandamus by George C. Palmer against W. E. Ragland, county treasurer, to compel the payment of a stenographer's bill. From a judgment for plaintiff, defendant appeals. Reversed.

The following is the official report:

Attached to the plaintiff's petition was a bill made out in his favor against the county for "six days' services, time necessary to transcribe testimony in felony convictions, and case of *State v. Green Neal, Jr.*, rape, mistrial, which is ordered written out by the court, at legal rate, \$15 per day." Upon this bill was the following order, signed by the judge: "It appearing to the court that the foregoing bill is correct, it is ordered and adjudged that the treasurer of Talbot county pay to the said George C. Palmer the sum of ninety dollars out of any funds that he may

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have on hand to defray court expenses." The defense was that the treasurer was advised that the order was not such as is allowed by the statute prescribing the payment of official stenographers, but that said bill shows upon its face that the work for which pay is claimed was not for taking down the testimony as the law provides, but was for time required in transcribing the reporter's notes from shorthand to ordinary writing, he having been paid for taking down said testimony on the trial of the case at \$15 per day. Plaintiff testified: "I was engaged at the September term, 1893, of the superior court as official court reporter, and as such reported the evidence in felony cases, consuming five days in taking down in shorthand notes said cases. The court granted me an order on the county treasurer for five days' taking down testimony, and six days' time necessary to transcribe felony convictions. When I presented my order to the treasurer, he advised me that he could not pay the full amount of it. He paid me \$75 (five days' taking down at \$15 per day), stating that he was willing to pay me for writing out testimony in felony convictions, but was refusing to do so under instructions of the county commissioners. I wrote out a portion of the convictions at said term after court adjourned, and wanted to know whether I would receive pay for the balance before I did so. The case I wrote out was *State v. Green Neal, Jr.*, charged with rape, and a mistrial, which was ordered written out by the court at the request of counsel. The original order is attached to the petition for mandamus."

J. J. Bull, Henry Persons, J. L. Willis, J. H. Martin, and S. B. Hatcher, for plaintiff in error. Worrill & McMichael and Little & Wimbish, for defendant in error.

PER CURIAM. Judgment reversed.

(84 Ga. 102)

BRUNSWICK & W. R. CO. v. MAYOR,  
ETC., OF CITY OF WAYCROSS.

(Supreme Court of Georgia. June 11, 1894.)

LAYING OUT STREETS—TAKING PRIVATE PROPERTY—COMPENSATION.

The power granted in the charter of the city of Waycross to the municipality to lay out and open streets, there being no grant of power to take or damage private property for the purpose, or to make compensation therefor, or to provide by ordinance for assessing or otherwise ascertaining the amount of compensation, does not enable the municipality to lay out and open a street over the land and over the tracks of a chartered railway company, without the consent of the company; and the fact that the city has passed an ordinance providing method and machinery for assessing compensation is no substitute for the necessary statutory authority on that subject. The judge erred in not granting the injunction prayed for.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Bill by the Brunswick & Western Railroad Company against the mayor and others of the city of Waycross. Judgment for defendant, and plaintiff brings error. Reversed.

S. W. Hitch and Goodyear & Kay, for plaintiff in error. J. L. Crawley, John C. McDonald, and L. A. Wilson, for defendant in error.

SIMMONS, J. Under the facts of this case, we think the judge erred in not granting the injunction prayed for. While it is true the legislature, in the charter of the city of Waycross, granted power to the municipality to lay out and open streets (Acts 1889, p. 897), it did not grant power to take or damage private property for the purpose, or to provide by ordinance for assessing or otherwise ascertaining the amount of compensation. Our constitution declares that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid" (Code, § 5024); and the facts disclosed by the record show that to open a street across the right of way of the railroad company, as contemplated by the municipal authorities, would result in great damage to the company. A municipal corporation has no more right than any other corporation to condemn property and provide the mode of assessing compensation therefor, unless authority to do so is granted by the legislature in express terms or by necessary implication. Such authority cannot be implied from the grant of power to lay out and open streets. In the absence of any further provision authorizing the municipal authorities to condemn property for that purpose, the presumption is that the legislature intended that the necessary property should be acquired by contract. The fact that the city has passed an ordinance providing method and machinery for assessing compensation is no substitute for the necessary statutory authority on the subject. See Lewis, Em. Dom. § 240; 6 Am. & Eng. Enc. Law, 517. Judgment reversed.

(94 Ga. 95)

#### STATE v. BROBSTON.

(Supreme Court of Georgia. June 11, 1894.)

#### INSOLVENCY OF BANK—SET-OFF BY DEPOSITORS—LIEN OF STATE—RECEIVERS.

1. Where a bank which is a state depository becomes insolvent while indebted to the state, and its effects are in the hands of a receiver, depositors in the bank who are also indebted to it by promissory notes have the right to set off against such notes in the hands of the receiver the amounts justly due them, respectively, on their deposits. Such notes are assets of the bank, upon which the state's lien takes effect only in so far as there may be balances due to the bank thereon after deducting the amounts of the respective deposits made bona fide while the bank did business and its effects were under its own control.

2. Under an order of the court directing the receiver "to allow parties indebted to said bank, where their promissory notes or other evidences of indebtedness are held by said bank,

to set off and credit upon such evidences of indebtedness whatever sums may be to the credit of said parties upon the books of said bank at the date of the closing thereof," he will act at his peril as to the real existence and rightfulness of any demand he may allow as a set-off.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Intervention by the state in the matter of the insolvency of the Brunswick State Bank, for which Edward Brobston had been appointed receiver. From a judgment against the state, it brings error. Affirmed.

J. M. Terrell and W. G. Brantley, for the State. Goodyear & Kay, for defendant in error.

LUMPKIN, J. The Brunswick State Bank, which was a state depository, became insolvent while indebted to the state. On the petition of certain creditors of the bank, a receiver was appointed to take charge of its assets, and the state, in whose behalf the governor had issued an execution according to law, became, by intervention, a party to the case, claiming that it had a first lien on all the assets, and praying for an order directing the receiver to turn over to the state, in preference to all other claims, all moneys received by him from the assets and securities of the bank, until the execution in favor of the state was fully satisfied.

Passing by a question of practice, the decision of which by this court was duly waived, there is but one question for our consideration.

1. That question arises as follows: Many persons who had deposits in the bank at the time it was closed were also indebted to it by promissory notes. They claimed the right, in settling with the receiver, to set off against their notes to the bank, held by him, the amounts of their respective deposits. The receiver presented a petition to the judge for direction in this matter, and, after the hearing, the court passed an order in the following terms: "It is ordered, considered, and adjudged by the court that the said receiver do, and he is hereby directed to, disregard the claims set up by the state of Georgia for a prior lien upon the papers of said bank to the exclusion of depositors of said bank, to offset upon said papers in the hands of said bank whatever amount there may have been to their credit at the date of the closing of said bank; and said receiver is further directed to allow parties indebted to said bank, where their promissory notes or other evidences of indebtedness are held by said bank, to offset and credit upon such evidences of indebtedness whatever sums may be to the credit of said parties upon the books of said bank at the date of the closing thereof." To the granting of this order the state excepted. Were the notes in question assets of the bank upon which the state's lien takes effect, without reference to the lia-

bility of the bank to the makers of these notes for amounts justly due them, respectively, on their deposits? We think not. On the contrary, in our opinion, these notes were assets only in so far as there might be due to the bank balances upon them after deducting the amounts of the respective deposits, if those deposits were made bona fide while the bank was engaged in the transaction of its regular business, and had control of its books. In *Ray v. Dennis*, 5 Ga. 357, it was held that, where the demands were mutual, a set-off should be allowed in favor of a defendant against whom suit had been brought by an administrator on a demand due his intestate, the case proceeding upon the idea that only the net balance, after deducting the amount of the set-off, would be assets of an insolvent estate. *Moise v. Chapman*, 24 Ga. 249, lays down the doctrine that the debtor of a bank may make any defense to a suit brought against him by a receiver of the bank which would be available in a suit against him by the bank itself. In this connection, attention is directed to section 2900 of the Code, which distinctly recognizes the right of set-off. It was held in *Seay v. Bank*, 66 Ga. 609, that the lien of the state upon the property of a state depository was not limited to such property only as could be reached by levy and sale, but extended to all the property, including choses in action. This case, however, does not rule that claims held by the bank against others are assets of the bank to their full amount, without reference to the bank's liability to the persons against whom it held these claims, but intimates to the contrary in holding that the assignee of an insolvent bank takes the assets subject to the preferences and priorities given by law. Outside of this state there are numerous authorities clearly affirming the right of a depositor in an insolvent bank to set off his deposit at the date of closing against any indebtedness of his own to the bank. See 1 *Morse, Banks*, § 338, and cases cited. The case of *Hannon v. Williams*, 34 N. J. Eq. 255, rules that a depositor in an insolvent savings bank, who is also a debtor to the institution for money borrowed, is not entitled to set-off the amount of his deposit against his indebtedness; but an examination of this case will show that it is based upon an exception to the general rule applicable to other banks, because in savings banks the depositors are themselves shareholders. The supreme court of Pennsylvania, in *Skiles v. Houston*, 110 Pa. St. 254, 2 Atl. 30, is to the same effect as our case of *Ray v. Dennis*, supra, and holds that one indebted to the estate of a deceased insolvent banker had the right to set off against a note due from him to the banker the amount of a deposit he had made with the banker, although the note itself had not matured at the time of the banker's death. The rule for which we are contending is also recognized in *Harlan v. Lumsden*, 1

Duv. 86. In *Platt v. Bentley*, 11 Am. Law Reg. 171, the supreme court of New York held that a depositor in a national bank which had failed, and passed into the hands of a receiver, could set off the amount of a deposit he had in the bank against a debt due by him to the bank on a promissory note. We find the following in the American and English Encyclopaedia of Law, under the title "Receivers" (volume 20, p. 135): "A receiver takes title to the property placed in his charge subject to all subsisting liens against it. It follows that choses in action of the defendant pass to him subject to any equitable set-off which might have been set up in defense in an action by the defendant himself." And in the twenty-second volume of this same admirable work, under the title "Set-Off," on page 308, it is stated that "the general principle governing set-off against receivers seems to be that the receiver takes the property over which he is appointed receiver subject to any set-off which the defendant might have set up against the original owner." The rule that the debtor of an insolvent bank will be permitted to set off against his indebtedness to the bank its indebtedness to him is recognized in *Bolles, Banks*, § 389, and is supported by the cases there cited, among which is that of *Platt v. Bentley*, supra. We might multiply indefinitely the citation of authorities, but we think the above establish beyond question that a demand held by an insolvent bank against a third person is an asset of the bank only in so far as there may be a balance due upon the same after deducting whatever the bank may be owing the person against whom the demand is held. We are therefore satisfied that the court below reached the correct conclusion with reference to this question.

2. With reference to so much of the order passed by the court below as is quoted in the second headnote, we will remark that, with the record now before us, we are unprepared to say what claims of set-off should be allowed by the receiver, and therefore have announced that, in making his settlements with the various parties at interest, he will necessarily act at his peril in determining as to the real existence and rightfulness of any demand he may be asked to allow as a set-off, and will be responsible for any errors he may commit. Judgment affirmed.

(32 Ga. 758)

#### LEWIS et al. v. MAULDEN.

(Supreme Court of Georgia. June 18, 1894.)

LIABILITY ON APPEAL BOND—DEATH OF PARTY.

The general rule is that coprincipals in a bond are sureties for each other. On an appeal bond executed by three persons as principals and one as security, judgment may be entered by the creditor against all three of the principals, notwithstanding the verdict finds against one of the principals only. The two principals against whom the appellant failed to recover

having joined in an appeal bond with a coprincipal in that bond against whom there was a recovery in the action, they stood in the relation of sureties for him, and as such were liable for the condemnation money, according to the terms of the bond and the provisions of the statute applicable thereto. The security for all the principals being dead when the judgment was entered on the bond, failure to include him in the judgment is legally accounted for.

(Syllabus by the Court.)

Error from superior court, Pulaski county; W. H. Fish, Judge.

In an action by Lewis, Leonard & Co. against R. S. Maulden and others. Judgment was rendered for plaintiffs in the county court, and on appeal judgment for the plaintiffs, and also against the sureties on the appeal bond. R. S. Maulden filed affidavit of illegality. From a judgment in his favor, plaintiffs bring error. Reversed.

W. L. Grice, for plaintiffs in error. J. H. Martin, for defendant in error.

SIMMONS, J. Lewis, Leonard & Co. sued R. S. Maulden, G. W. Brown and M. E. McKinney in the county court, on a promissory note, all the defendants being sued as principals. They filed a plea setting up usury in the note, and Maulden and McKinney pleaded that they were merely sureties on the note, and were discharged because of the usury therein. The judge of the county court rendered judgment against Brown as principal, and Maulden and McKinney as sureties. All the defendants appealed the case to the superior court, giving one King as security on the appeal bond. On the trial of the case in the latter court the jury rendered a verdict against Brown, and found in favor of Maulden and McKinney. On this verdict the plaintiffs entered judgment in their favor against Brown, and also against Maulden and McKinney as sureties for Brown on the appeal bond. The judgment recited that King, the surety on the appeal bond, was dead, and 12 months had not expired since his death. Execution was issued upon this judgment, and levied on the property of Maulden, and he filed an affidavit of illegality upon the ground that the judgment entered against him and McKinney as sureties on the appeal bond was illegal and void, and unsupported by any verdict, and that the verdict of the jury had relieved them from all liability in the premises. The case was submitted to the judge for determination without a jury, upon the facts above recited. He sustained the illegality, and the plaintiffs excepted. We think the court erred in sustaining the illegality. Although the verdict of the jury in the superior court relieved Maulden and McKinney from liability as sureties on the note, it did not relieve them of their liability on the bond which they had entered into jointly with Brown in order to take the case from the county court to the superior court. Their defense was different from that of

arate appeal, but they elected to join in the same appeal and bond with Brown. The general rule is that coprincipals in a bond are sureties for each other (1 Brandt, Sur. § 38). and we see no reason why this rule should not apply to an appeal bond. According to the express terms of the bond, and the provisions of the statute applicable thereto (Code, § 3616), the obligor in such a bond is liable for the eventual condemnation money; and the eventual condemnation money, in this case, was the amount of the final judgment against Brown. If Maulden and McKinney have to pay this, they will, of course, be entitled to be subrogated to all the rights of the plaintiffs in the judgment against Brown. It appearing from the judgment on the appeal bond that King, who signed the bond as security, was dead, and that 12 months had not expired from his death, failure to include him or his administrator in the judgment was legally accounted for. Code, § 2548. Judgment reversed.

(94 Ga. 577)

#### DOWDY et al. v. McARTHUR.

(Supreme Court of Georgia. June 25, 1894.)

ISSUE AS TO LAND TITLE—GRANT TO FIRM—CLAIM UNDER ALLEGED PARTNER—CONVEYANCE BY PURPORTED HEIRS—PROOF OF HEIRSHIP—DEED BY EXECUTORS.

1. The land in controversy having been granted by the state in 1818 to "McDonald, Pope & Co.," a deed made in 1879 by Michael McDonald, as administrator of James McDonald, under an order of the ordinary passed in that year granting leave to sell the premises as a part of the real estate of James McDonald, deceased, with no evidence to show the identity of James McDonald in name or in person with the McDonald who was a member of the firm of McDonald, Pope & Co., or to show any relationship between them, is not sufficient to pass title out of McDonald, one of the grantees.

2. An original grant issued by the state in 1818 to "McDonald, Pope & Co." was in the possession of one W. S. Pope, Jr., in the year 1860, who then, for himself and as attorney in fact under a power executed in 1852 by other persons, some of them bearing the name of Pope and others the name of Hunter, sold and conveyed the premises covered by the grant, and at the same time delivered the grant itself to his vendee, the privies of whom now hold and produce it. The power of attorney recited that the makers thereof, together with the attorney himself, were the heirs of William L. Pope, and the deed referred to the power. At the time of making the deed W. S. Pope, Jr., stated to his vendee, to whom he was a stranger, that he was the son of William L. Pope. There was no further evidence tending to identify the last named, either in person or in name, with the Pope mentioned in the grant under the designation of "McDonald, Pope & Co." or tending to prove any relationship of the Popes and Hunters to William L. Pope or his family; and there was no evidence that any of them have died, or that any actual possession of the premises was ever taken or enjoyed under the deed. *Held*, that the evidence was not adequate to establish either the identity of William L. Pope as one of the grantees from the state, or that the Popes and Hunters who conveyed by the deed were his heirs.

3. A deed by one as executrix, purporting to convey land as the property of her testator.



passes no title without evidence that she was executrix, and had authority, either by the will or by leave of the ordinary, to sell.

4. A woman to whom a devise was made by the name of Sarah V. McLauchlin, and who afterwards conveyed the devised premises as Sarah V. Butler, describing herself in the conveyance as formerly Sarah V. McLauchlin, should be presumed to have acquired her new name by marriage, and no proof of her identity is required merely in consequence of this change of name.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Action by W. T. McArthur against Dowdy & Robuck. Judgment for plaintiff, and defendants bring error. Reversed.

The following is the official report:

McArthur brought an action of trespass against Dowdy & Robuck, alleging that defendants, on January 1, 1891, and on other days before the filing of the suit, entered on land lot 201 in the Fourteenth district of Dodge county, and cut and carried away all the merchantable sawmill timber thereon, the property of plaintiff. The suit was filed January 19, 1892. A verdict and judgment were rendered for \$200 in favor of the plaintiff, and defendants excepted to the rulings of the court hereafter appearing.

Plaintiff introduced in evidence: (1) Certified copy of letters of administration issued by the ordinary of Montgomery county, April 7, 1879, to Michael McDonald, described therein as a nonresident of said county at the time of his death, it not further appearing that he was then a nonresident. Defendants objected on the ground that the administration was illegal and void, and no connection or identity was shown between James McDonald and any of the original grantees of the land from the state, or that McDonald had any interest therein. The objection was overruled. (2) Certified copy of order granting Michael McDonald leave to sell the wild lands of said estate, among them the lot in dispute, the sale to be private. This order was granted May 5, 1879, by the ordinary of Montgomery county. Defendants objected thereto on the same ground as just stated, and the objection was overruled. (3) Deed from Michael McDonald, as administrator of James McDonald, to plaintiff and John W. Griffin, dated May 6, 1879, conveying, among others, the lot in dispute, the sale being private, and the deed appearing to be recorded in Dodge county, April 1, 1880, and again on September 7, 1882. (4) Deed from J. O. Mattherson and "S. V. Butler (formerly McLauchlin)" to plaintiff, quitclaiming the lot in dispute, among many others, dated March 30, 1885, and properly recorded. Defendants objected on the ground that there was no evidence showing that Sarah V. Butler was formerly Sarah V. McLauchlin, except a recital to that effect in this deed, which was not binding on defendants, they not being parties or privies thereto. The objection was over-

ruled. (5) Certified copy of letters testamentary to George A. Oates as executor of G. H. McLauchlin, dated August 3, 1868, by the ordinary of Richmond county. (6) Certified copy of will of Gerrard H. McLauchlin, of Richmond county, bequeathing to his sister, Sarah V. McLauchlin, all of the property, both real and personal, and naming George A. Oates as his executor, dated October 20, 1865, and probated at chambers in Richmond county, in common form, July 21, 1868. (7) Affidavit of plaintiff, dated March 14, 1893, that the original power of attorney made by Harriet Pope, Henry Pope, Elizabeth Pope, J. M. G. Hunter, and M. S. Hunter to W. S. Pope, dated December 6, 1852, recorded in the office of the clerk of the superior court of Pulaski county in Book L, p. 361, authorizing W. S. Pope to sell and convey, among other property, land lot 201 in the Fourteenth district of Dodge County, Ga., "— not in — possession, power, or custody, and that — believes said original — lost or destroyed." (8) Certified copy of power of attorney from the records of Pulaski county signed by the named Popes and Hunters, constituting and appointing William S. Pope as their attorney in fact, to grant, bargain, and sell certain land lots, including the lot in dispute, in the Fourteenth district of Wilkinson county, wherein it is recited that all the parties hereto reside in Jackson county, Fla., and are the heirs at law of William L. Pope, of that state and county, and formerly of Richmond county, Ga. To this defendants objected on the grounds that the recitals therein were not evidence as against them, they not being parties or privies thereto, and that there was no evidence that William L. Pope was a member of McDonald, Pope & Co., the grantees of said land. The objections were overruled. (9) Deed from W. W. Harrell, J. J. Hamilton, O. C. Horn, and H. J. Manning, executrix of S. M. Manning, to G. H. McLauchlin and J. O. Mattherson, composing the firm of McLauchlin & Co., of Richmond county, dated July 10, 1862, properly recorded, conveying the lot in dispute among many others. (10) Warranty deed signed by William S. Pope, attorney in fact, and by William S. Pope, Jr., per se, conveying to Wright W. Harrell, John J. Hamilton, Orran C. Horn, and Seaborn M. Manning certain lands lying in the counties of Pulaski, Laurens, and Telfair (originally Wilkinson), aggregating 27,742½ acres more or less, among them a lot in the Fourteenth district, the number of which was written thus, "207"; it being contended by plaintiff that this was the lot in dispute. This deed recites that it is between William S. Pope, Sr., and William S. Pope, Jr., attorney in fact for Harriet Pope, Henry Pope, Margaret S. Hunter, formerly Pope, and Elizabeth Wombwell, formerly Pope, of the county of Jackson, of the first part. It is dated June 20, 1860, recorded in Pulaski county, July 17, 1860, in

Telfair county, April 29, 1861, and in Laurens county, January 11, 1889. Defendants objected to its introduction, on the grounds that there was no evidence that any of the vendors was the grantee of the land, or that they were the heirs at law of the grantees thereof, or had interest therein, or that William S. Pope was the attorney in fact of the parties named in the deed, the recitals therein not being evidence as against defendants who were neither parties nor privies thereto; and because it was impossible to tell from an inspection of the number, which plaintiff contended was that of the land in dispute, whether it was intended for "201" or "207"; and because it did not appear from the description in the deed what county that lot was in, even if it was intended for "201"; and because there was no evidence of who composed the firm of McDonald, Pope & Co., nor the interest of each in the land, nor that the parties named in the deed as grantors were members of McDonald, Pope & Co. The objections were overruled. (11) Mutilated original and a certified copy of plat and grant from the state to McDonald, Pope & Co., of Richmond county, to said lot of land, dated April 27, 1818.

J. A. Wooten testified: "The timber on the lot in controversy was worth about \$400. Defendant told me a part of it was cut by Dowdy & Veal, a part of it by Dowdy & Robuck, and a part by the Key Lumber Company. I do not know what portion of it was cut by either party. I have been on the lot since it was cut. Robuck said the timber on the lot was worth \$400. He did not say how much of it was cut by defendants." J. D. Bryant testified: "I live not far from the land in controversy. Defendants had a sawmill on a lot near by, and I saw hands cutting timber on the lot, and they were hands that worked at the sawmill until defendants sold it out to the Key Lumber Company. I don't know how much of the timber was cut by defendants nor how much by the Key Lumber Company. The timber on the whole lot was worth about \$400. I know that defendants' hands cut most of the timber that was cut off the lot in dispute." W. W. Harrell testified: "Lot number 201 is in Dodge county. Don't know whether it was in Dodge or Telfair before Dodge was formed. I was one of those who purchased the land from William S. Pope, Jr. I never saw any member of the firm of McDonald, Pope & Co., and do not know who composed it. We got the deed from William S. Pope, Jr., and at the same time received from them the original grant in evidence. William S. Pope gave plat and grant to the lot in dispute, with plat and grants to all others made to himself and others, just referred to. William S. Pope, Jr., was heir of William S. Pope, Sr., by reputation in the family. I never saw any one of the family except him. He represented himself to be the son of W. S. Pope, Sr." Defendants mov-

ed for a nonsuit, but the motion was overruled. No further evidence was introduced, and the court charged the jury that plaintiff had shown sufficient title to recover, and that the sole question for them to pass upon was the amount of the damages; and then proceeded to give in charge the law in reference to damage and trespass. To this instruction and to the other stated rulings defendants excepted.

E. A. Smith, E. Herrman, and W. B. Coffee, for plaintiffs in error. J. E. Wooten, for defendant in error.

PER CURIAM. Judgment reversed.

(93 Ga. 773)

PUSEY et al. v. McELVEEN COMMISSION CO.

(Supreme Court of Georgia. June 30, 1894.)

CONTRACT OF SALE — BREACH BY SELLER — SUFFICIENCY OF DECLARATION — ALLEGATION OF DEMAND — TIME FOR PERFORMANCE.

By the contract as alleged in the declaration, delivery by the sellers and payment by the purchasers were to be concurrent acts; and no specific time for performance by either party being alleged, and the declaration being silent as to any demand upon the defendants for delivery, or any refusal to deliver, or any offer of payment or tender of the purchase money, and as to any readiness or willingness of the plaintiffs to perform on their part, the declaration set forth no complete cause of action, and it was error to overrule the demurrer. To allege merely that the defendants failed to deliver at the time specified, no time in fact being specified, is not sufficient, in the absence of other requisite allegations, to set forth any breach of the contract on their part.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Pusey & Co. against the McElveen Commission Company. Judgment for plaintiffs, and defendants bring error. Reversed.

Johnson & Johnson, for plaintiffs in error. F. H. Harris and J. L. Harris, for defendants in error.

SIMMONS, J. The plaintiffs sought to recover upon an alleged breach of contract by the defendants in failing to deliver a certain quantity of hay which they had agreed to sell and deliver to the plaintiffs at Avondale, Pa., to be loaded upon a vessel at Philadelphia, chartered by the plaintiffs for the purpose of bringing the hay to Brunswick. According to the allegations in the declaration, the delivery of the hay by the defendants, and payment therefor by the plaintiffs, were to be concurrent acts. The declaration does not allege any specific time for performance by the parties on either side, and is silent as to any demand upon the defendants for delivery, or any refusal to deliver, or any offer of payment or tender of the purchase money, and as to any readiness or willingness of the plaintiffs to perform on their

part. This being so, the declaration failed to set forth a complete cause of action, and the court erred in overruling the demurrer. "Where two acts are to be done at the same time, as where one agrees to sell and deliver, and the other to receive and pay, in an action for the nondelivery it is necessary for the plaintiff to aver and prove a readiness to pay on his part, whether the other party was at the place ready to deliver or not." If no time for delivery is specified in the contract, a demand and refusal must be alleged. The allegation that the defendants failed to deliver "at the time specified," there being no other allegation showing that any time was in fact specified in the contract, is not sufficient, in the absence of other requisite allegations, to set forth a breach of the contract. See *Biggers v. Pace*, 5 Ga. 171; *Hotchkiss v. Newton*, 10 Ga. 560, 565; *Bruce v. Crews*, 39 Ga. 544 (3), 548; *Allen v. Hollis*, 31 Ga. 143, 147; *Maxw. Code Pl.* (1892 Ed.) p. 81, and cases cited in note 1. Judgment reversed.

(94 Ga. 584)

## BUSSEY et al. v. DODGE.

(Supreme Court of Georgia. Aug. 29, 1894.)  
 SUIT AS TO LAND — EVIDENCE OF TITLE — JUDGMENT AGAINST THIRD PERSON — CONVEYANCE BY HEIRS UNDER DECREE.

1. Where the title of the plaintiff in a spit touching land has to be made out in order for him to recover, and it consists, according to his own showing, of a lengthy chain of conveyances, the record of a decree in favor of one of his predecessors in title aiding or supplying a particular link in the chain is competent evidence in his behalf, though the defendant in the suit on trial was not a party to the suit in which the decree was rendered. But although the record of the decree recite the perfect links in the chain, and it was necessary for them all to appear in order to obtain the decree, the record will not suffice, as against a stranger, to prove any of these links; it will serve only to aid or supply the particular link which without the decree would be defective or absent. As to the other links, the record of the decree indicates on its face the existence of better evidence than the decree affords, and this better evidence must be produced or accounted for.

2. Heirs who are shown by a decree to have no interest can convey none save as against themselves and their privies, though the decree, for the purpose of estopping them and disarming them of all pretext of ownership, orders them to convey.

3. If the case of *Dodge v. Spiers*, 11 S. E. 610, 85 Ga. 585, was correctly decided, it was because the defendant therein, by introducing and relying on the deed to Colby, Chase, and Crocker, subjected himself to be treated as in privity with their heirs, who were parties to the decree, and against whom the decree itself established a perfect equity by requiring them to convey to the plaintiff. Except in so far as that case is supportable upon this distinction between it and the present case, it cannot be adhered to or followed.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Petition by Norman W. Dodge against T. V. & G. P. Bussey to restrain the cutting of timber, and for damages for timber already

cut, and asking that the title claimed by defendants to the land be declared void and canceled. Judgment for plaintiff, and defendants bring error. Reversed.

The following is the official report:

Norman W. Dodge, by his petition, alleged that he was the owner in fee simple of lot 137 in the Ninth district in Telfair county, and all the timber thereon, having a perfect chain of title, originating in a plat and grant from the state of Georgia to Peter J. Williams; that the timber on said lot is worth \$1,000; that T. V. & G. P. Bussey, a partnership, acting under some pretended and fraudulent claim of title, have, without any warrant or authority, trespassed upon the land, and cut and carried away and appropriated to their own use about half the timber thereon, to petitioner's damage \$1,000, and are still cutting timber on the lot, and, unless enjoined, will in a short time cut and carry away all of it. Petitioner prayed that defendants be enjoined from further cutting and carrying away or interfering with the timber; that petitioner might recover from defendant such sum as he might prove they had damaged him for the timber they had already cut on the land; that defendants be required to produce their pretended title to the land or timber; that the same might be decreed to be fraudulent and void, and to be canceled; and for general relief. The abstract of title attached to the petition was: Plat and grant from the state to Peter J. Williams to the lot in question; certified copy of the deed from Williams to Colby, Chase, and Crocker, dated February 28, 1834, conveying said lot with others; affidavit of Norman W. Dodge as to the loss of the original of this deed; decree of the United States circuit court, Southern district of Georgia, in the case of *Dodge v. Briggs*, 27 Fed. 160, decreeing the title to said lot, with others, in George E. Dodge; and deed from George E. Dodge to Norman W. Dodge, conveying said lot with others since said decree. The record contains no answer of defendants. There was a verdict for plaintiff for \$150, whereupon the court rendered judgment for plaintiff for that sum as damages against defendant, and a decree for perpetual injunction against defendants. Defendants moved for a new trial, which motion being overruled, they excepted.

Upon the trial, plaintiff introduced the papers set forth in his abstract of title and other evidence. No evidence was introduced by defendants, nor was there any evidence at all as to what they based their claim, if any, upon, except that one of the plaintiff's witnesses testified that he went to one of defendants, and demanded that he (defendant) quit cutting the timber on the lot, and Bussey replied he would not do so, that he had bought the land from Mark Rawlins, and intended to cut the timber. The motion contained the general grounds that the verdict was contrary to law, evidence, etc.; also, because the court erred in admitting (over objection of defend-

ants, upon the grounds that the same was irrelevant, in that it did not shed any light on the case being tried, and was illegal, in that defendants were not parties or privies thereto, and not bound by the recitals therein, and against whom the recitals therein were not evidence, and that said recitals were not evidence, the deeds being the highest and best evidence of the execution) the record and decree in the case of *Dodge v. Briggs*, supra, by the circuit court of the Southern district of Georgia, consisting of the bill filed in said cause, amendment thereto, answers, orders, etc., and decree therein. The bill was instituted by George E. Dodge against Hall, Briggs, and Sleeper, against the heirs at law of Colby, Chase, and Crocker, and many other parties defendant. The defendants in the present cause do not appear to have been named among said parties defendant, nor was Mark Rawlins. The bill alleged that George E. Dodge was the owner of large tracts of land in Georgia, among which was the lot of land in dispute in this case; that the title of Dodge originated in the grants from the state to Peter J. Williams; deed from Williams to Colby, Chase, and Crocker, February 28, 1834; deed from Colby, Chase, and Crocker, as agents of the Georgia Lumber Company, to said company, January 5, 1835; deed from Georgia Lumber Company to the state of Indiana, September 24, 1842, etc., with various deeds, acts of the legislature, powers of attorneys, etc., down to George E. Dodge. Various allegations were made as to a conspiracy on the part of Briggs, Hall, and Sleeper with persons claiming to be heirs at law of Colby, Chase, and Crocker to deprive complainant of the lands; that Briggs, Hall, and Sleeper procured powers of attorney from said alleged heirs at law, and induced innocent and ignorant people to purchase lots of land or timber thereon, etc.; that many of the other defendants were persons who had been trespassing on the land, and destroying and using the timber, etc. The decree was, so far as seems, material. The deed made by Williams to Colby, Chase, and Crocker, dated February 28, 1834, was taken by them as agents of the Georgia Lumber Company, and the lands therein mentioned paid for by money of said company, and Colby, Chase, and Crocker, by their deed of January 5, 1835, conveyed to the Georgia Lumber Company, under whom complainant claims title, all right, title, and interest in said lands mentioned in the deed of Williams, as appears by said deed and the proofs made in this case; and neither Colby, Chase, and Crocker, nor their heirs, nor those claiming under them, have any title or interest therein; and Butler, Colby, or their agents, or the attorneys, or Briggs and Sleeper, are not entitled in equity to claim control or to interfere with said lands; and Butler and said heirs at law and all the defendants to the bill claiming under them are directed to execute their deed to complainant to all the right, title, and in-

terest which they or each of them have in the lands, or any part thereof. That all the powers of attorney made by the heirs of Colby, Chase, and Crocker, or any of them, to Briggs, Hall, and Sleeper, or either of them, relating to the lands, or any part of them, and all deeds, leases, and other conveyances by Briggs, Hall, and Sleeper, or any of them, under such power of attorney, and any deeds, leases, and other conveyances of said heirs at law, or any of them, to the land, or any part thereof, are decreed to be canceled as against the title of complainant. And that said heirs at law and their attorneys in fact, said Briggs, Hall, and Sleeper, and each of them, and Butler, and the agents of each and all of them, are perpetually enjoined from claiming the lands or any part thereof, or attempting to convey the same, or leasing or encumbering or in any wise interfering with or trespassing upon the same.

E. A. Smith, for plaintiffs in error. De Lacy & Bishop and Hill, Harris & Birch, for defendant in error.

PER CURIAM. Judgment reversed.

(93 Ga. 717)

FISHER v. GEORGE S. JONES CO.

(Supreme Court of Georgia. April 23, 1894.)

FORECLOSURE OF CHATTEL MORTGAGE—QUASHING FI. FA.—PAYMENT—EVIDENCE.

1. Where the levy of a mortgage *fi. fa.* embraced numerous articles of personal property, it was no cause for quashing the *fi. fa.* or for excluding it from evidence, with the entry of levy thereon, that the description of a few of the articles varied in the entry of levy from the terms of description embraced in the *fi. fa.* and mortgage. The levy may have been bad as to some of the property, but was undoubtedly good as to the residue, since the levy conformed to the descriptive terms used and set forth by the defendant himself in the mortgage.

2. A plea of payment may be supported by parol evidence that promissory notes were delivered and accepted in payment, without producing such notes or accounting for their non-production.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by George S. Jones Company against A. K. Fisher to foreclose a mortgage. Affidavit to illegality filed. Judgment for plaintiff, and defendant brings error. Reversed.

E. H. Cutts and E. H. Williams, for plaintiff in error. E. A. Smith, for defendant in error.

SIMMONS, J. 1. A mortgage given by Fisher to the Jones Company on certain personalty was foreclosed, and the mortgage *fi. fa.* levied, and Fisher filed an affidavit of illegality, in which he alleged that he was not indebted in any amount on the mortgage, it having been long since paid in full, and canceled; that, in 1891 or 1892, Wishart, Mayfield & Mobley bought of the defendant

the property covered by the mortgage, the consideration of the sale being that the purchasers were to give their notes to the Jones Company, and take up the defendant's notes to secure which the mortgage had been given; and that this arrangement was carried out, the Jones Company relinquishing to Wishart, Mayfield & Mobley the defendant's notes, and accepting in lieu thereof the notes of Wishart, Mayfield & Mobley. On the trial of the case the plaintiff tendered in evidence the mortgage *fi. fa.*, and the defendant objected, and moved to quash it, because the description of the property in the entry of levy was insufficient. The description in the entry of levy was: "One 40 horse power engine, one boiler, one 25 horse power engine, and 5 headblocks, one set molding complete, one shaping machine, one planer, one hub-boring machine, one spoke-turning machine, one iron lathe." The description in the mortgage and in the *fi. fa.* was: "One 40 horse power engine and boiler, one 25 horse power engine, one sawmill complete, one shaping machine, one planing machine, one hub-sawing machine, one spoke-turning machine, two iron lathes." It will be observed that the levy embraces numerous articles of personal property, and that as to a few of these the description in the entry of levy varies from the terms of description contained in the *fi. fa.* and mortgage; but we do not think this would authorize the court to quash the *fi. fa.*, nor to exclude it as evidence. If the levy embraces any articles not described in the mortgage and *fi. fa.*, it is bad as to them, but it is certainly good as to the residue, since the levy conforms to the descriptive terms used and set forth by the defendant himself in the mortgage.

2. The defendant offered to prove (1) that a sale of the mortgaged property was made by plaintiff's consent to Wishart, Mayfield & Mobley, and that plaintiff accepted the notes of Wishart, Mayfield & Mobley for the purchase price in lieu of the note and mortgage involved in the present suit; (2) that the plaintiff admitted that he had received other notes in lieu of the note and mortgage sought to be foreclosed, and accepted said notes in settlement of the note and mortgage of the defendant, and had thereby released defendant from the note and mortgage sought to be foreclosed. The plaintiff objected on the ground that the notes claimed to have been so accepted were the best evidence, and the objection was sustained. Error is assigned on each ruling so made. We think the court erred in sustaining this objection. A plea of payment may be supported by parol evidence that promissory notes were delivered and accepted in payment, without producing the notes or accounting for their nonproduction. If the defendant had alleged and offered to prove that he had paid the notes and mortgage in bank bills or gold coin, the court certainly would not have required him to produce the identical bills or coin. The de-

fendant did not propose to go into the contents of the notes, but merely proposed to prove the fact that notes had been accepted by the plaintiff in lieu of the note and mortgage which the plaintiff was then seeking to enforce, and that the plaintiff had thereby released the defendant from his obligation. Judgment reversed.

(93 Ga. 630)

# MILLER v. EAST TENNESSEE, V. & G. RY. CO.

(Supreme Court of Georgia. March 26, 1894.)

ACTION AGAINST RAILROAD COMPANY—INJURY TO PASSENGER—STOPPING OUTSIDE OF STATION—ATTEMPT TO ALIGHT—CONTRIBUTORY NEGLIGENCE.

This case, under the evidence, is not quite clear enough to warrant the trial court in granting a nonsuit. Whether the railway company, having stopped the train immediately after the conductor called out the station, failed in extraordinary diligence towards the plaintiff by not warning him that the station had not been reached, so as to prevent him from alighting in the darkness of the night at an unsafe place, and whether the plaintiff, a youth of 17 years, was negligent in so alighting without first assuring himself that the station had been reached or that the place was safe, are questions more proper for submission to a jury than for determination by the court on a motion for a nonsuit.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Charles N. Miller, by next friend, against the East Tennessee, Virginia & Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Dabney & Fouché and J. S. Fouché, for plaintiff in error. McCutchen & Shumate and Hoskinson & Harris, for defendant in error.

SIMMONS, J. Miller, a youth of 17 years, was a passenger on the defendant's train from Rome to Cave Spring. As the train approached Cave Spring, the usual signal of approach to the station was blown by the whistle of the locomotive, and shortly thereafter the conductor came into the car where the plaintiff was, and called out "Cave Spring," twice, and then went out of the front door. The plaintiff arose, and went to the rear door of the car, supposing the train was about to stop at the station. It stopped about 200 yards before reaching the station. It was about 10 o'clock at night. The night was dark and drizzly, and the train was late. As soon as the train stood still, the plaintiff, thinking it was at the station, stepped off in the darkness, and fell into a ditch sloping off from the ends of the cross-ties, and was thereby seriously injured. These facts, with the others which appear in the record, it is true, do not make a very clear case for a recovery against the railroad; but whether the conductor failed in extraordinary diligence in not warning the plaintiff that the station had not been reached, so as to prevent him from alighting in the darkness of the night at an unsafe place, and whether the plaintiff was

negligent in so alighting without first assuring himself that the station had been reached or that the place was safe, were questions more proper for submission to a jury than for determination by the court on a motion for nonsuit. In cases of this kind, where the right to recover is doubtful, it is the better practice to leave the matter to be passed upon by the jury. The jury is the tribunal upon which the law imposes the duty of determining doubtful questions of fact. See *Wood v. Railroad Co.*, 84 Ga. 363, 10 S. E. 967; *Ray, Neg. Imp. Dut.* pp. 189, 141, § 47, citing *Railroad Co. v. Van Horn*, 38 N. J. Law, 133, and other cases, in which the facts were somewhat similar to those presented in the case at bar. Judgment reversed.

(94 Ga. 449)

**DRIVER v. DRIVER et al.**

(Supreme Court of Georgia. March 26, 1894.)

**SUIT FOR ALIMONY — FINDING AS TO SPECIFIC LAND — CONSTRUCTION AND EFFECT — PREVIOUS JUDGMENT FOR TEMPORARY ALIMONY — LEVY ON LAND.**

A wife, in her suit for alimony, having made a purchaser from her husband of certain land a joint defendant with him, and in her petition having prayed for both permanent and temporary alimony, and having therein attacked the conveyance of the land as fraudulent because made to defeat her claim for alimony and prevent its collection, and, pending the suit, a general judgment in her favor having been rendered against her husband for temporary alimony, without any adjudication touching her right to subject the land in question for its payment, and an execution founded upon that judgment having been issued against the husband alone and levied upon some of the land in controversy, in resistance to which levy a claim was interposed by the other defendant in the alimony suit, and while this claim was pending a final decree in the alimony case having been rendered upon and in conformity with a verdict of the jury, which found in favor of the wife as permanent alimony a certain specific parcel of land, which parcel embraced one-fourth of the particular land levied upon and claimed, and the verdict and decree being silent touching temporary alimony, and touching the judgment therefor, the levy, and the claim case, and being silent also as to the purchaser's right and title, the result was, upon a proper construction of the verdict and decree, in the light of the pleadings and of the extrinsic facts above recited, that the wife's rightful claim against the land, as between her and the purchaser thereof, was limited to so much of the land as she recovered by her suit for alimony, and that the balance of it was the property of the purchaser, free from alimony, both permanent and temporary. Consequently, upon a subsequent trial of the claim case, a verdict should have been rendered for the claimant as to three-fourths of the premises embraced in the levy, and it was error to direct a general verdict in favor of the plaintiff in execution.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Writ of error by J. W. Driver from a judgment in favor of Nancy A. Driver and others.

John S. Edwards and W. F. Brown, for plaintiff in error. Adamson & Jackson and S. L. Craven, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 539)

**BEWICK LUMBER CO. v. HALL.**

(Supreme Court of Georgia. April 30, 1894.)

**CHOSE IN ACTION — ASSIGNABILITY — ACTION THEREON.**

A written instrument in these terms, "Credit check, \$6.50. Number 687. February 20th, 1891. Issued to Aaron Hattan. Not transferable. Payable on demand, in merchandise, by Bewick Lumber Company. Johnsonville, Georgia. G. B. Monroe," is a chose in action arising upon contract. By section 2244 of the Code, all choses in action arising upon contract are assignable so as to vest the title in the assignee. Therefore this instrument is assignable, and, the same having been assigned in writing by Aaron Hattan to H. A. Hall, the latter can maintain an action upon it in his own name, after compliance with the terms of the act of December 26, 1888, touching payment in cash of checks, script, or other written evidences of indebtedness for wages.

(Syllabus by the Court.)

Error from superior court, Appling county; J. L. Sweat, Judge.

Action by H. A. Hall against the Bewick Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

G. J. Holton & Son and A. C. Wright, for plaintiff in error. Graham & Parker, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 735)

**VALENTINE et al. v. STAFFORD et al.**

(Supreme Court of Georgia. April 30, 1894.)

**SALE ON EXECUTION — DISTRIBUTION OF PROCEEDS — PROCEDURE.**

Upon a rule against an officer to distribute money, the court, under a misapprehension, having proceeded with the trial, and allowed contesting claimants to introduce evidence when there was really no issue of fact on the record, should, upon discovering the mistake, have allowed an issue to be written out, tendered and filed, instead of ruling out all the evidence received, and directing a verdict in favor of some of the contestants and against another, solely on the apparent merits as shown by the documents presented by the respective parties as the foundation of their liens on the fund.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

From an order of distribution on execution sale, Valentine & Brown bring error. Reversed.

Crovatt & Whitfield, for plaintiffs in error. D. W. Krauss, for defendants in error.

SIMMONS, J. A constable sold certain property under legal process, and there were a number of claimants to the fund arising from the sale, among whom were the plaintiffs in error. A rule to distribute the fund was brought against the constable, and the case was submitted to a jury. After all the evidence offered by the parties at issue had been submitted to the jury; and full argument had been made to the jury by counsel for all the parties, the judge discovered that

the issues had not been reduced to writing, and that there was nothing except the several processes claiming the fund before the court for its consideration. He thereupon determined that he alone was authorized to decide the case, and he directed the jury to render a verdict for certain of the claimants. Counsel for the plaintiffs in error requested the court to be allowed to reduce the issues to writing, in order that the case might proceed to verdict and judgment. The court refused to allow this, and ordered the jury to return a verdict as above stated. We think the court ought to have granted this request. It would have taken but a few moments to reduce the issues to writing, and it appears to have been as much the mistake of the court as of counsel that the case proceeded to trial without this having been done. The record discloses that some of the parties claiming this fund, and who were deprived of it by the action of the court, had meritorious claims upon the fund; and for this reason alone, if for no other, the court ought to have allowed the issues to be made up and the jury to pass upon them, instead of ruling out all the evidence which had been received up to that time, and directing a verdict in favor of some of the claimants and against others. Judgment reversed.

(93 Ga. 727)

## LANCASTER v. LEWIS et al.

(Supreme Court of Georgia. April 30, 1894.)

## CLAIMS AGAINST DECEDENT'S ESTATE—CONSOLIDATION—MARSHALING ASSETS—BONDS OF ADMINISTRATORS.

1. Where a large number of suits have been brought against the administrator of an insolvent estate, to all of which he has the common defense of plene administravit praeter, and an application for a homestead in the lands of the intestate is pending, and there are other complications in the administration of the estate which do not affirmatively appear to have been brought about by the fault of the administrator, notwithstanding the fact that some years have elapsed since the grant of administration, a petition to consolidate all the suits and try them together, and also to marshal the assets, and decree a proper distribution of the same according to the legal priorities existing among the various creditors, has equity in it, and should not be dismissed on general demurrer.

2. Where two administrators execute a common bond as such, each is surety for the other; and, where one of them dies, this suretyship continues in force as to subsequent acts of the survivor.

(Syllabus by the Court.)

Error from superior court, Pulaski county; W. H. Fish, Judge.

Bill by J. W. Lancaster, administrator, against Lewis, Leonard & Co. and others, to marshal assets. Judgment for defendants, and plaintiff brings error. Reversed.

The following is the official report:

Williams, as administrator of J. C. McCormick, filed his equitable petition against Lewis, Leonard & Co. and others, for direction, to marshal assets, etc. The case afterwards pro-

ceeded in the name of Lancaster, as administrator, as plaintiff. A demurrer was interposed to the petition, which demurrer was sustained, and to this ruling plaintiff excepted. The grounds of demurrer were: (1) There is no equity in the petition. (2) No sufficient cause is shown for injunction, nor for the interposition of equity powers. (3) There is an ample and complete remedy under the common-law proceedings already commenced for all the alleged grievances of petitioner, and a resort to this proceeding is wholly unnecessary. (4) Under the statements in the petition, the assets are not in a condition to be marshaled. (5) Petitioner does not show that he is without fault on his part, there being no allegation that he has collected the debts or sold the property of the estate, and no reason given why this has not been done. The petition alleged: Petitioner was appointed administrator of the estate of J. C. McCormick in February, 1887. The estate was appraised, including both solvent and insolvent choses in action, at \$6,985.42, and a large amount has been paid out in payment of just debts of deceased, and in paying necessary expenses of administration, as will appear by reference to returns and vouchers attached. J. C. McCormick and L. B. Wilcox were joint administrators on the estate of M. D. Wilcox. McCormick died in November, 1886, leaving L. B. Wilcox sole surviving administrator of M. D. Wilcox. When McCormick died, L. B. Wilcox was perfectly solvent. The assets of M. D. Wilcox's estate had been converted into money, and L. B. Wilcox had in his possession \$3,470.99 thereof. When McCormick died, both he and L. B. Wilcox were each fully able to respond for any just claim against them, for all amounts due the creditors of M. D. Wilcox. If there has been any mismanagement or devastavit of the estate of M. D. Wilcox, it was after the death of McCormick, and by L. B. Wilcox, for which McCormick's estate is not responsible. McCormick was always ready and willing to account for and pay over all the assets of M. D. Wilcox in his possession or power to those entitled, and, since McCormick's death, petitioner, as his administrator, has always been. Said amount is \$1,551.76, with interest from June 1, 1886, and this amount petitioner is willing to pay over, and be discharged from further liability. To avoid a multiplicity of suits and unnecessary expense, it is needful that the matters embraced in the suits hereafter named shall be determined in this petition. All said suits involved the same legal propositions and the same defenses. All the matters pertaining to the estate of M. D. Wilcox were referred to an auditor, who made his report to Pulaski superior court April 3, 1886; and, according to the report, there was found in the hands of the administrators \$5,022.75. The report was made the judgment of the court, and decree rendered thereon against L. B. Wilcox, surviving administrator, at the November term, 1889; but no

judgment or decree thereon has ever been made against the estate of McCormick, nor against petitioner as his administrator. There are now pending in said superior court suits upon the administration bond given by McCormick and L. B. Wilcox as said administrators, various suits against the administrators and their sureties, naming them and the amounts for which brought. Under said decree, L. B. Wilcox claims \$349.70; Lewis, Leonard & Co. claim \$140.55, C. P. Brown claims upon a judgment rendered in Houston superior court (the validity of which petitioner denies) \$127.65, with interest, and petitioner owes attorney's fees for the management of said estate, \$——. In addition to this, Mary E. Williams, as next friend and mother of Rebecca McCormick and others, has applied for homestead and exemption out the estate of J. C. McCormick, which is now pending in the court of ordinary of Pulaski county. These claims are largely in excess of the whole of the assets of McCormick's estate. Petitioner prays that he be allowed to marshal the assets of said estate; that the several equities of the various claimants thereto be inquired into and determined, as also the rights of said estate, and proper direction be given him as to the distribution thereof, to save himself and securities harmless, and insure a proper distribution of the estate; that all of said parties interplead, and have their respective rights adjusted under this petition; that all said common-law suits, as well as the application for homestead, said fl. fas. and claims, be enjoined from proceeding until further order and decree of this court. Unless a restraining order be granted, the injury apprehended will be done. He further prays that, if any necessary parties have been left out, upon ascertaining them they may be made parties hereto; that the auditor's report and decree referred to may be considered part of this petition; and for general relief. He further alleges: Lewis, Leonard & Co. hold against the estate of McCormick a fl. fa. for \$468.82, with interest, and another for \$87.10, with interest, claimed to be a prior lien upon the assets of said estate, but may not be if the homestead is granted and said suits sustained. These fl. fas. were obtained against McDuffie and McCormick during the life of McCormick, and McDuffie is insolvent. Among said complications and conflicting claims, petitioner does not know how to pay out the assets of the estate with safety to himself and sureties. All the claims due the estate have not been collected, nor all the real estate sold, and he does not know the amount that will be realized out of the estate for distribution. He attaches exemplification from the court of ordinary, the application for homestead, and asks leave to attach other exhibits should they become necessary. Process was prayed to Lewis, Leonard & Co., L. B.

Wilcox, administrator of M. D. Wilcox, and many other parties.

A. C. Pate and L. C. Ryan, for plaintiff in error. J. Watson, J. H. Martin, and W. L. Grice, for defendants in error.

SIMMONS, J. 1. The administrator of McCormick filed his equitable petition against Lewis, Leonard & Co. et al. for direction to marshal assets, etc. The facts, so far as material, will be found in the official report. It appears that the estate was insolvent, and that a large number of suits had been brought against the administrator, to all of which he had a common defense of plene administravit praeter. There was also an application for a homestead in the land of the intestate, and there were other complications which it is unnecessary to mention here. These complications do not appear to have been brought about by any fault on the part of the administrator, although several years had elapsed since he was appointed. He petitioned by the present suit that all the pending suits against him might be consolidated and tried together, and that the assets be marshaled, and a proper distribution of the same decreed, according to the legal priorities existing among the various creditors. In our opinion, the court erred in dismissing the petition for want of equity. The facts recited show a sufficient equity to have authorized the court to retain the petition, and grant the relief prayed for therein.

2. McCormick and L. B. Wilcox were joint administrators on the estate of M. D. Wilcox. McCormick died, leaving L. B. Wilcox surviving administrator. The petition alleges that, when McCormick died, L. B. Wilcox was perfectly solvent; that the assets of M. D. Wilcox's estate had been converted into money, and L. B. Wilcox had in his possession \$3,470.99 thereof; and that, if there had been any mismanagement or devastavit of the estate of M. D. Wilcox, it was after the death of McCormick, and McCormick's estate was not responsible therefor. Where two administrators unite in giving a joint bond for the proper administration of the estate, each is surety for the other (Code, § 2510), and, where one of them dies, this suretyship continues in force as to subsequent acts of the survivor. We are aware that some courts have held that, where one administrator dies, his estate is not responsible after his death for the acts of a coadministrator, but we think the better opinion is that the bond remains as a subsisting security for the performance of duty by the other, unless proper steps are taken to have it made inoperative as to future defaults. To this effect, see 7 Am. & Eng. Enc. Law, pp. 216, 217; Schouler, Ex'rs, § 145, and cases cited; Stephens v. Taylor, 62 Ala. 269; Dobyns v. McGovern, 15 Mo. 662. Judgment reversed.



(94 Ga. 534)

## SMITH et al. v. MOODY.

(Supreme Court of Georgia. April 30, 1894.)

ACTION ON NOTE — PROVISION FOR ATTORNEY'S FEES—AMOUNT OF RECOVERY — INSTRUCTIONS—DEPOSITION—INVALID RETURN—MUTILATED ENVELOPE.

1. In the trial of an action upon a promissory note containing the stipulation, "And should it become necessary to employ an attorney in the collection of this debt, we promise to pay all reasonable attorney's fees charged therefor," the plaintiff would be entitled to recover only the actual counsel fees incurred by him under a reasonable contract fixing the amount of the same, or, if he made no contract as to amount, then only what would be a reasonable charge; and it would be incumbent on the plaintiff to prove what was charged him for collection, and that it was reasonable, or else that no amount was agreed upon between him and his attorney, and then show what would in fact be a reasonable charge; but as the defendant, without objection, permitted the plaintiff to introduce evidence showing that reasonable fees would range from 10 to 20 per cent., it was no cause for a new trial that the court charged: "Upon the question of attorney's fees, you are to look to this note, and then to the evidence, and determine what would be a reasonable sum for attorney's fees,—whether it be ten per cent., fifteen per cent., or more, upon the amount of the principal and interest found to be due upon this note. For such amount as you may find in that way, the plaintiff would be entitled to recover by virtue of the contract as set out in this note."

2. Where interrogatories were executed by a single commissioner (it being inferential from the record that a second commissioner was dispensed with by consent), and it appeared that the envelope in which the interrogatories and the answers thereto were contained was in a badly-mutilated condition, being open half its length on each side and at each of the four corners, and not having the name of the commissioner written across the seal as directed in section 3888 of the Code, but there being upon the envelope an entry, signed by the postmaster at the office to which it was addressed, in these words, "Received in bad condition, in due course of mail, but can't say it has been tampered with," it was error to admit the answers to these interrogatories over the objection of the opposite party, based on the above-recited facts, made in due time, and in other respects complying fully with the requirements of section 3892 of the Code, touching exceptions to the execution and return of commissions to take interrogatories. Because of the facts stated, the answers ought to have been excluded, although the envelope did have upon it an entry, signed by the postmaster at the office where it was mailed, certifying that he had received the package from the commissioner, naming him, to be forwarded by due course of mail. The answers being vitally important to the plaintiff's case, the error in admitting them is cause for a new trial.

3. There was no other error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from superior court, Clinch county; J. L. Sweat, Judge.

Action by Smith, Buck & Co. against D. H. Moody. Judgment for defendant, and plaintiffs bring error. Reversed.

S. W. Hitch, S. C. Atkinson, and Spencer R. Atkinson, for plaintiffs in error. E. P. Padgett and John C. McDonald, for defendant in error.

PER CURIAM. Judgment reversed.

(93 Ga. 742)

## SAVANNAH, F. &amp; W. RY. CO. v. SMITH.

(Supreme Court of Georgia. June 11, 1894.)

INJURY TO CHILD—ACTION BY MOTHER — AMENDMENT OF DECLARATION—EFFECT ON LIMITATIONS — INFANT OF TENDER YEARS — CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. A wife, while living in a state of separation from her husband, who has abandoned and failed to provide for her and their minor child, having the entire care and custody of the child, is entitled to maintain an action against a railway company for injuries negligently inflicted upon the child since the separation took place, by reason of which she is deprived of his services.

2. Where a declaration filed in due time failed, for the want of vitally essential allegations, to set forth a cause of action, but such allegations were afterwards, by leave of the court, supplied by amendment, and at a subsequent term an order was passed striking the amendment, whereupon the plaintiff dismissed her action, and afterwards, within six months, brought another action, which substantially set forth the same cause of action contained in the original declaration as amended, this second action was a renewal of the first, and was not barred by the statute of limitations, although filed more than two years after the cause of action accrued.

3. On the trial of an action against a railway company for personal injuries to a child nine years of age, it was not pertinent and appropriate to charge the jury that "a child under the age of ten years is not presumed in law to have arrived at the age to discern between right and wrong, and of sufficient capacity and knowledge to make him responsible for his acts, and would not be chargeable of knowledge of right and wrong, unless it be clearly shown that he had such knowledge and capacity. If you find from the testimony that this plaintiff was injured, that he was nine years old or less, the law does not presume that he has arrived at that age so as to have the proper discretion in judging between right and wrong, unless it is shown by proof that he had." The child being before the jury as a witness, the jury should have been left free to determine for themselves, from his own and other evidence, what his capacity was for exercising care for his own safety at the time of the injury.

4. In view of the entire charge as given, there was no error as against the company in charging as follows: "If you find that the defendant company contributed to this accident or to this injury, and the boy also contributed to it, in that event you would diminish the amount of the recovery in proportion to the amount of the negligence that he contributed to the injury."

(Syllabus by the Court.)

Error from superior court, Ware county; C. C. Smith, Judge.

Action by Susan Smith against the Savannah, Florida & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Erwin, Du Bignon & Chisholm and S. W. Hitch, for plaintiff in error. G. J. Holton & Son and Symmes & Bennet, for defendant in error.

SIMMONS, J. 1. Susan Smith sued the railroad company, alleging that on the 12th of September, 1887, her minor son Fulton boarded the defendant's train, and, while the train was running at considerable speed, one of the employes of the defendant push-

ed him off the train, and he fell on the track, and a car wheel ran over one of his legs, making him a cripple for life. This declaration was filed January 12, 1889. By an amendment, which was allowed by the court April 8, 1890, the plaintiff alleged, in substance, that, at the time of the injury, the child injured as above set forth lived with her, and now does so; that her husband, the father of the child, long before the injury, had failed to provide for him, and had deserted her and her children, and the abandonment still continued; that she had the entire care of the children, and, by reason of their abandonment by her husband, she was compelled to provide for them herself, and was therefore entitled to the custody of the injured child and the value of his services. The amendment sets out what his services were worth at the time of the injury, and what they would probably be worth up to the time of his becoming of age. Under this state of facts, we think the mother was entitled to the custody and services of the child, and, if it was injured by the negligence or recklessness of an employé of the company, she would be entitled to recover, although her husband was still living. If a husband or father abandons his wife and children, and refuses or fails to maintain them, but leaves them to earn their own support, the mother becomes the head of the family, and is entitled to the custody of the children and to their earnings; and if, by the negligence of another, one of the children is injured, we see no reason why the mother should not be entitled to recover the value of the services of the injured child. The husband's abandonment of the children and his failure and refusal to support them are a voluntary relinquishment of his right to their custody and to their services. Section 1793 of the Code declares that "until majority the child remains under control of the father, who is entitled to his services and the proceeds of his labor." It declares, also, that "this parental power is lost \* \* \* by the failure of the father to provide necessities for his child, or his abandonment of his family." The amendment alleges both of these grounds.

2. It appears from the record that the original declaration was filed within the time prescribed by law for bringing such suits. After allowing the amendment, the court, at a subsequent term, reconsidered its action, and passed an order striking the amendment; whereupon the plaintiff dismissed her action, and within six months thereafter brought another action, in which the same cause of action contained in the original declaration, as amended, was substantially set forth. It was contended by counsel for the defendant that no cause of action having been set forth in the original declaration, and the amendment having been stricken before the case was dismissed, no cause of action was left pending at the time of the dismissal,

and therefore the action could not be renewed, under section 2932 of the Code, which authorizes a renewal of an action within six months after a dismissal or nonsuit; that, as no cause of action was pending at the time of the dismissal, there was nothing to renew, and the present declaration, being filed more than two years after the injury, was barred by the statute of limitations. This contention, in our opinion, was not sound. Although the original declaration did not set out a cause of action in the mother, yet, when the amendment showing her right to recover was allowed, it made the declaration a good one in this respect, and became a part thereof, as much so as if the allegations in the amendment had been inserted in the declaration when it was first drawn and filed; and when the court, at a subsequent term, struck the amendment, and the plaintiff thereupon dismissed her action, she had at this term of the court a good cause of action, and if she renewed it by bringing another action, setting forth the same cause of action contained in the original declaration as amended, the second action was a renewal of the first, and was not barred by the statute of limitations, although filed more than two years after the cause of action accrued.

3. It was complained that the court erred in charging the jury as follows: "A child under the age of ten years is not presumed in law to have arrived at the age to discern between right and wrong, and [to be] of sufficient capacity and knowledge to make him responsible for his acts, and would not be chargeable of knowledge of right and wrong, unless it be clearly shown that he had such knowledge and capacity. If you find from the testimony that this plaintiff was injured, that he was nine years old or less, the law does not presume that he has arrived at that age so as to have the proper discretion in judging between right and wrong, unless it is shown by proof that he had." Under the facts in the case, we do not think this charge was pertinent and appropriate. The child was before the jury as a witness, and they ought to have been left free to determine for themselves from his appearance and his testimony, and the testimony of others on this subject, what his capacity was for exercising care for his own safety at the time he was injured, without being hampered by presumptions of laws either for or against the competency of the child. See *Railroad Co. v. Rylee*, 87 Ga. 491, 13 S. E. 584; *Railroad Co. v. Golden* (last term) 21 S. E. 68. Some children are much more precocious than others. A child nine years of age, who has been reared in the neighborhood of railroads, and who has ridden upon them frequently, may have as much capacity for realizing the dangers connected therewith, and exercising care for his own safety, as a youth of 15 years not familiar with railroads would have. As to the rule which should be applied to infants with respect to due care, see *Rail-*

road Co. v. Young, 81 Ga. 397, 7 S. E. 912; Id., 83 Ga. 512, 10 S. E. 197.

4. In view of the entire charge as given, there was no error as against the company in charging as set out in the fourth head-note to this opinion.

Judgment reversed.

(94 Ga. 87)

**BAKER et al. v. CITY NAT. BANK OF GRIFFIN.**

(Supreme Court of Georgia. June 11, 1894.)

**CONSTRUCTION OF PETITION—ACTION ON CHATTEL MORTGAGE DEBT—ASSUMPTION BY PURCHASER OF GOODS—JOINDER OF DEFENDANTS—VENUE—APPOINTMENT OF RECEIVER—INJUNCTION AGAINST SALE.**

1. Properly construed, the petition in this case is not a proceeding to enforce the lien of the mortgage, but as to the resident defendant is an action to recover a general judgment against him on the mortgage debt, and as to one of the nonresident defendants to recover a like judgment against him founded upon his alleged promise made to the mortgagor to pay that debt. As to the other nonresident defendant, its object is to attack his title to the goods as being only colorable as between himself and the first nonresident defendant mentioned, and to deprive him of possession and control, pending the controversy.

2. One who, upon the purchase of mortgaged property, contracts with the mortgagor to pay the mortgage debt, the mortgagee not being a party to the agreement, cannot be treated by the mortgagee as a joint promisor with the mortgagor, so as to render both of them subject to suit in the same action, legal or equitable, in the county of the mortgagor's residence, the purchaser being a resident of another county.

3. Even treating the suit as well brought as against all the defendants, there being no allegation of insolvency as to the two defendants residing in another county, or either of them, and the proof being that they are both in fact solvent, there would be no just cause for appointing a receiver or for enjoining the sale by them of the mortgaged goods, the greater part of the assets to which the mortgage applies, if not all of them, being necessary to pay partnership debts, and these debts being superior to and having priority over the lien of the mortgage, which lien is restricted to the interest of the mortgagor in the residue of the assets after the payment of all liabilities of the partnership.

(Syllabus by the Court.)

Error from superior court, Spalding county; J. J. Hunt, Judge.

Petition by the City National Bank of Griffin against W. F. Baker and others. Judgment for plaintiff, and defendants bring error. Reversed.

The following is the official report:

The City National Bank, by its petition to the superior court of Spalding county, alleged: For several years Shelton & Baker, a firm composed of Shelton, of Spalding county, and Baker, of Bartow county, have been merchandising in Griffin, the business being under the immediate control of Shelton. On January 2, 1894, Shelton made and delivered to A. J. Burr a mortgage on his half interest in the stock of goods, to secure four notes for \$110, each due the 1st of April, June, August, and November, 1894. Burr transferred the mortgage and notes to petitioner,

and the mortgage was duly recorded January 3, 1894. February 8, 1894, Baker came to Griffin, and negotiations were begun for a sale by Shelton to Baker. Shelton at once notified Baker that he had given said mortgage, to which act Baker made no objection, but said, if he bought him out, that would be the first debt to be paid. Immediately afterwards Shelton transferred to Baker all Shelton's interest in said stock and business, in consideration that Baker would pay the mortgage and notes and all other liabilities. In pursuance of this trade Baker took control of the stock, through his agent Turner, and now claims to have sold the stock to Turner, who is now in possession thereof. In the transfer between Shelton and Baker there was no consideration other than that named above. The stock involved over \$4,400, and the firm liabilities were about \$2,800. While the sale was pending, Shelton assured petitioner that Baker would pay the mortgage, and after the sale was made told petitioner the same thing. Baker has now notified petitioner that he declines to pay it, and repudiates the contract made with Shelton. Turner, Baker's agent, is still in possession, is rapidly disposing of the stock, and will dispose of it entirely or take it to Cartersville. The mortgage is not due, and petitioner cannot foreclose it, and believes all the parties to the transaction are about to move from the county. Turner was a clerk for Baker, and has no means. Shelton is insolvent, and petitioner has no means of learning Baker's financial standing. Petitioner prayed for injunction, receiver, judgment against Shelton & Baker for the full amount due it, and for process. The mortgage, copy of which was attached, was attested by J. G. Rhea, notary public.

Shelton answered: Baker came to Griffin about January 31, 1894, and, after looking into the business, opened negotiations to buy him out. He then told Baker he had given the mortgage on his interest for \$440, and that it was held by the City National Bank; and Baker replied, "The mortgage will be the first debt paid." Finally the following agreement was made: Shelton was to transfer his interest to Baker, and Baker was to pay off the mortgage, and then pay all the firm debts. An inventory of the stock was taken, and it invoiced over \$4,400. The liabilities were about \$2,800. This was the only consideration of the transfer, and, if Baker declines to carry out his agreement, the consideration has failed and the transfer is void; and petitioner asks that it be decreed void, and that the court would either appoint a receiver and wind up the business for the benefit of the creditors, or that the stock, etc., be turned back to Shelton & Baker, to be held as they were before the transfer. He believes that Turner knew the terms of said trade, and knew that Baker was to pay the bank and other debts.

Baker and Turner pleaded to the jurisdiction.

tion, on the ground of their residence in Bartow county. Further, that they are not joint or several obligors with Shelton to plaintiff, and in no way legally bound for the debt; and that there is a misjoinder of each of them, in order to try to give the superior court of Spalding county jurisdiction of them. They each answered, their answers being, in substance: Shelton & Baker, while citizens of Bartow county, entered into a partnership to engage in business at Griffin or elsewhere, under which each was to furnish an equal amount and over a thousand dollars. Shelton was to conduct the business and have full charge of it, and receive \$600 a year out of the undivided profits, the remaining profits to be equally divided, but, if he ran the business without employing a watchmaker, he was to receive only \$300 out of the undivided profits. Shelton represented to Baker that he furnished \$733.37, but Baker cannot say whether this is true. Baker furnished \$932.81. Shelton moved to Griffin, and conducted the business until January 31, 1894, when it was dissolved by mutual consent, Shelton conveying all his interest therein by warranty deed to Baker. Up to a short while before said date, Baker had implicit confidence in Shelton's integrity, and therefore went to Griffin seldom, and never scrutinized the conduct of the business; Shelton assuring him that the business was in good shape, and the firm making money. About January 27, 1894, Shelton wrote to him to come down after the 1st, but knew that his engagements were such he could not leave home from the 1st to the 4th of each month. From the tone of the letter he (Baker) became uneasy, went to Griffin on January 29th, had a conference with Shelton, and from a cursory examination of the books did not like the situation of the business, and offered to convey all his interest to Shelton if Shelton would pay the partnership debts or give him good security against them. The next day Shelton came with him as far as Acworth to try to get the money, but wrote him from Acworth that he could not do so, and advised that the best thing they could do was to make an assignment. It was on the night of January 29th that Shelton, in answer to a question from Baker as to how and whence he got the \$400 he said he had paid his kinsman on a debt, told Baker he got the money from the City National Bank, and had given a mortgage on his half interest in the business to secure its payment. Baker did not then and never has ratified this act. On January 30th, Baker was advised by his attorney, Mr. Conyers, that the partnership debts would have to be first paid, before any of the partnership assets could be applied to individual debts of a partner; that the interest of a partner was not the subject-matter of levy and sale, and he did not believe that a partner could legally bind by mortgage his interest in a partnership for his individual debts without the consent of his partner, if at all; and he was sure, as Shelton was insolvent

and the partnership probably so, Baker could have all the assets applied to the partnership debts to the exclusion of the mortgage. With this advice Baker went to Griffin, January 31st, and asked Shelton if he was willing to turn over the whole business to him, as he was bound for the partnership debts, and would have to pay them, as none of them could be made out of Shelton. In reply, Shelton said he was willing to do anything, began to cry, and at last pretended to be uneasy for fear the partnership debts would ruin Baker; and Baker drew the deed, and Shelton read it, and, when he came to the part warranting the title against the claims of all persons, asked Baker what about the mortgage, and Baker told him if he (Shelton) had not the money he did not see how Shelton could defend it. No one was present but Shelton and Baker, and they were talking in a very low tone. Baker in no way agreed to become responsible for the debt, as he would have had to lose all he put into the business, and pay Shelton \$440 of what Shelton put into it, if he had agreed to pay or be responsible for the mortgage debt. Shelton told Baker he got \$400 on the notes and mortgage from the bank, and, if this is true, then Rhea, who was at the time acting cashier of the bank, could not act as notary public in attesting the mortgage. Defendants are informed that all the principal named in the note over \$400 is usury, and charge that the transaction was made to appear in the name of Burr in order to place the bank, if possible, in the position of bona fide purchaser for value before due of commercial paper; but such a position would not benefit it, for the bank, and Burr, who defendants charge is its acting president, knew all about it. Defendant took the deed in good faith from Shelton, and intended to convert the assets into money as quickly as he could, and apply the proceeds to the partnership debts. He put the assets in the possession of J. J. Speer, of Griffin, who had been employed by the partnership up to that time, and on February 2d he (Baker) sold them all to Turner, conveying them by warranty deed, and taking from Turner a mortgage to secure the purchase money. This sale was made in good faith, to convert the assets into money, so as to pay the partnership liabilities as far as possible. Baker has learned that the partnership liabilities amount to \$3,756.70, besides a small debt which Turner paid recently at Baker's request, and all the partnership assets which came into Baker's hands will not be enough to pay the debts, entailing on him a loss of the amount he put into the business, and several hundred dollars besides he will have to pay on the partnership debts. Turner has never held the property as Baker's agent, but has held it in his own right, as above stated. The inventory of the assets was: Merchandise, \$2,690.25; store furniture, \$362.35; notes solvent and insolvent, \$541.45; accounts solvent and insolvent, \$918.80; aggregating \$4,412.83. All the assets were not worth over

\$3,000, and Turner offers to take \$3,000 for them, and Baker offers to transfer his mortgage to any purchaser from Turner, without recourse, upon payment to Turner of the \$3,000. Baker never authorized Shelton to represent to plaintiff that Baker would pay the mortgage debt. In equity Shelton had no interest in the partnership property when he gave the mortgage, there being, according to the books, large amounts of cash which went into Shelton's hands; and are unaccounted for, and on a just accounting Shelton would have had no interest in the business, even if there had been no partnership debts outstanding. The firm made its deposits with plaintiff, in part at least, up to January 8, 1894, when Shelton ceased to deposit with it, which ought to have put Burr and plaintiff upon notice before the money was furnished by them to Shelton, especially when the firm had overdrawn its bank account with plaintiff. Neither Turner nor Baker is insolvent, and it was an easy matter for plaintiff to find out their financial standing by inquiries of the Bank of Cartersville.

On the hearing before the judge below evidence was introduced for the petitioner to the following effect: Shelton gave the bank the mortgage on his half interest, and subsequently transferred his interest in the stock to Baker, in consideration that Baker would pay the mortgage and all other liabilities of the firm. An inventory of the stock was taken at the time, and it amounted to something over \$4,400, and the entire liabilities were about \$2,800, leaving a net balance in the business of \$1,600. When the transfer was made it was specially agreed that the bank's debt should be paid by Baker, which agreement was a part of the consideration. Baker has not paid Shelton a cent for his interest, though he promised Shelton that after the bank's debt and the other debts of the firm were paid he could have his part of the net surplus. Turner told Shelton that Baker told him that he (Baker) had promised to pay the bank's mortgage, had assumed the payment of it, and had arranged it so it would not bother him in his work in Griffin. When the trade was made between Baker and Shelton for the stock, Shelton told Baker of the mortgage, and Baker said that this would be the first debt paid. The above appears from the affidavit of Mr. and Mrs. Shelton, Mrs. Shelton stating that she was present and heard the trade between Baker and Shelton. Speer made affidavit that Baker told him of the mortgage, and said he (Baker) would have it to pay; and that the stock of goods were invoiced at about \$4,100, without the fixtures, and deponent did not know the invoice of the fixtures. Plaintiff read in evidence an unexecuted affidavit of Turner, to the following effect: Before he bought the stock Baker told him of the mortgage, and said the mortgage would not interfere with him (Turner) in his purchase, and that when

it was presented for Turner to notify him and he would take care of it or protect it, or words to that effect. Accompanying this were affidavits of R. T. Daniel and H. C. Burr that this affidavit was prepared by Daniel in Turner's presence; that it was read over to Turner and by Turner, and Turner said it was true, and started to sign it, and then asked to show it to his attorney, and went off, and handed it to his attorney, and then declined to sign it. H. C. Burr made affidavit: No threat or inducement of any kind was made to or against Shelton to induce him to sign any affidavit or other paper, nor threat to get him to leave Griffin, nor did any officer or person connected with the bank request him to leave. They did not want him to leave. As soon as the bank learned that Turner was in Griffin, after Shelton sold out, Turner was informed of the mortgage, and said he was aware of it; that Baker would attend to all that; that he (Turner) understood the bank would be protected; and that Baker was to pay all the debts. Turner afterwards said, in response to a request to indorse the bank's notes, that the bank would be paid, and that if Baker said so he (Turner) would indorse the bank's notes, but that as fast as the money came in the notes would be paid. The bank was satisfied with this, until it received a letter from Conyers declining to pay the debt and repudiating the entire matter. This letter was introduced, and stated Baker's position in the matter substantially as stated in his answer, and asked for notice if any legal steps were to be taken, so that Turner might not be given unnecessary trouble, and the necessary bond might be given, and stating that Baker sold the whole stock to Turner, and, of course, would protect the title he conveyed to Turner. It was admitted that A. J. Burr furnished no money to Shelton on the notes and mortgage, but carried them to the bank, and discounted them for Shelton. By direction of the court, the following statement was put into the bill of exceptions, over the objection of counsel for Baker and Turner, to which Baker and Turner except: "That counsel for plaintiff asked James B. Conyers if he had the written agreement mentioned in the mortgage given by J. L. Turner to W. F. Baker, dated February 3, 1894, in his possession. Conyers replied he did. Counsel for plaintiff then asked said Conyers to furnish it to him to read in evidence. Said Conyers declined to produce the paper, because plaintiff had served no notice or subpoena duces tecum to compel its production. The counsel for plaintiff then appealed to the court to require the production of the writing, and the court declined to require the production of said writing." It is insisted by plaintiffs in error that it was error to require this put in the bill of exceptions, as it was not evidence in the case.

For the defendant the following evidence

was introduced: After Shelton transferred his interest to Baker, Baker left the business in the hands of Speer as his agent, until Turner came down and took charge of the business for himself on February 3, 1894. About January 1, 1894, Speer helped Shelton to take stock of the merchandise and notes and accounts, but not of the store furniture. This inventory amounted to about \$4,100. No other inventory was made afterwards until Turner took charge, which last was the only complete inventory Speer knew of, and it amounted to \$4,400, including all notes and accounts, solvent and insolvent, and store furniture. Baker never at any time told Speer that he had promised to pay the mortgage to the bank, but what Speer understood him to say was that he would have that mortgage debt to pay. Turner never told Shelton that Baker had told Turner that Baker had promised to pay the bank's mortgage, and had assumed the same, and had arranged it so it would not bother Turner in his work in Griffin, and Baker never told Turner any such thing. Turner never made the statement set out in the evidence for plaintiff, as to what Baker had said he would do about the mortgage debt. Baker had never told Turner that he would or would not pay that debt. Turner knew Baker was amply solvent, and had Baker's warranty deed, and knew Baker would protect his (Turner's) title; and Turner may have said he would indorse the notes or pay the debt if Baker said for him to do it, because he was owing Baker on the purchase of the stock, and it did not matter with him to whom he paid the money, so he got credit for it on his debt to Baker. Baker told Turner about this mortgage the day he sold Turner the stock and made him the deed, but also told Turner he would protect his warranty deed. When they traded he told Turner his business was such in Cartersville he could not attend to the business in Griffin, and wanted to sell it out to get money to pay the firm debts, as he would have them to pay, as nothing could be collected out of Shelton. The trade between Turner and Baker was on February 3, 1894, in Cartersville, where both resided then, and where they still reside, and where they resided when this suit was begun. Turner has never resided in Spalding county. Baker did ask Turner to try to get Shelton to leave Griffin, and go back to his old home in Cobb county, or to Cartersville, because he feared some of the firm creditors might try to put them in the hands of a receiver, and he said he preferred to have the litigation at home or nearer home than it would be in Griffin. The defendant put in evidence the partnership contract between Shelton and Baker the nature of which has been sufficiently hereinbefore stated. Also the deed from Shelton to Baker dated January 31, 1894, conveying to Baker Shelton's entire interest in the business and its assets. This deed

states that Shelton is indebted to Baker, and that the conveyance was made "for value received." Also the deed from Baker to Turner made February 3, 1894. The consideration of this deed is stated as "value received." Also the mortgage from Turner to Baker made February 3, 1894, reciting the purchase by Turner from Baker of the stock of goods, etc. That for said property Turner had that day executed and delivered to Baker his "obligation in writing," and that in order to secure the payment of said purchase to Baker the mortgage was given; "and whenever I shall pay said purchase money due to said W. F. Baker, in accordance with my written obligation which he holds, of even date with this writing, then this mortgage is to be null and void, else of full force and effect, said purchase money being the amount of \$3,000, and is to be paid, according to the terms of my written agreement, during the present year." Defendants also showed the indebtedness of Shelton & Baker on January 31, 1894, to be \$3,756.70, and that Baker had made a settlement of nine of the claims, aggregating \$1,160.01, since January 31, 1894; that the books of the firm, which were kept by Shelton, showed that Shelton had not charged himself with \$38.75 of firm money used by him, had taken credit on the books twice for the same debt; \$82.30, and had entered on the cash book as "short" and "shortage" sums amounting to \$316.98; that the firm bought goods during the 15 months it was in business amounting to \$10,937.12; that Shelton took in from cash sales during that time \$9,337.38; that on the afternoon of February 15 or the morning of February 16, 1894, Shelton came into Turner's store in Griffin, and told Turner he (Shelton) had to do something about the mortgage or go to jail; that during the day of February 16th, Turner learned that Shelton and his wife had made affidavit to be used by the bank about the mortgage; that Shelton appeared to be very uneasy, until after he and his wife signed said affidavits, as to his freedom from arrest, and after they signed said affidavits Shelton told Turner that they would not trouble him (Shelton), and he could go; that it is very difficult to dispose of any stock which had been handled as much as the stock in question for more than 50 cents on the dollar of invoice price; that, from the best information Turner can get as to the notes and accounts in question, they are not worth more than 40 per cent. of their face value, and he does not believe that the entire assets are worth more than \$2,797.89; that Turner is not insolvent, and has always paid in full every debt he owed, and can still do so; that he is now carrying on a family grocery business in Cartersville, and had had no connection in business with Baker since December 31, 1893, until he made this trade with Baker, February 3, 1894. Defendants also put in evidence an affidavit of the mayor of

Cartersville, the clerk of the superior court, the postmaster, the cashier of the First National Bank, Howard, of the Howard Bank, and another, that they were well acquainted with the general character of Baker and Turner, whose homes were in Cartersville; that it is very good indeed, and from deponents' knowledge of it they would believe Baker and Turner on oath, in any court of justice, and know them so well they would believe what either of them would say whether under oath or not; and that they were known in Cartersville and recognized as upright, honest, truthful men and good citizens. During the argument before the court counsel for plaintiff and for Shelton moved to rule out this last-mentioned affidavit upon the ground that no effort had been made to impeach Baker and Turner. This motion was sustained, and to this ruling, also, Baker and Turner excepted. Defendants' counsel then moved to rule out all the evidence of Shelton and his wife, in so far as it was contradictory of the deed from Shelton to Baker, stating to the court that it did not occur to him to object to this evidence when it was offered, the ground of objection being that parol evidence was inadmissible to vary the deed or contradict its terms. The court did not rule out this evidence, and made no ruling on the motion, "so far as counsel is informed"; and to this also defendants excepted. The court passed an order granting the injunction, appointing Turner permanent receiver upon his giving bond, giving direction as to the management of the business by the receiver; and further ordering that if Baker would give bond of \$1,000, conditioned to pay plaintiff what plaintiff might recover against him and Shelton on the final disposition of this case, or any other suit brought against him or on the same cause of action, then so much of the order as appointed a receiver and granted injunction should be dissolved. To the judgment granting injunction and appointing receiver defendants excepted.

J. B. Conyers and Kontz & Conyers, for plaintiffs in error. Jas. S. Boynton and R. T. Daniel, for defendant in error.

LUMPKIN, J. 1. The material facts are stated by the reporter. Properly construed, the petition filed by the City National Bank was not really a proceeding to enforce the lien of the mortgage which had been executed and delivered by Shelton to Burr, and by the latter assigned to the bank. The only prayer for substantial relief against Shelton, the only defendant residing in Spalding county, was to recover a general judgment against him on the notes given by him to Burr, and which Burr had assigned to the bank along with the mortgage. As to Baker, another defendant, who resided in Bartow county, the petition should be treated as neither more or less than an action against him founded upon his alleged promise

to pay to the bank the debt of Shelton secured by the mortgage. As to Turner, the other nonresident defendant, the object of the petition was simply to attack the title to the goods, which he claimed to have derived by purchase from Baker, as being only colorable, and not real, and therefore to have him dealt with by the court as a mere nominal owner of the goods, and consequently deprived of the possession and control of them pending the litigation. The above, we think, sets forth, in a condensed form, the real nature and character of the plaintiff's petition with respect to each of the several defendants.

2. Even if Baker did purchase from Shelton the interest of the latter in the stock of goods, as alleged in the petition, and if, as a part of the consideration of that purchase, Baker contracted with Shelton to pay the mortgage debt of the latter held by the bank, the latter, being no party to this agreement, has no right whatever to treat Baker as a joint promisor with Shelton so as to render both of them subject to suit in the same action, either legal or equitable, in Spalding county, Baker being a resident of Bartow, as already stated.

3. Even if the action was well brought as against all the defendants, no just cause for appointing a receiver or for enjoining the sale of the mortgaged goods by Baker or Turner appeared. There was no allegation of insolvency as to either of them, but, on the contrary, the proof showed they were both solvent. Consequently it was not necessary for the court to take possession of the stock of goods for the purpose of making available to the bank any judgment it might recover against these nonresident defendants. Besides, the greater part of the assets covered by the mortgage—in fact, most probably all of them—were necessary to pay the partnership debts; and as these debts are superior to and have priority over the lien of the mortgage, which lien is restricted to the interest of Shelton in the residue of the assets of the partnership after the payment of all its liabilities, it is not in the least degree likely that the bank would realize a cent upon the mortgage after administration by a receiver. It certainly would not if the cost and expenses of such administration proved as disastrous to the fund as is usual in the majority of receivership cases. Judgment reversed.

(93 Ga. 706)

#### FREENY v. HALL.

(Supreme Court of Georgia. April 23, 1894.)

ESTOPPEL—OF MAKER OF NOTE—STATEMENTS AS TO CONSIDERATION—RENT CONTRACT—LIEN ON CROPS—AFFIDAVIT FOR DISTRESS WARRANT—AMENDMENT.

1. If one, on being inquired of by another, who is about to purchase, before the maturity of the crop, a negotiable note not yet due, purporting on its face to be given for rent, admits the execution of the note by him, and that it was



in fact given for rent, and the person making the inquiry acts upon this information in purchasing the note, the maker may be estopped to deny either the execution of the note or its consideration, in a subsequent proceeding against him by the purchaser to enforce by distress warrant the special lien on crops given by the act of September 27, 1883, the transfer of the note being by written assignment of the payee, as provided for in that statute. But there will be no estoppel unless it is made to appear, either directly or from the attendant circumstances, that at the time of answering the inquiry the person inquired of either knew or had good reason to believe that a purchase of the note was in contemplation, and that the inquiry was not made out of mere curiosity, or in the interest of the payee or of somebody already having or claiming a right in the subject-matter. Whether or not the answer was made with notice of the object of the inquiry is a question of fact for determination by the jury.

2. An affidavit to obtain a distress warrant to enforce a special lien on crops for rent in behalf of the transferee of a rent contract is amendable, but to render the affidavit sufficient when amended it should show all the facts necessary to raise the special lien provided for in the act of 1883, above referred to. Let any necessary amendment be made before the next trial.

(Syllabus by the Court.)

Error from superior court, Lee county; W. H. Fish, Judge.

Proceeding by R. A. Hall against Dock Freeny for the collection of a note alleged to have been given for rent. Judgment for plaintiff, and defendant brings error. Reversed.

Fort & Watson, for plaintiff in error.  
Wooten & Wooten, for defendant in error.

SIMMONS, J. 1. Hall claimed that Hooks offered to negotiate to him a note purporting to be signed by one Freeny, payable to Hooks' wife, for rent, and that he declined to purchase the note until he could see Freeny and ascertain if he had signed it; that shortly thereafter he saw Freeny, and asked him if he had signed the note, and Freeny replied that he had; that he asked Freeny if it was given for rent, and he replied that it was; and that he (Hall) thereupon purchased the note from Hooks, taking a written assignment of it. The note falling due, Hall, as transferee, had a distress warrant issued for the rent, as allowed by the act approved September 27, 1883 (Acts 1883, p. 109). Freeny made a counter affidavit denying that the sum distrained for was due. On the trial of the case Hall testified, in substance, as above set out. Freeny denied signing the note, or that he had ever had any conversation with Hall about it. Upon this state of facts the judge charged the jury, in substance, that if Freeny stated to Hall that he had rented land from Hooks, and had given that note for the rent of the land, and had signed it, and upon that admission the plaintiff traded for the note, and Hooks assigned it to him, the defendant would be estopped from denying the admission. While this charge is sound as to everything requisite except the state of mind of Freeny, we think

the court should have added that Freeny would not be estopped unless he knew or had reason to believe that Hall intended to purchase the note. It is not every assertion or representation that will work an estoppel. A man may make an untrue assertion or representation to another because he may deem the question asked him impertinent, and in that case he would not be estopped; but if he knew that the person making the inquiry intended to contract on the faith of the information given, and he then made a false representation, upon which the other person acted, this would amount to an estoppel. In *Bigelow on Estoppel* (page 628) it is said: "The representation must have been made with the intention, either actual or reasonably to be inferred by the person to whom it was made, that it should be acted upon. In general, where there is nothing reasonably indicating that the representation was intended to be acted upon as a statement of the truth, or that it was tantamount to a promise or agreement that the declaration made is true so as to amount to an undertaking to respond in case of its falsity, the party making it is not estopped from proving the truth." It is further said (page 636): "Where an inquiry has been made which has resulted in the representation in question, it is necessary that the purport of the inquiry should be made clear. If that be not the case, there cannot be said to be any intention, whether actual or presumptive, that the representation should be acted upon." See, also, *Andrews v. Lyons*, 11 Allen, 349; *Hefner v. Vandolah*, 57 Ill. 520. In the case of *Tompkins v. Phillips*, 12 Ga. 52, relied on by counsel for the defendant in error, it appears that the defendant intentionally induced the plaintiff to act by his representations. The case of *Reedy v. Brunner*, 60 Ga. 107, is very much like the one now under consideration. There the broad doctrine as announced by the trial judge in this case was laid down by the court, but there was nothing in the record to call the attention of the court to the distinction which we lay down in this case, the exception being to the whole charge of the court. If Hall had told Freeny of the purpose of his inquiry, or if Freeny could have inferred that Hall contemplated purchasing the note and would act upon his representations, and he made the replies which Hall claimed he made, he would be estopped from denying the truth of those representations, if Hall acted upon them by purchasing the note. But if Hall said nothing as to the purpose of his inquiry, and Freeny had no reason to infer that a purchase of the note was in contemplation, he would not be estopped. Whether or not the answers of Freeny were made with notice of the object of the inquiry is a question of fact for determination by the jury.

2. The affidavit made by Hall to enforce a special lien on the crops of Freeny for the rent was amendable, under the act of 1887



and the act amendatory thereof, but when amended it should show all the facts necessary to raise a special lien, as provided for in the act of 1883, above referred to. These amendments can be made before the next trial. Judgment reversed.

(93 Ga. 648)

**FREEMAN et al. v. BREWSTER, Ordinary.**

(Supreme Court of Georgia. April 2, 1894.)

**JOINT BOND OF GUARDIANS—LIABILITIES FOR DEVASTAVIT—BURDEN OF PROOF—ADMISSIONS BY JOINT GUARDIAN—EFFECT—ATTORNEY AS WITNESS—PRIVILEGED COMMUNICATIONS.**

1. If the proceeds of a check or draft be rightfully the property of a ward, and they reach the hands of his guardian in consequence either of the collection or the negotiation of such check or draft, it matters not as to whether the draft itself or the indorsements upon it were regular or irregular, and no proof of signing or indorsement is requisite.

2. Where two guardians jointly appointed for the same ward execute a joint bond for the faithful performance of their trust, each of them is a security upon the bond for the other; and both they and their sureties upon the same bond are responsible for a devastavit committed by either.

3. In an action upon the bond for a breach thereof, the suit being brought by the ordinary for the use of the ward, after the latter had attained his majority, and after demand made by him, proof that either of the guardians received assets of the ward during his minority, and while the letters of guardianship were in force, will cast upon the defendants in the action the burden of accounting for a legal disposition of such assets, either before or after the ward arrived at majority.

4. Admissions made by one of the guardians after the letters of guardianship were revoked would not affect the other guardian or the sureties upon the bond; and the particular admission made in this case was not rendered admissible against them upon the ground that the guardian who made it was dead at the time of the trial, the admission as a whole not being against his interest, inasmuch as his entire statement, if taken as true, would discharge him from one debt by charging him with another, thus leaving his interest balanced as a result of the admission.

5. The knowledge of an attorney at law of the contents of an insurance policy, the identity of the beneficiaries named therein, the collection of the money, and the payment of the same to his client, having been acquired while acting in his professional capacity under employment to collect the policy, and by reason of this relationship, he is an incompetent witness to testify to these facts, and it was error to admit his evidence.

6. A letter is not admissible in evidence without proof of its being genuine, and this proof cannot be supplied solely by what appears on the face of the letter itself, to wit, the contents, the letter head, etc.

(Syllabus by the Court.)

Error from superior court, Coweta county; S. W. Harris, Judge.

Action by J. P. Brewster, ordinary, for the use of one Nicholas, against R. W. Freeman and others, upon a guardian's bond. Judgment for plaintiff, and defendants bring error. Reversed.

P. H. Brewster and L. R. Ray, for plaintiffs in error. R. W. Freeman, H. A. Hall, and Alvan D. Freeman, for defendant in error.

**SIMMONS, J.** 1. Mrs. Stallings had her life insured by the St. Louis Life Insurance Company for the benefit of her children, William, Edward, and Nicholas. After her death, Watkins Orr and Henry Orr were appointed guardians of Nicholas. The present action was brought by the ordinary for the use of Nicholas, after he became of age, against Henry Orr and the administrator of Watkins Orr, as principals, and against L. R. and John D. Ray, as sureties, upon the bond given by Watkins and Henry Orr as guardians, to recover a sum alleged to have been collected by said guardians from the insurance company as the share of Nicholas in the proceeds of this insurance. There was a verdict for the plaintiff, and the defendants made a motion for a new trial, which was overruled, and they excepted. It appears that the insurance company paid the amount due upon the policy by means of a draft payable to its order, drawn by the Mechanics' Bank of St. Louis on the National Bank of the Republic, of New York. One of the grounds of the motion for a new trial was that the court erred in admitting this draft in evidence, over the objection of the defendants that it was not shown to have been indorsed by the insurance company nor by Henry Orr, and that the indorsement of Caslin, cashier, which appeared on the draft, if sufficient to pass the title to the draft at all, made part of it payable to Watkins Orr and Henry Orr as individuals, and not as guardians. The court did not err in overruling these objections. It appears from the evidence that the draft was left at the First National Bank of Newnan, with direction that the draft be paid over on the surrender of the policy and the signing a receipt for the money. The draft was indorsed as follows: "Pay Robert Orr, Watkins Orr, and Henry Orr, guardians, or order. J. G. Caslin, Cash." Watkins Orr went to the bank, together with Robert Orr, who had been appointed guardian of the other children, William and Edward, and each indorsed the draft, and signed a receipt for the money, Watkins Orr signing also the name of Henry Orr, saying he had been authorized by the latter to do so; and the money was paid over to them. It thus appears that the amount due Nicholas Stallings under the policy came into the hands of his guardians; and, this being so, it does not matter whether the indorsement or the draft itself was irregular or not. If the guardians obtained the money on the draft, and it belonged to their ward, they are responsible for it; it matters not how they obtained it.

2, 3. It was argued that Henry Orr was not liable for this money, because there was no proof that he received any part of it, or that he authorized Watkins Orr to indorse the draft in his (Henry's) name, or to sign his name to the receipt. We do not think this point is well taken. We think, where two guardians appointed for the same ward unite in giving a joint bond for the faith-

ful performance of their trust, each of them is a security upon the bond for the other, and both they and their sureties upon the same bond are responsible for a devastavit committed by either. And where it is shown in an action of this kind that one of the guardians, during the minority of the ward, and while the letters of guardianship were in force, received assets belonging to the ward, the burden is cast upon the defendants to show that a legal disposition of such assets was made, either before or after the ward arrived at majority.

4. It appears from the record that the letters of guardianship of Watkins and Henry Orr were revoked in 1873, on the application of their sureties. Walter Orr, who resided in Texas, had removed Nicholas Stallings to that state, and had been appointed his guardian there. The court allowed the plaintiff, over the objection of the defendants, to prove by William Stallings that in 1875 Watkins Orr told him that, as guardian of Nicholas, he had collected about \$1,000 on the life insurance policy of his ward's mother, and had paid the money to Walter Orr upon his private debt due said Walter, and that he paid it in 1873, while Walter was in Georgia, and before he had carried Nicholas to Texas or been appointed his guardian. At the time of the trial, Watkins Orr was dead. We think the admissions of Watkins Orr, made after his letters of guardianship had been revoked, ought not to have been received in evidence to charge the other guardian or the sureties on the bond. The letters having been revoked, no act or admission on the part of one of them in regard to the disposition of the assets of the ward could bind the other or his sureties. Nor did the fact that the one who made the admission was dead at the time of the trial render it admissible. The admission was not against his interest, for, taking his whole statement as true, it would discharge him from one debt by charging him with another, thus leaving his interest balanced as a result of the admission.

5. J. B. S. Davis, an attorney at law, was introduced and sworn as a witness to prove the contents of the insurance policy, the identity of the beneficiaries therein, and the collection of the money, and the payment of the same to the guardians. It appears that he was employed by the guardians to collect the money on the policy, and it was objected that he was incompetent as a witness, because all the knowledge he had as to the matters referred to was obtained by reason of his employment as attorney. We think the court erred in admitting the testimony of this witness. The act approved August 4, 1887, declares that "no attorney shall be competent or compellable to testify in any court in this state for or against his client to any matter or thing knowledge of which he may have acquired from his client

by virtue of his relations as attorney or by reason of the anticipated employment of him as such attorney." Acts 1887, p. 30. The knowledge of this witness as to the facts sought to be proved by him having been acquired while he was acting in his professional capacity, under employment to collect the policy, and by reason of such employment, we think the act referred to rendered him incompetent to testify to these facts. In our opinion, his incompetency does not relate solely to admissions made by the client, as was contended by counsel for the defendant in error, but relates to all facts knowledge of which he obtained concerning his client's case pending his employment. In the case of *Skellie v. James*, 81 Ga. 419, 8 S. E. 607, relied upon by counsel for the defendant in error, the attorney represented a loan company; and his knowledge as to the loan about which he was introduced as a witness was acquired, not as attorney for the borrower, who was the party objecting to his testimony, but as attorney of the loan company, which was not a party to the case on trial.

6. We think the court erred in not excluding the letter signed "J. G. Caslin, Cash.," there being no proof that the letter was genuine. This proof could not be supplied solely by what appeared on the face of the letter itself, to wit, the contents, the letter head, etc. *Johnson v. Railroad Co.*, 90 Ga. 810 (5), 17 S. E. 121. Judgment reversed.

(33 Ga. 635)

**WESTERN UNION TEL. CO. v. SMITH.**  
(Supreme Court of Georgia. March 26, 1894.)  
TELEGRAPH COMPANY—FAILURE TO DELIVER MESSAGE—ACTION FOR PENALTY—AMENDMENT OF DECLARATION—ABSENCE OF SENDER'S ADDRESS—EFFECT.

1. The declaration in a suit against a telegraph company to recover the statutory penalty for failure to deliver a telegram in due time is amendable so as to make it allege that the person to whom the telegram was addressed resided within the city to which it was sent, and within one mile of the company's station.

2. Failure of the sender of a telegram to indicate in the address the street and number of the sendee is not of itself negligence on his part, the company having accepted the message for transmission, and received the toll therefor, without the address being more specific than it was, and, so far as appears, without inquiring of the sender touching the street and number.

3. The search and inquiry to find the sendee made by the company in the city to which the telegram was addressed, not embracing any inquiry at the post office, may have been less extensive than the occasion and circumstances required. This was a question for the jury, and, the trial court having approved the finding and refused to set the verdict aside, the supreme court will not interfere.

(Syllabus by the Court.)

Error from city court of Floyd county; W. T. Turnbull, Judge.

Action by Henry G. Smith against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

McHenry, Nunnally & Neel, for plaintiff in error. C. Rowell and Victor L. Smith, for defendant in error.

SIMMONS, J. H. G. Smith sued the telegraph company for the statutory penalty for failure to deliver a message dated May 2, 1892, signed by him and addressed to C. M. Ford, Atlanta, Ga., this message having been delivered by the plaintiff to the company's agent at its office in Rome, Ga., and the charges for sending the same being prepaid. There was a verdict for the plaintiff, and, the defendant's motion for a new trial being overruled, it excepted.

1. There is no merit in the objection that, this being a proceeding to enforce a statutory penalty, the rule of amendment applicable to actions arising *ex contractu* or *ex delicto* does not apply. "There is no difference as to the doctrine of amendment at common law between penal and other actions" (Tidd, Prac. p. 711; see, also, cases to this effect cited in note to *Ellison v. Railroad Co.*, 87 Ga. 723, 13 S. E. 809), nor has such a distinction been made by any statute of this state. An instance of the application to this class of cases of the doctrine of amendment applicable to actions at law generally will be found in the case of *Conyers v. Telegraph Co.* (decided at the last term of this court) 92 Ga. 619, 19 S. E. 253. Applying the rule of amendment applicable to other actions, there can be no question that this amendment was proper.

2. It is complained that the court failed to charge the jury that, this being an action for a penalty, before the plaintiff could recover he must be without fault or negligence; and if he addressed a message in Rome, to be sent to Atlanta, and failed to give any definite address as to the number of house or street, such failure would constitute contributory negligence, and he could not then recover. No written request to so instruct the jury was presented to the court, and, besides, we do not think such an instruction would have been proper. It would certainly be going very far to say, as a matter of law, that the sender of a dispatch who does not, in giving the sendee's address, specify a particular street and house, is guilty of such negligence as would preclude a recovery by him for negligence of the telegraph company, without regard to whether he was able to furnish such information or not, and without regard to whether the telegraph company inquired of him in reference thereto or not. So far as appears from the evidence in this case, the address given by the sender was as specific as he knew how to make it, and the company accepted the message and the pay for it without attempting to have the address made more specific than it was. In the case of *Telegraph Co. v. McDaniel* (Ind. Sup.) 2 N. E. 709, relied on by counsel for the plaintiff in error, the sender was asked by counsel for the plaintiff in er-

ror, the agent of the company, to give the Christian name of the person for whom the message was intended and the number of her residence, but replied that it was unnecessary, and directed the message to be sent without such name and number.

3. The messenger of the defendant at Atlanta testified that, when the message was turned over to him to be delivered, he did not know C. M. Ford, the addressee, and had never heard of him, and, not finding his name in the city directory or address book of the company, he took the message to all the hotels in the city except the Markham House, and made inquiry for C. M. Ford, but could not find such a person. He then handed the message to another messenger, who was on his way to the Markham House, and asked him to inquire there for C. M. Ford. That messenger left it with the clerk at the Markham House, although it did not appear that any person named C. M. Ford was at the hotel or had ever been. The hotel clerk stated that there was a person staying at the hotel by the name of Fort, who had a brother at dinner with him, but it does not appear that he informed the messenger that either of these persons was C. M. Ford, nor does it appear that the messenger sought any further information on this point. The message was never delivered to the addressee. He was then residing in Atlanta, at No. 451 Courtland street, and occupied an office at No. 6 Kimball House, and had been a resident of the city for about six months. Before this message was sent he had received other messages through the defendant's office in Atlanta. When the plaintiff proved that the message was not delivered, a *prima facie* case of negligence was made out, and it became incumbent on the company to show that it exercised due diligence. The leaving of the message at the Markham House, simply because there was a person there named Fort, without making any further inquiry then or afterwards to ascertain whether this was the proper person or not, might well have been regarded by the jury as insufficient to establish due diligence on the part of the company; and, if its efforts to find the addressee before leaving the message at the hotel were not sufficient to relieve the company of any further duty in the premises, the jury were clearly warranted in finding as they did. Whether the company was justified in abandoning all further effort to find the addressee when it failed to find him at the hotels, or to find his name in the city directory or address book of the company, would depend upon whether there were other means of finding him, which, in the exercise of ordinary and reasonable diligence, it ought to have resorted to. A means which might naturally have suggested itself to the company as likely to prove effective, and which doubtless would have been so if the company had resorted to it in this case, was an inquiry at the post

office, or a notice sent through the mail to the addressee of the message. It has been said: "If, after a reasonable effort to find the person addressed, the company is unable to do so, it might perhaps be under an obligation to mail him a copy of the message at the place of destination, upon the ground that the postal authorities have, as a rule, immediate knowledge of new and altered addresses,—a knowledge which a telegraph company, drawing its information from directories, might easily be without." Gray, *Commun. Tel.* § 23. We do not undertake to say, as a matter of law, that the company was under any obligation to do this. The omission to do so, however, is a sufficient ground for upholding the verdict in this case. The jury were authorized to find that in failing to do so the company did not do, or have done, all that ordinary and reasonable diligence required of it. Whether due diligence was exercised or not was a question for the jury, and the jury having found that such diligence was not shown on the part of the defendant, and the trial judge having approved their finding, this court will not interfere. Judgment affirmed.

(93 Ga. 762)

#### BARNETT v. SPEIR.

(Supreme Court of Georgia. June 25, 1894.)

HORSE TRADE—CONSTRUCTIVE FRAUD—RESCISSION  
—RIGHT TO BRING TROVER—RETENTION  
OF HORSE RECEIVED—EFFECT.

1. The right to rescind for fraud in a horse swap exists only when actual fraud has been committed. Rescission, where a right to rescind is not expressly reserved, cannot be had for constructive fraud, or merely on account of warranty, express or implied. For this reason it was error to instruct the jury touching the law of warranty.

2. Where the right to rescind exists, and the party exercising it tenders back the horse he received, demanding at the same time the one he parted with, and there is refusal as to both the tender and the demand, the subsequent retention of the horse received will not bar an action of trover brought for the one parted with; and if, after the action is commenced, the horse received is disposed of by the plaintiff for his own benefit, the fair market value of this horse or the fruits of the disposition will go in mitigation of damages, if the defendant so elects. That this horse may have been useless to the plaintiff will not protect the plaintiff from accounting for his value after a conversion by swapping him off.

3. The evidence being conflicting, and the charge of the court on the subject of warranty not being applicable to the case, the court erred in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Henry county; J. J. Hunt, Judge.

Action by Allison Speir against G. V. Barnett. Judgment for plaintiff, and defendant brings error. Reversed.

E. J. Reagan and W. T. Dicken, for plaintiff in error. J. F. Wall and G. W. Bryan, for defendant in error.

SIMMONS, J. This was an action of trover for a horse. It appears from the record

that the plaintiff swapped his horse for the defendant's mare, but on the next day tendered back the mare, and asked a rescission of the trade, claiming that the defendant cheated and defrauded him by false representations as to the character and qualities of the mare. The defendant refused to take back the mare or return the horse, and this action was brought. The defendant claimed that he had made no representations as to the mare, but that the plaintiff traded for her on his own responsibility. The court charged the jury that, "If the defendant traded the plaintiff a mare in exchange for a horse, the defendant, even if he said nothing, nevertheless warranted the mare to be reasonably suited to the uses for which horses are generally intended." This was excepted to by the defendant, and made one of the grounds of his motion for a new trial. We think this charge was error. This was not an action for a breach of warranty, but to recover the horse or its value, upon the ground that the title had not passed. To prevent title from passing, there must be actual fraud. Mere constructive fraud or breach of warranty does not prevent title from passing. Where two persons exchange horses, and an actual fraud is committed on one by the other, the right of rescission may exist on the part of the one defrauded, but this right does not arise from constructive fraud or on account of a breach of warranty express or implied, unless the right to rescind is expressly reserved in the contract. Where, however, there is an actual fraud perpetrated on one of the parties, and he elects to rescind the contract, and makes a tender of the horse to the other party, which is refused, and he brings trover for the horse, the question of warranty is not in the case. Such being the nature of the present action, it was error to charge the jury upon the subject of warranty. See *Dawson v. Pennaman*, 65 Ga. 698; 21 Am. & Eng. Enc. Law, 60.

2. After the defendant refused to take back the horse, the plaintiff kept it for some time, and, after this action was brought, disposed of it. It was contended by the defendant that the retention of the horse by the plaintiff precluded a recovery in this action. We do not think so. Where the right to rescind exists, and the party exercising it tenders back the property he received, demanding at the same time that with which he parted, and there is a refusal as to the tender and the demand, the subsequent retention of the property received will not bar an action of trover brought for that parted with. If, after the action is brought, however, the property received is disposed of by the plaintiff for his own benefit, its fair market value or the fruits of the disposition should go in mitigation of damages, if the defendant so elects. The above is applicable in the present case, although the horse retained was useless to the plaintiff. This fact would not protect him from accounting for its value. If he had kept the horse until this suit was terminated, and

had prevailed in the suit, the defendant would have been liable to him for the expense of keeping the horse. See *Hambrick v. Wilkins* (Miss.) 3 South. 67.

3. The evidence being conflicting, and the charge on the subject of warranty not being applicable to the case, the court erred in denying a new trial. Judgment reversed.

(94 Ga. 436)

WESTERN UNION TEL. CO. v. MICHELSON.

(Supreme Court of Georgia. April 30, 1894.)

TELEGRAPH COMPANY—NONTRANSMISSION OF MESSAGE — LIABILITY FOR PENALTY — INTERSTATE MESSAGE—REVIEW ON APPEAL—ERRORS NOT APPARENT IN RECORD.

1. Nothing in interstate law, whether constitutional or statutory, offers any impediment to enforcing the statute of Georgia imposing upon telegraph companies a penalty for not transmitting messages, the message involved in the given case not having been even started to its destination, and thus the whole of the negligence by which the statute was violated having occurred within the territory and jurisdiction of the state.

2. Any question as to complying with special contract terms touching presentation of claim or making demand, or the time of so doing, does not arise where the default sued for is failure to start the message. A contract which one party abandons without excuse or justification cannot be enforced against the other.

3. The settled rule that the objection to evidence which was made and decided below must appear, and that the evidence improperly admitted must be set out either in the motion for a new trial or the bill of exceptions, applies to several of the grounds of the motion in this case, and therefore those grounds are not considered. The charge of the court was free from error, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Jacob Michelson against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

The sender of a message from Brunswick, Ga., to New York sued the telegraph company for the statutory penalty for failure to transmit and deliver the same, to wit: "Aug. 20, 1892. To J. David, 250 West 128th St., New York. Hetty and children will arrive by Mallory steamer Monday morning, nine o'clock." This was written on one of the company's blanks for a night message, and was marked as filed at 10 p. m., "check 12, paid 34." This blank contained the following: "Send the following night message, subject to the terms on back thereof, which are hereby agreed to." On the back was the following: "The \* \* \* company will receive messages to be sent during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates. The company will not be liable for the damages or statutory penalties in any case where the claim is not presented in writing within thirty days

after the message is filed with the company for transmission." The suit was brought on November 15, 1892. In the plaintiff's testimony the following appeared: "Hetty and children," referred to in the telegram, are my wife and children. J. David is my father-in-law, who resides in New York City, within three blocks, each one hundred and eighty feet in length, from an office of defendant. Miss Cleminson in the agent and manager of defendant in Brunswick. She wrote me a note about this telegram, and afterwards came to see me in person when I had got a dispatch from my wife after her arrival in New York. I went to defendant's office in Brunswick on Tuesday following the Saturday night I had delivered the message to defendant for transmission. I found Miss Cleminson there, and she, after searching, found the dispatch which I had sent to the office on Saturday night. She offered me the money which I had paid to have the message transmitted, saying she was sorry there had been a failure to transmit it. I refused to take the money. That is the telegram Miss Cleminson found, and that is the note I received from her. I did not send any other telegram that day. I carried that note to her, and she said she had written it to me. I paid 35 cents, the charge for the transmission of the telegram, to the defendant. Miss Cleminson told me the telegram was never sent from Brunswick by defendant. She said it had been laid upon a desk and accidentally overlooked, and that it was a mistake of one of the young men employed in the office. My bookkeeper wrote the telegram, by my direction, and I sent it to the telegraph office by my porter, to whom I gave the money for sending it. The message was delivered to the defendant between 10 and 11 o'clock Saturday night, by sun time. Defendant had no contract with me to deliver this telegram on Sunday morning. I simply delivered it to them to be transmitted and delivered. I supposed it would be delivered on Sunday. The porter left my store for the telegraph office about half past 10 o'clock, sun time, and returned in about five minutes. He did not bring the telegram back with him. That is my signature to the demand made on the defendant for the payment of the penalty and damages for the failure to transmit and deliver the telegram. I delivered a copy of this paper to Miss Cleminson on the 17th day of December (?), 1892. I am sure that my father-in-law has not instituted suit against this company. He never said anything to me about it. I have not heard anything from him about it." The copy of the demand just referred to, as it appears in the brief of evidence, is dated September 17, 1892. The note from Miss Cleminson to plaintiff, identified by him, states: "I refund you the 34c. for msg. Will also refund for your wife's msg. and your answer, if you wish. Please sign rect." No witness other than the plaintiff testified.

The jury found for the plaintiff, and defendant's motion for a new trial was overruled. The motion alleges that the verdict is contrary to law and evidence, and that the court erred in overruling a demurrer to the declaration and a motion for nonsuit. The ground of demurrer and one ground of the motion for nonsuit was that the message was an interstate message, for transmission and delivery from Georgia to New York, and therefore the cause of action was one of which this state had no power to take cognizance, or to pass any law to regulate or enforce, but the same was within the operation and wholly controlled by the third clause of section 8, art. 1, of the constitution of the United States (Code, § 5266). Another ground of the motion for nonsuit was that it did not appear that the plaintiff was the first to sue for the penalty, or that no action therefor had been brought by the sendee, although plaintiff's declaration so alleged. A further ground was that it appeared that the message was delivered on Saturday night to be transmitted by the company during that night and delivered to the sendee on the Sabbath day, and, not being a work of necessity or charity, the contract between the parties was void, and defendant was not liable for the penalty. Another ground of the motion for new trial is that the court allowed plaintiff, over defendant's objection, to testify as to the admissions alleged to have been made to him by Miss Cleminson, "said admissions having been made some days subsequent to the delivery, or the alleged delivery, of said telegram, in behalf of the plaintiff to the defendant, and which said statements of Miss Cleminson are fully set out in the brief of evidence offered in said case, filed herewith and made a part of this motion." Another ground is that the court erred in allowing the plaintiff to read to the jury and place in evidence the note signed by Miss Cleminson individually, "a copy of which is to be found in the brief of evidence offered in said case, filed herewith and made a part hereof, and to testify concerning the same, the said note not appearing to have been made or written by Miss Cleminson as the agent of, or at the instance of, or for and in behalf of said defendant, but simply appearing to be the individual act of Miss Cleminson; to all of which defendant then and there objected." It is also alleged that the court erred, after the close of the testimony, "in permitting the plaintiff to reopen the case, and to offer in evidence, and to permit the plaintiff to testify in person concerning the making of, the demand upon the defendant for the payment of the sum sued for by him in his declaration in said case, a copy of which said demand is to be found in brief of evidence offered in said case, filed herewith and made a part hereof; to the reopening of which case the defendant then and there objected, and to the admission of which testimony of plaintiff, and the introduction of the

copy of said demand, the defendant likewise then and there objected, the same not being the original demand served upon the defendant, but expressly alleged to be a copy, and it not having been made first to appear that said original was lost, or could not be found and obtained, and there being no evidence in writing of the service of such original demand upon defendant. To the introduction and reception and admission the defendant then and there objected."

The following instructions to the jury are assigned as erroneous: "You may take all of the testimony which has been submitted to you,—the testimony upon the part of the plaintiff as to whether this message was written by his clerk and signed by his authority, and was delivered to his porter, with money to pay the charge; as to whether the porter left the store with instructions to go to the Western Union Telegraph office; whether he returned soon thereafter; whether it was Saturday night or not, and in the usual office hours for that kind of business; and you are likewise authorized to take any and all admissions which it has been shown the agent of the defendant, the Western Union Telegraph Company, may have made concerning this matter,—and from all this find the truth in reference to this case, as to whether the plaintiff has sustained by necessary proof the allegations as made in the declaration, and is authorized to recover under the law which the court has given you." "It is claimed by the plaintiff in this case that on August 20, 1892, he caused to be delivered at the office of the Western Union Telegraph Company in Brunswick, Ga., a certain dispatch to be forwarded by that company, together with the amount of money necessary to pay the charges therefor; that the dispatch in question was not sent at all; that it was received at the office on Saturday night, together with the money to pay the charges, and was permitted to remain there without being forwarded, as was the duty of the telegraph company to have done with promptness and dispatch and with impartiality, as required by law; that the plaintiff himself called at their office on the following Tuesday, found his message still there, and that it had not been sent by the telegraph company. Now, gentlemen of the jury, if you find this claim upon the part of the plaintiff to be true, then the court charges you that, under the law, the defendant telegraph company would be liable for the penalty of \$100, as provided in the law which the court has read to you; otherwise, the defendant would not be liable, and you would not be authorized to find a verdict in favor of the plaintiff and against the defendant."

Crovatt & Whitfield, for plaintiff in error.  
Symmes & Bennet, for defendant in error.

PER CURIAM. Judgment affirmed.

(98 Ga. 749)

**APPLE v. LESSER.**

(Supreme Court of Georgia. June 11, 1894.)

**INDORSER OF NOTE—LIABILITY — NOTICE OF PROTEST—DEPOSIT IN POST OFFICE—NON-RECEIPT BY INDORSER—EVIDENCE.**

1. Where a negotiable promissory note payable on its face at a bank is indorsed by the payee, whether for value or for accommodation, he is entitled to notice of nonpayment and of protest, as provided for by section 2781 of the Code; and where the proof of notice relied upon is that a notice was sent to him by mail, and there is positive evidence that he never received it, the time of depositing the notice in the post office must appear, so that it may be determined whether it was done in a reasonable time or not.

2. The evidence showing that the note was payable in the city of the indorser's residence, and there being no evidence that the notary was ignorant of his residence, and no explanation why notice was in the first instance sent by mail to a bank in another city, whence it was again mailed to the indorser at a place where he sometimes received his mail, and it not affirmatively appearing at what time the notice was posted in either instance, the plaintiff failed to show that due notice was in fact given, even if the mailed notice was properly addressed the second time, the indorser testifying that he never received it.

3. There is no evidence from which an unconditional promise by the indorser to pay the note could rightly be inferred.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by S. Lesser against one Bennett and B. J. Apple. Judgment for plaintiff, and defendant Apple brings error. Reversed.

L. A. Wilson, for plaintiff in error. Hitch & Myers, for defendant in error.

**SIMMONS, J.** Lesser sued Bennett as principal, and Apple as indorser, on two promissory notes, due, respectively, 9 and 12 months after date, payable to the order of Apple at any bank in Savannah, Ga., signed by Bennett, and indorsed in blank by Apple. The notes were made at Waycross, Ga. There was a verdict against the defendants upon one of the notes, and they made a motion for a new trial on the ground that the verdict was contrary to law and the evidence. The motion was overruled, and they excepted. It appeared from the evidence that, before the notes matured, Lesser deposited them in a bank in Augusta for collection, and the cashier of the bank forwarded them to a Savannah bank for collection. On the day of their maturity the cashier of the latter bank presented them to the teller of another bank in Savannah, and demanded payment, which was refused, there being no funds to meet them. The cashier who had presented the notes for payment protested them, and made out separate notices of protest, addressed, respectively, to Bennett, Apple, Lesser, and the cashier of the Augusta bank, from which the notes had been received for collection. All the notices were mailed to Beane, the cashier of the Augusta bank, and Beane, in turn,

mailed to Bennett, Apple, and Lesser the notices intended for them. It does not appear from the evidence at what time the cashier at the Savannah bank mailed the notices to Beane, nor does it appear at what time Beane mailed them to Waycross. Apple testified that he resided in Savannah, though he sometimes received his mail at Waycross, being a traveling salesman. He further testified that he had never received any notice.

1. The note upon which the recovery was had was payable at a chartered bank. Our Code, § 2781, declares: "When bills of exchange and promissory notes are made for the purpose of negotiation, or intended to be negotiated at any chartered bank, and the same are not paid at maturity, notice of the non-payment thereof, and of the protest of the same for non-payment, must be given to the endorser thereon within a reasonable time, either personally or by post (if the residence of the endorser be known), or the endorser will not be held liable thereon." Under this section, whether Apple indorsed the notes for accommodation or for value, he was entitled to notice of nonpayment and of protest, and, if he received no such notice, he was not liable thereon. The plaintiff claimed that Apple was notified by mail, but he fails to show, either by the cashier of the bank in Savannah or by the cashier in Augusta, by whom the notices were sent, at what time they were deposited in the mail. The above section of the Code declares that it must be done "within a reasonable time." As to what constitutes a "reasonable time" for this purpose, see 2 Daniel, Neg. Inst. (4th Ed.) §§ 1035, 1039, 1040, and authorities cited. It is there said that when the parties reside in different places, and there is mail communication between them, "the notice should be deposited in the post in time to be sent by the mail of the day after dishonor, provided such mail is not closed before early and convenient business hours of that day, in which case it must be sent by the next mail thereafter." It not appearing from the evidence in this case at what time the notices were mailed, and Apple testifying that he never really received the notice, it could not be determined whether the notices were mailed in a reasonable time or not.

2. The evidence showing that Apple resided in Savannah, where the notes were made payable, and there being no proof that the cashier of the Savannah bank was ignorant of his residence, and no reason being given why notice was sent in the first instance to the cashier of the bank in Augusta, whence the notices were mailed to Apple at Waycross, and it not affirmatively appearing at what time the notices were mailed either in Savannah or in Augusta, the plaintiff failed to show that due notice was in fact given, even if Apple had resided in Waycross, as claimed by the plaintiff; Apple testifying



that he did not receive it, and there being no contradiction of his testimony.

3. There is no evidence from which an unconditional promise by the indorser to pay the note could rightly be inferred. Judgment reversed.

(93 Ga. 663)

**MARCHMAN v. SEWELL et al.**

(Supreme Court of Georgia. April 2, 1894.)

**ESTOPPEL BY JUDGMENT—SUIT INSTITUTED WITHOUT AUTHORITY—ENFORCEMENT OF JUDGMENT—INJUNCTION.**

Where a person not a party to an account procures a suit to be instituted, and judgment rendered thereon, through attorneys employed by him, who in fact represent him, and not the plaintiff, and after the rendition of judgment the plaintiff disavows any interest therein, or any connection with the suit, and disclaims all right to the proceeds thereof, and is himself neither making nor authorizing any effort to enforce the judgment, but the person who caused it to be rendered and his attorneys are seeking to enforce it in the name of the plaintiff, and have caused the defendant's property to be levied upon, or his debtors to be garnished for that purpose, the judgment, while it would be an estoppel in favor of the plaintiff therein were he claiming the right to enforce it, is no estoppel in favor of this other person and his attorneys, they being no parties thereto, and having no equitable interest therein, and not being in privity with the plaintiff; and, the facts of the case appearing in the record showing that it would be grossly inequitable for this person and his attorneys to enforce the judgment for their benefit, they ought to be enjoined from so doing in a suit for the purpose, in which they and the plaintiff in the judgment, together with the levying officers, are made joint defendants.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Petition by W. B. Marchman against J. D. Sewell and others to restrain the enforcement of a judgment. Judgment for defendants, and petitioner brings error. Reversed.

The following is the official report:

Marchman, by his petition, alleged: On June 21, 1892, Brannan & Co. got judgment against him for \$46.96 principal, with interest and cost, in a justice's court of Carroll county. From this judgment, execution had been issued against him and his security on appeal, which execution has been levied on his property. This judgment is on an open account purporting to be in favor of Brannan & Co. against him, the consideration of which was fertilizers said to have been furnished him by Brannan & Co. in 1885, for \$54. The account was sued in the justice court in February, 1888, in favor of Brannan & Co., and as their chief property. He pleaded that he owed defendants nothing, but only J. D. Sewell, whom he had fully paid for fertilizers, by reason of having been garnished at the instance of Halls, Ordway & Mitchell, creditors of J. D. Sewell, who obtained judgment against said Sewell and petitioner, petitioner admitting he owed said Sewell for the guano, which judgment he had fully paid off to Halls, Ordway & Mitch-

ell through their attorney, Oscar Reese. The case of Brannan & Co. against him, when first tried, resulted favorably to him. There was an appeal to a jury, who also rendered a verdict for him. The case was then taken by certiorari to the superior court, which remanded it for a new trial before a jury. Upon the second jury trial there was a verdict against petitioner, which verdict was set aside by the superior court, and a new trial had. Upon the third trial there was a verdict against petitioner, the result of which is the *fi. fa.* and judgment first mentioned. During none of these trials was any plea made by him that the title to the account was not in plaintiffs,—that is, Brannan & Co. He suspected that such was the case, but not enough so to cause him to file a plea to that effect, and get up proof thereon. Upon every trial of the case where oral testimony was had, Green B. Sewell swore positively that the account was not the property of J. D. Sewell, but of Brannan & Co.; that he had been employed as their agent, through one Myers, to collect the account, and as such agent had brought the suit, and employed Cobb & Beall, attorneys at law, for that purpose; "that he had never had any communication with them during the progress of the suit; and that J. D. Sewell had assigned, and he was his assignee." J. D. Sewell also swore that the account was the property of Brannan & Co.; that he had so told petitioner as soon as he was garnished by Halls, Ordway & Mitchell, and so told Green B. Sewell and G. W. Merrell; that he was insolvent, and had assigned to Green B. Sewell; that he had sold guano on commission for Brannan & Co. in 1885, and all the guano notes and accounts he had got from them were Brannan & Co.'s property. After hearing all this, petitioner thought perhaps Brannan & Co. had authorized the suit brought, or had some interest therein. After the execution first mentioned was levied, knowing how unjust it was for him to pay the account twice, and knowing it belonged to J. D. Sewell, if anybody, he determined, as he had now nothing to lose in prosecuting his inquiries to the bottom, to ascertain if Brannan & Co. had anything to do with the matter, or any title to or any interest in the account; and ascertained the following facts, which he never fully ascertained until April 7, 1893: Brannan & Co. did a fertilizer business in Atlanta in 1885, the firm consisting of Brannan alone, who sold to Sewell that year 20 tons of fertilizer, for which the firm took Sewell's obligation, and for which Sewell was alone responsible. Said firm never had any interest in or title to the account, and had no knowledge of suit, judgment, *fi. fa.*, or levy until March 15, 1893, when they repudiated the suit, judgment, and *fi. fa.* Green B. Sewell was never the firm's agent in any capacity, nor has it ratified his conduct. Green B. Sewell, through his attorneys, acting fraudulently under the name of



Brannan & Co., has garnished various creditors of petitioner, whereby he and his customers are harassed, and his customers driven off. Petitioner is a butcher. He (Green B.) has never paid or accounted to that firm concerning any fertilizer claim he may have collected in its name, although he has so collected several hundred dollars, but deponent believes he has paid the entire sum collected to his brother J. D. and his attorneys, after keeping a large share for himself, thereby aiding J. D. to defraud his creditors, and to cheat petitioner. Petitioner believes Green B. Sewell is insolvent, and knows J. D. is, unless his assignment is set aside. On the — day of —, 1893, Green B. Sewell, as assignee, sued petitioner in a justice's court, being represented by the same attorneys. His defense to the suit was that the account as to the amount was correct, but that he had been garnished at the instance of Halls, Ordway & Mitchell, as above stated, and a judgment rendered against him in the garnishment proceeding; that, when garnished, he notified Green B., and J. D. Sewell assigned to Green B. on November 6, 1885, and in his deed pretended to set out in full the names of his creditors and debtors, and his assets, which deed has been recorded and accepted by Green B., who has collected several hundred dollars as such assignee. None of the guano accounts above mentioned, and especially that sued on against petitioner, is anywhere mentioned in that deed. J. D. Sewell claims they belong to Brannan & Co., when in truth they were the property of J. D. Sewell, and should have been placed in the deed of assignment, but were fraudulently left out. Petitioner had no notice of this fraud until March, 1893, though he expressly charges notice thereof upon Green B. Sewell and Cobb & Beall, who, with J. D. Sewell, are the real plaintiffs in the fraudulent judgment against him first above mentioned. He prayed that the judgment be set aside, and the levy dismissed; for injunction against the sheriff, J. D. and Green B. Sewell, and Cobb & Beall; that the deed of assignment be set aside; that Cobb & Beall, J. D. and Green B. Sewell refund to him the amount collected of him under the judgment against him in favor of Green B. as assignee; and for temporary restraining order and process. Various exhibits were attached as indicated in the petition. This petition was presented and the introductory order made April 8, 1893.

Cobb answered that he brought the suit in favor of Brannan & Co. against Marchman, and, after various trials obtained a judgment, false and fraudulent pleas intended for delay having been filed by Marchman; and, after sufficient time elapsed for certiorari, respondent had the execution issued, and levy made. At no time did Marchman deny in any way that the title to the account was not in Brannan & Co., though he knew, or might have known, that Brannan & Co.

lived in Atlanta. In 1888 respondent, as attorney at law, received the account from Green B. Sewell or G. W. Merrell for collection, Merrell being attorney for Sewell in the matter of the assignment. The account was sued in the name of Brannan & Co. because no written transfer was made on it to any other person. Halls, Ordway & Mitchell never obtained any judgment against Marchman on any suit or judgment against Sewell, nor had Marchman legally paid the sum due on the account to Halls, Ordway & Mitchell. After said pretended summons of garnishment on Marchman, he, without answering the same, and before judgment against J. D. Sewell, fraudulently colluded with Reese, attorney for Halls, Ordway & Mitchell, to defraud Brannan & Co., the true owners of the guano account (not J. D. Sewell), and Marchman and Reese then and before had notice that the account did not belong to J. D. Sewell, and that he had no interest therein, but Marchman, acting as he did, and with the promise that Reese would hold him harmless, paid over to Reese the sum due on the account; all of which was pleaded and was in issue in all the trial of said case heretofore. Respondent received the account for collection from Green B., with the statement that it belonged to Brannan & Co., and not to J. D., or Green B., as assignee of J. D. He is informed and believes the account was turned over to Green B. for collection by S. A. Webzler acting as agent for Brannan & Co. The latter had transferred their contract with J. D. Sewell for the sale of guano to said agent, to make settlement with J. D. Sewell, as though he was acting as agent for Brannan & Co., and that title to the account was never in J. D. Sewell. Respondent denied all charges of fraud, etc. Green B. and J. D. Sewell and Beall also answered. The nature of their answers is fully indicated by what has been quoted from the answer of Cobb, or will sufficiently appear from the report of the evidence introduced. The judge below refused the injunction, and to this ruling Marchman excepted.

At the hearing Marchman introduced the judgment in favor of Halls, Ordway & Mitchell against him rendered at the April term, 1887, for \$61.74 principal and for cost. This judgment was against him as garnishee, being a debtor of J. D. Sewell, a debtor of Halls, Ordway & Mitchell. Also, a receipt on the judgment, by Reese, plaintiff's attorney, to Marchman, and by the clerk of the court, dated August 18, 1887, in full of the judgment. Also affidavit of Brannan that he alone composed the firm; that in 1885 he sold J. D. Sewell 20 tons of fertilizer, for which Sewell paid; that Sewell alone owed him for the goods; that, if any suit has been instituted on account of said goods, it has been without his knowledge or consent or connivance, and he now positively repudiates the same; that he sold only said goods to Sewell; that he never heard of the suit or

judgment in question until Reese informed him by letter, March 15, 1893; that he never employed Green B. Sewell as agent or any attorneys in the matter; that he has lived in Atlanta during and since 1885; that he never had any claim against Marchman; that the goods were sold to J. D. Sewell under written contract, at a stipulated price, and he alone was responsible to deponent under the contract; and that he knows not where the contract is, but supposes it is in possession or control of J. D. Sewell, who owes him nothing for guano. Also affidavit of various citizens of Atlanta as to the integrity of Brannan, the truth of which affidavit was conceded. Also affidavit of Oscar Reese that he never induced Marchman to pay Halls, Ordway & Mitchell. As their attorney, he had a claim against J. D. Sewell, now in judgment. Sewell made no defense. Affiant, learning that Marchman was the debtor of Sewell, had him garnished. After this was done, Marchman asked affiant, not as his attorney, but as his friend, whether the money should be paid to Green B. Sewell, assignee of J. D. Sewell, who stated he was the agent of Brannan & Co., or to Halls, Ordway & Mitchell. Affiant then asked Marchman whom he owed, and, upon Marchman replying, J. D. Sewell, and not Brannan & Co., gave it as his opinion that Marchman had better not pay Green B. Sewell anything in any capacity. After this, affiant saw J. D. Sewell's assignment of record, and among the list of assets there was no account upon which the judgment in question is based, and so informed Marchman, and told him that, if what Marchman stated was true, the whole assignment could be defeated. Marchman said it was true, and he could prove it. Affiant made the examination because Marchman said he owed Sewell not only for the guano, the consideration of the present judgment, but also a small store account, on which the assignee brought suit and recovered judgment, and which Marchman paid, as deponent is informed. During none of the trials was Brannan & Co. heard of. Deponent, in connection with his then partner, represented Marchman, and, while suspicious that Brannan & Co. knew nothing about the suit, nor had any interest in it, they were afraid to investigate, as it might result in injury to their client. After judgment in both cases, there being nothing to risk, investigation was had, with the result stated by Brannan in his affidavit. After judgment by Halls, Ordway & Mitchell against Sewell, Marchman having made no answer, judgment was rendered against him for the same amount as against Sewell,—over \$400. After this was done, Marchman told affiant that the reason why he made no answer was sickness of himself and family, and other circumstances. Affiant told him to state all he owed Sewell, and he would obtain an order of court authorizing him to write off all but that from the judg-

ment against Marchman as garnishee. This was done, and Marchman paid the same off to affiant, except \$7.50; and he sent the amount to his clients, charging Marchman nothing. Also the garnishment proceedings against Marchman, and record of Sewell's assignment, in which nowhere appears the account in question.

For defendant was introduced affidavit of G. W. Merrell that he wrote the deed of assignment, and represented Green B. Sewell, assignee, for some time thereafter; that some one claiming to represent Brannan & Co. had a settlement with G. B. Sewell; that afterwards Marchman came to town with a bale of cotton, to pay his guano debt, and some other store accounts with J. D. Sewell, and claimed, before he paid, to have been garnished by Reese for a debt due by Sewell; that affiant told him the garnishment would not lie, because Sewell had no interest in the claim, as he had assigned; that Marchman voluntarily paid over these amounts, after this notice, to Reese, claiming Reese would hold him harmless, or words to that effect; that affiant warned Marchman against paying it over until after the garnishment was determined, and, if he did so, he would be responsible for the money, and he replied that Reese had become personally responsible for the money, and was good. Also affidavit of Brannan that he sold his contract with J. D. Sewell for the sale of fertilizers, and all his interest therein, to one Webzler, of Baltimore, Md., with full power to claim all indebtedness and make all settlements as though he was acting as affiant's agent; and that affiant does not know what disposition Webzler made of the accounts, nor whether any settlement of the account against Marchman for guano sold by Sewell under said contract with Brannan & Co. was ever made.

Cobb & Bro. and Oscar Reese, for plaintiff in error. J. L. Cobb and Wm. Beall, for defendants in error.

SIMMONS, J. The facts alleged in the petition are set out in the official report. Under these facts the court erred in refusing the injunction prayed for. The judgment obtained by Sewell against Marchman on the account, which he (Sewell) represented belonged to Brannan & Co., for whom he claimed to act as agent, did not estop Marchman, it appearing that Brannan & Co. knew nothing of the suit on the account, and, after the judgment was obtained thereon, disavowed any interest therein, or any connection with the suit, and disclaimed all right to the proceeds thereof, and were neither making nor authorizing any effort to enforce the judgment, and that Sewell was attempting to enforce it in his own interest. If Brannan & Co. were attempting to enforce the judgment in their own interest, Marchman would probably be estopped, but, under the facts alleged, it would be grossly inequitable for

Sewell and his attorneys to enforce the judgment for their own benefit, especially as it appears that Marchman has already paid the account twice, and this is an attempt to compel him to pay it the third time. Judgment reversed.

(116 N. C. 499)

**ARMSTRONG et al. v. CARR.**

(Supreme Court of North Carolina. March 19, 1895.)

**ASSIGNMENT BY FIRM—PREFERENCES OF INDIVIDUAL CREDITORS.**

An assignment of partnership property by members of an insolvent firm is not rendered fraudulent as to the firm creditors by a clause therein preferring over partnership creditors certain debts due to the creditors of the individual partners.

Appeal from superior court, Guilford county; Hoke, Judge.

Action by Armstrong, Cator & Co., as firm creditors, against O. W. Carr, trustee of Powell & Horton, to set aside as fraudulent as against plaintiffs an assignment for creditors by the said Powell & Horton, containing a provision for the preference out of the firm assets of the individual debts of the separate partners. From a refusal to charge that such preference rendered the assignment void, plaintiffs excepted, and appealed from a verdict and judgment for defendant. Affirmed.

L. M. Scott and Shaw & Scales, for appellants. Dillard & King, for appellee.

**MONTGOMERY, J.** If, upon the face of a deed of assignment, it appears manifestly that its execution was for the purpose of hindering and delaying creditors, and for the ease and advantage of the debtor, the court may declare it void, without the aid of a jury. The plaintiffs in this action insist that because, in the assignment made by the partners of the partnership property, there was a clause which secured certain debts due to creditors of the individuals composing the partnership, this court should declare the deed void; that is, the only relief which the plaintiffs seek rests upon the idea that they have a lien upon the partnership property as against individual creditors, and that it is a fraud apparent on the face of the deed for the partners to apply the same to their individual debts, instead of to their partnership liabilities. There is not only no fraud on the face of this assignment, but such provisions as the plaintiffs object to in this deed have received the sanction of our judicial decisions. In the case of *Allen v. Grissom*, 90 N. C. 90, Chief Justice Smith, for the court, treats fully the questions of the rights of creditors, and also of those of the partners in the partnership property. In that opinion he says: "With the assent of the partners, any one of them is free to dispose of the company's effects for his individual use, and a creditor cannot intervene to prevent

the application." This is the doctrine established by repeated recognitions in this court, from which, whatever may have been the decisions elsewhere, we are not at liberty to depart, and it commends itself to our approval. In the case of *Davis v. Smith*, 113 N. C. 94, 18 S. E. 53, this court, Justice Avery delivering the opinion, approved, with citations from *Allen v. Grissom*, supra, the law set forth in that case. There is no error in the ruling of the court below, and the judgment is affirmed.

(116 N. C. 526)

**COWAN et al. v. LAYBURN.**

(Supreme Court of North Carolina. March 19, 1895.)

**COMPETENCY OF WITNESS—TRANSACTIONS WITH DECEDENT.**

Testimony that a witness carried supplies to a decedent is not evidence of a conversation or transaction which makes the witness incompetent, under Code, § 590.

Appeal from superior court, Pender county; Boykin, Judge.

Action by Mary E. Cowan and others against John T. Layburn. From judgment for plaintiffs, defendant appeals. Affirmed.

The complaint alleges that the plaintiffs are the heirs at law of one Annie Croom, who died intestate; that she executed about a year before her death a deed of all the land she owned to the defendant, containing the condition that defendant should provide for her personal needs during her life, and for her decent burial, the deed to become void and the land to revert to her and her heirs if the conditions were not complied with; and, further, that the execution of the deed had been obtained by fraud, and its conditions broken by the defendant.

A. D. Ward, for appellant.

**FAIRCLOTH, C. J.** The only exceptions were to the competency of the evidence of Thad Cowan and Catherine Cowan, under Code, § 590. The former testified that "I carried food there to her," meaning to Ann Jane Croom; the latter, that "I went to carry her supplies. She was sickly. I was there every day. I carried her supplies. She was sickly. She had no food except what we carried. She was bad off for clothes." We see no "conversation" or "transaction" in this evidence, such as is inhibited by section 590. In fact, it does not appear whether the old lady accepted or refused the food and supplies. Affirmed.

(116 N. C. 518)

**FRANCKS v. WHITAKER et al.**

(Supreme Court of North Carolina. March 19, 1895.)

**CONSTRUCTION OF WILL—DESCRIPTION OF DEVICES.**

In a will devising property to testator's son for life, and after his death to his lawful heir or heirs, if any, and, if none, to the chil-

dren of another son, the words "heir or heirs" refer to his issue, and not to his heirs generally; and upon his death without issue the property goes to the children of the other son, some of whom were living at the execution of the will.

Appeal from superior court, Jones county; Brown, Judge.

Action by W. W. Francks against T. C. Whitaker and others to declare certain deeds a cloud upon plaintiff's title, and to have them canceled, and judgment rendered in favor of plaintiff as the owner of the lands under a certain will. From a judgment that plaintiff acquired no title under such will, and that the complaint shows no cause of action, and dismissing the suit, plaintiff appeals. Affirmed.

O. H. Gulon and W. W. Clark, for appellant. Simmons, Gibbs & Pearsall, for appellees.

MONTGOMERY, J. The courts, in interpreting wills, make it their first duty to find out and give effect to the intention of the testator. Even where a testator makes use of technical legal phrases and expressions which have in law a fixed and definite legal meaning, yet, if he so explain and qualify their use as to show an intention different from the meaning which the law puts upon the technical words, the will must receive that construction which the testator intended. "So, as the predominant and controlling purpose of the testator must prevail, when ascertained from the general provisions of the will, over particular and apparently inconsistent expressions, to which, unexplained, a technical force is given, we may inquire and find out in what sense such expressions were used, and what the testator meant in using them." Under this test we will look into the will which is before us for construction. Its date is 11th of July, 1885, and the section before the court is in these words: "I give and devise [real estate] to my beloved son E. S. Francks, during his natural life, and after his death to his lawful heir or heirs, should he have any surviving him, then I give and devise the same to the children of my beloved son W. W. Francks." The word "lawful" may be stricken out as meaningless, for there is no such anomaly in the law as an unlawful heir. At the time of the date of the will W. W. Francks, the brother of S. F. Francks, and the plaintiff in this action, and the children of W. W. Francks, were living. The testatrix knew that if S. F. Francks died after the will was published the very grandchildren to whom the estate was devised would have been his heirs if their father had been dead. If she meant heirs general, why say, "But should he not leave any lawful heir or heirs surviving him," knowing at the time there were living persons who were his lawful heirs, and that he must continue to have heirs as long as those to whom the land was limited in remainder should live? It is plain that this

is so, and therefore the proper construction of the will is as if it read: "I give and devise to my beloved son E. S. Francks, during his natural life, and after his death to his issue, should he leave any surviving him; but should he not leave issue then I give and devise the same to the children of my beloved son W. W. Francks." Rollins v. Keel, 115 N. C. 68, 20 S. E. 209. No error. Judgment affirmed.

(115 N. C. 137)

COBB et al. v. RASBERRY et ux.

(Supreme Court of North Carolina. March 12, 1895.)

HUSBAND'S CONTROL OVER WIFE'S SEPARATE PROPERTY.

Under Act 1849 (Code, § 1840), the husband may sell, lease, or mortgage the rents and profits of his wife's land, without her consent; and this rule applies to all cases where the marriage and seisin of the wife in the lands took place before the adoption of the constitution of 1868.

Appeal from superior court, Pitt county; Bynum, Judge.

Action by R. J. Cobb, assignee, against S. S. Rasberry and wife, to recover possession of certain crops grown on land owned by feme defendant, the crops having been mortgaged by her husband to plaintiff's assignor. The answer of the feme defendant set up that the crops were grown on her land, and were her separate property. The court instructed the jury that defendant's right to the crops was not affected by the date of her marriage and the time of the vesting of her title to the lands, and that plaintiff could not recover. The jury found for the defendant, and the plaintiffs appeal. Reversed.

J. B. Batchelor and Jas. E. Moore, for appellants.

MONTGOMERY, J. The matter set up in the answer of the feme defendant cannot avail her. At common law the husband, when, by birth of issue, he became tenant by the curtesy initiate, was the owner of the crops grown on the wife's land, and, even in case of his death before hers, his personal representatives were entitled to them. Williams v. Lanier, 44 N. C. 30. The act of 1849 (Code, § 1840) only prohibited the husband from selling or leasing, for the term of his life or any less term of years, the real estate of his wife when the marriage had taken place since the third Monday of November, 1848, without her consent, by deed and privy examination; nor would that act suffer his estate in the land to be sold under execution against him. His rights, however, to the profits and rents were not impaired or disturbed. In Houston v. Brown, 52 N. C. 163, this court said, in referring to that act: "The sole object was to provide a home for her [the wife], of which she could not be deprived by the husband or the creditors."

The marriage and seisin of the wife in the lands took place before the adoption of the constitution of 1868; and article 10, § 6, of that instrument, and the laws made in pursuance thereof, apply only to cases where the marriage has been contracted or the property acquired since the adoption of the constitution. *Morris v. Morris*, 94 N. C. 613; *Thompson v. Wiggins*, 109 N. C. 508, 14 S. E. 301. There was error in the instruction which his honor gave to the jury, and the plaintiff is entitled to a new trial.

(116 N. C. 161)

**BATTLE v. BATTLE.**

(Supreme Court of North Carolina. March 12, 1895.)

**STATUTE OF LIMITATIONS—PART PAYMENT BY TRUSTEES.**

Part payment of an obligation, without the debtor's authority, by trustees under an assignment by the latter for the benefit of creditors, will not remove the bar of the statute.

Appeal from superior court, Nash county; Mebane, Judge.

Action by Thomas H. Battle, executor, against W. S. Battle, to recover balance due on a bond which had passed, under a trust deed, into the hands of defendant's trustees, who had made a payment thereon. From a judgment in favor of the plaintiff, defendant appeals. Reversed.

Don Gilliam and Shepherd & Busbee, for appellant. H. G. Connor, for appellee.

**CLARK, J.** Code, § 172, requiring an acknowledgment or new promise to be in writing, left the effect of a partial payment in removing the bar of the statute of limitations as it was before the Code of Civil Procedure. *Bank v. Harris*, 96 N. C. 118, 1 S. E. 459. The effect of partial payment in stopping the running of the statute is not by virtue of any statutory provision. It was not in the statute of James I. but was an exception allowed by the courts, and its application depends upon the reasoning in such decisions. The act of 9 Geo. IV. c. 14, in a similar way to our statute, merely recognizes the exception as existing. Partial payment is allowed this effect only when it is made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as then existing, and his willingness, or at least his obligation, to pay the balance. *Hewlett v. Schenck*, 82 N. C. 234; *Pickett v. King*, 84 Barb. 193; *Richardson v. Thomas*, 13 Gray, 381; 1 Wood, Lim. § 99. In the present case there was no payment by the debtor on the bond within 10 years before action brought. The assignment conferred no power on the trustee, as agent of the debtor, to do any act to waive the statute, or express a willingness or intention of the debtor to pay the debt after it should otherwise become barred. His agency was strictly limited to the duties marked out in

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the instrument of paying out the assets in the manner stated, and bound the assignor by no implied agreement to pay more or to waive the statute. Chancellor Kent, in *Roosevelt v. Marks*, 6 Johns. Ch. 286. Indeed, the assignment indicates an inability to pay anything more on the debts secured therein, and it would be a contradiction of its plain meaning to hold that the pro rata distribution of the assets thereunder by the assignee was an authorized expression of a willingness and intention to pay the balance, and therefore a waiver of the statute. It is settled that a payment by assignees in bankruptcy and for the benefit of creditors does not take the case out of the statute of limitations. 13 Am. & Eng. Enc. Law, 760; *Burrill, Assignm.* (6th Ed.) § 399, and cases there cited. *Belov v. Spach*, 85 N. C. 122, held that a payment by the assignee repelled the statute of presumptions. That might well be, for to repel the presumption it is only necessary to show that the debt was still existing and unpaid; and the payment of the assignee in bankruptcy is some evidence of that fact, but the statute of limitations is an absolute bar. To remove it, there is necessary some act of the debtor, or by his authority, such as a written promise or a payment, under such circumstances as implies an obligation to pay the balance. Error.

(116 N. C. 932)

**YOUNG v. WILMINGTON & W. R. CO.**

(Supreme Court of North Carolina. March 12, 1895.)

**WAREHOUSEMAN—NEGLIGENCE—EVIDENCE.**

In an action against a railroad company to recover for goods burned in its warehouse, evidence that a night telegraph operator, who worked in the warehouse, and slept therein, was an habitual drunkard, and was drunk at the time of the fire, does not justify a verdict for plaintiff.

Appeal from superior court, Harnett county; Bynum, Judge.

Action by E. F. Young against the Wilmington & Weldon Railroad Company to recover damages for goods destroyed by fire in defendant's warehouse at Dunn, N. C. The plaintiff sought to establish the charge of negligence on the part of the defendant by evidence showing that one of the latter's employes, a night operator, who had charge of the telegraph office in the warehouse, was addicted to drinking, and was drunk at the time of the fire. Upon the ruling of the court that the evidence was not sufficient to justify a recovery, plaintiff submitted to a nonsuit, and appeals. Affirmed.

F. P. Jones, for appellant. Junius Davis, for appellee.

**FAIRCLOTH, C. J.** At the close of plaintiff's evidence, his honor was of opinion that he was not entitled to recover, and a nonsuit was taken, and an appeal granted. At

the time of the fire, the defendant was not liable as a common carrier, but was only liable for want of ordinary care as a warehouseman. *Hilliard v. Railroad Co.*, 6 Jones (N. C.) 343. The plaintiff was required to prove the negligence as a part of his case. *Kahn v. Railroad Co.*, 115 N. C. 638, 20 S. E. 169. We think his honor properly held that the evidence was insufficient to justify the jury in rendering a verdict for plaintiff. Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. There is, or may be, in every case a preliminary question for the judge, not whether there is absolutely no evidence, but whether there is more than a scintilla of evidence, upon which a jury can properly proceed to find a verdict for the party introducing it, upon whom the burden of proof is imposed. *Commissioners v. Clark*, 94 U. S. 278; *Ryder v. Wombwell*, L. R. 4 Exch. 39; *Wittkowsky v. Wasson*, 71 N. C. 451.

**Affirmed.**

(116 N. C. 209)

**SALMON v. McLEAN.**

(Supreme Court of North Carolina. March 12, 1895.)

**JUDGMENT OF JUSTICE—LIMITATIONS.**

A judgment rendered by a justice of the peace is vacated by a subsequent judgment granted upon rehearing in the same court, and the statute of limitations begins to run from the date of such second judgment.

Appeal from superior court, Harnett county; Bynum, Judge.

Action by S. A. Salmon, to use of J. T. Rogers, against D. H. McLean, on a judgment rendered by a justice of the peace. The record shows that a judgment was given in favor of S. A. Salmon against defendant, D. H. McLean, on a note for \$171.67 in justice's court, on April 12, 1887. A rehearing was granted, in which the same judgment was rendered on May 2, 1887. Plaintiff, Salmon, afterwards transferred the judgment to J. T. Rogers, who owned it at the time of bringing suit in the lower court, April 30, 1894. In this suit the court instructed the jury that the true date of the judgment was April 12, 1887, and that since a justice's judgment is barred by a lapse of seven years, if they should find that seven years had elapsed between the date of the judgment and the time of bringing this suit, their verdict should be for the defendant. There was a verdict and judgment for the defendant, and the plaintiff appeals. Reversed.

L. B. Chapin, for appellant. T. M. Argo and F. P. Jones, for appellee.

**CLARK, J.** A new trial cannot be granted by a justice of the peace (Code, § 865), but in the cases mentioned in Id. § 845, a rehearing may be allowed. *Froneburger v. Lee*, 66 N. C. 333; *Gambill v. Gambill*, 89 N. C. 201; *Guano Co. v. Bridgers*, 93 N. C. 439. Though the judgment was first rendered 12th April, 1887, a rehearing was granted, and the new judgment was rendered 2d May, 1887. The statute ran from the 2d May, because the first judgment was vacated by the rehearing. This action was begun April 30, 1894, which was within the seven years limited by statute. Code, § 153, subd. 1. The defendant has no ground to complain, for the rehearing was granted on his motion. In instructing the jury that the judgment was barred there was error.

(116 N. C. 202)

**GOLDSBORO STORAGE & WAREHOUSE CO. v. DUKE et al.**

(Supreme Court of North Carolina. March 12, 1895.)

**LANDLORD AND TENANT—NOTICE.**

A lessor who, under a right in the lease, gives the lessee the notice of his intention to cancel the lease and take possession at the end of 30 days, for nonpayment of rent, may withdraw such notice before the expiration of the time fixed, and sue for the rent due. *Patrick v. Railroad*, 93 N. C. 422, followed.

Appeal from superior court, Wayne county; Bynum, Judge.

Action by the Goldsboro Storage & Warehouse Company against B. L. Duke and others, trustees of B. L. Duke. Judgment for defendants, and plaintiff appeals. Reversed.

Aycock & Daniels, for appellant. Fuller, Winston & Fuller, for appellees.

**CLARK, J.** This case is governed by *Patrick v. Railroad*, 93 N. C. 422. The notice is not an offer which the lessee could accept, and thereby make irrevocable. It was a notice of proposed action, under the contract, which by its terms the lessee could avoid by payment in 30 days of the rent due. The recall of the notice is not an attempted renewal of an ended contract, but the withdrawal of a notice in pursuance of which it might soon have ended. *Patrick v. Railroad*, 93 N. C. 428. It is not necessary to repeat the strong reasoning of Smith, C. J., in that case. The notice could have been withdrawn at any time before the day named for it to take effect. It was *vox emissa sed non irrevocabilis*. Error.

(116 N. C. 449)

**FORBES v. McGUIRE.**

(Supreme Court of North Carolina. March 12, 1895.)

**JUSTICES OF THE PEACE—JURISDICTION—PROCEEDINGS ON APPEAL.**

1. A justice of the peace has no power, after he has transmitted an appeal from his judgment and all the papers to the reviewing court,

to grant a motion to set aside his judgment for want of jurisdiction.

2. Pleadings on appeal from a justice are in the discretion of the court, and an adjudication that the matter could be better determined upon the trial de novo upon the original appeal, made on the denial of a motion to dismiss for want of jurisdiction in the justice, pending an appeal from his judgment, is simply a continuance of the matter to the next regular term of the appellate court, and does not give defendant, who had not before pleaded, the right to plead to the jurisdiction.

3. It is not error in such case, where no want of jurisdiction is apparent from the record, to deny defendant's motions on the hearing of the original appeal to dismiss for want of, and for leave to plead defenses to, the jurisdiction.

Appeal from superior court, Granville county; Shuford, Judge.

Action by W. S. Forbes against R. H. McGuire to recover an amount due by account. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Graham and J. B. Batchelor, for appellant. Fuller, Winston & Fuller, for appellee.

FAIRCLOTH, C. J. The plaintiff instituted this action before a justice of the peace for \$195.33, due by account, and at the trial in December, 1892, the defendant was present and admitted the debt. Judgment was entered, and defendant appealed, and on December 10, 1892, the justice transmitted the appeal and all the papers to the superior court. Afterwards, on April 25, 1893, upon notice, defendant moved before the justice to set aside his judgment, on the ground that he had no jurisdiction of the subject-matter, which was refused on the ground that he had no power to do so pending the appeal in the superior court, and the defendant prayed an appeal. At July term, 1893, a motion to dismiss and quash the proceedings was denied, and his honor adjudged that "the matter could be better determined upon the trial de novo upon the original appeal, when the evidence and facts should be before the court." At January term, 1894, the cause came on regularly to be heard upon defendant's appeal, when defendant moved to dismiss for want of jurisdiction in the justice of the peace, and for leave to plead defenses to the jurisdiction, which motions were refused, and plaintiff's motion for judgment was allowed, and the defendant appealed. Leave to plead at the trial term was discretionary with his honor, and his decision is not reviewable here. Clark's Code, 228. It was conceded here that the defendant had no defense, unless the order of Brown, J., at July term, 1893, gave him the right to plead to the jurisdiction. We construe that order to be simply a continuance of the whole matter to the next regular term of the superior court. It was no adjudication upon the rights of either party. In April, 1893, it was not in the power of the justice to make any order in the matter, for the reason that the action was then pending in the superior

court. It is true that his docket contained the record of what he had previously done, but he could do no more, except to further certify at the instance of the appellant or in obedience to an order of the court, in order to perfect or make the record above speak the truth. He could not make a new record. Then, as no plea was entered anywhere, and as we do not discover in the record any want of jurisdiction, we see no error below. Judgment affirmed.

(116 N. C. 497)

### CAUSEY v. SNOW.

(Supreme Court of North Carolina. March 12, 1895.)

#### APPEAL—CERTIORARI—TIME OF APPLICATION.

Where the appellant has neglected to docket his appeal or apply for a writ of certiorari until a year after the cause has been determined in the lower court, he is not then entitled to such writ.

Action by O. S. Causey against W. H. Snow. Judgment for plaintiff, and defendant appeals. On petition for certiorari. Writ refused.

F. H. Busbee, for petitioner. L. M. Scott, for respondent.

CLARK, J. This cause, having been determined below at February term, 1894, should have been docketed here before the completion of the call of the docket of the district to which it belonged at fall term, 1894. Rule 5 of this court, 12 S. E. v. If for any good reason it was not so docketed, the appellant should at that time have applied for a certiorari (Rule 41, 12 S. E. ix.), otherwise the appellee might have docketed a certificate and had the appeal dismissed (Rule 17, 12 S. E. vi.), though, as the appellee did not do this, the appellant could have docketed the appeal at any time during said fall term. All this was summarized in *Porter v. Railroad Co.*, 106 N. C. 478, 11 S. E. 515, and has been repeatedly affirmed since. *Hinton v. Pritchard*, 108 N. C. 412, 12 S. E. 838; *Graham v. Edwards*, 114 N. C. 228, 19 S. E. 150; *Paine v. Cureton*, 114 N. C. 606, 19 S. E. 631. Not having done this, it is too late to docket or ask for a certiorari at this term. *State v. Freeman*, 114 N. C. 872, 19 S. E. 630, and cases there cited. Besides, at the term of the court held below after the expiration of the fall term of this court, the appellant, on proper notice, procured a judgment of the court below that the appeal had been abandoned. This he had a right to do. *Avery v. Pritchard*, 93 N. C. 266; *Porter v. Railroad Co.*, supra. This is not like the cases of *Arrington v. Arrington*, 114 N. C. 113, 115. There the papers were sent to the officer in time, and the failure to serve in due time was by no neglect of the appellant. Nor is it like the case of *Walker v. Scott*, 104 N. C. 481, 10 S. E. 523, in which the transcript failed to reach here

in time by reason of the delay in the mails. But here the appellant had ample opportunity to learn whether the transcript had been sent up. He made no inquiry and offered no fees. When he learned at the call of the district that it had not been sent up, even then he took no steps. Appellees have rights which would be seriously infringed by permitting such negligence to procure further delay for the appellant. Certiorari denied.

(116 N. C. 125)

BOYER et al. v. GARNER.

(Supreme Court of North Carolina. March 5, 1895.)

FAILURE TO PERFECT APPEAL — SICKNESS OF ATTORNEY — EFFECT — SUIT FOR LAND — ASSESSMENT OF IMPROVEMENTS — TIME FOR APPLICATION.

1. Where defendant's attorneys agree that one of them shall perfect the appeal, the fact that the one selected to attend to the matter was taken sick after notice of appeal was filed, the other being in perfect health, though absent from the county on business, is not sufficient excuse for defendant's failure to perfect the appeal, so as to entitle him to a review of the judgment by certiorari.

2. A judgment for the recovery of land and for damages is "executed," within the meaning of Code, § 473, authorizing one against whom a judgment for land is rendered, at any time "before the execution of such judgment," to petition for an assessment of the value of the permanent improvements made by him in good faith, when plaintiff is put in possession, and the execution returned, though the damages adjudged have not been paid.

Appeal from superior court, Franklin county; Bynum, Judge.

Action by S. H. Boyer and others against C. A. Garner for possession of land. There was a judgment for plaintiffs. From a judgment denying defendant's petition for a stay of execution on the judgment and for an order directing the clerk of the superior court to place the case on the docket in order that the question of damages and improvements might be passed upon by a jury, defendant appeals. Affirmed.

N. Y. Gulley, for appellant. F. S. Spruill, for appellees, specially on motion for certiorari.

MONTGOMERY, J. In this action the plaintiffs, at January term, 1894, of Franklin superior court, obtained judgment against the defendant for the recovery of a tract of land, from which judgment the defendant gave notice of appeal to this court. The appeal was not perfected, and the defendant in apt time applied for a certiorari as a substitute for the appeal, to bring the record up, that the errors therein assigned might be examined into by this court. The affidavit in support of the petition sets out the following facts: "(1) That the affiant and N. Y. Gulley, Esq., as associate counsel, represented the defendant in the trial of the cause in the court below. (2) That the defendant gave notice of appeal through his said counsel,

and had an entry made on the minutes of "time allowed to file bond and prepare case on appeal." (3) That before the appeal had been perfected, and before the time allowed had passed, the affiant (W. M. Person) was taken sick, and was for some time too unwell to attend to the duties of his office. (4) That by agreement between himself and his associate counsel, N. Y. Gulley, the affiant was to attend to this matter, the said Gulley being engaged for a great portion of his time in work outside of the county; and that under these circumstances, through the misfortune and sickness of his counsel, the defendant lost his right of appeal. (5) That the defendant fully intended to perfect his appeal, and so instructed his counsel, and the failure to do so was due to no negligence of the defendant, but to the causes set forth." An answer to the petition was filed by plaintiff, and in the affidavit of Messrs. E. W. Timberlake and F. S. Spruill, used in support of it, the following statements appear: "(1) That when the defendant excepted and gave notice of appeal to the supreme court, notice was waived, bond fixed at \$25, and 20 days given to serve statement of case and perfect appeal. (2) That to these affiants' best knowledge and recollection Mr. Person did not absent himself from his office during the twenty days allowed for perfecting his appeal, and that his associate, N. Y. Gulley, was well and strong, mentally and physically, during the entire period. (3) That a partial and incomplete statement of the case on appeal was made out and filed in the office of the clerk of the superior court, but the same was never served on the plaintiffs, or their attorneys, and this was done several months after the trial was held; and that no appeal bond accompanied these proceedings."

We do not find from the foregoing facts any ground for the interposition of this court, nor any sufficient legal excuse for the failure of the defendant to perfect his appeal. The giving of the appeal bond is not one of the duties of an attorney, and when an attorney assumes this duty he does it as agent, and his neglect is that of the principal. *Churchill v. Insurance Co.*, 92 N. C. 485. The agreement between the two attorneys in this case that Mr. Person should attend to this appeal was a matter personal between them. In law, both were compelled to give the appeal their attention; and, leaving out of consideration Mr. Person's sickness, his associate, Mr. Gulley, was in perfect health the whole time allowed for perfecting the appeal. The motion for a certiorari is denied.

The following proceedings were had in another branch of this case: Notice of a motion was given to the plaintiff on the 9th of May, 1894, that the defendant would move before Hon. John G. Bynum, Judge, holding the courts of the Third judicial district, at Henderson, on the 21st day of May, 1894, or



as soon thereafter as practicable, for an order "suspending the execution of said judgment in the court below, and to allow the defendant pay for the improvements made by him on the tract of land in controversy; the amount to be ascertained by a jury." At the hearing the defendant filed his petition and affidavits, and that portion of them deemed necessary for the settlement of this case is as follows: That in the trial of the case the defendant set up no claim for betterments or taxes paid, although he had been in the possession of the land many years, and had made improvements enhancing its value, and paid a considerable sum in the shape of taxes upon it; and that the said judgment had not been executed; wherefore the petitioner prayed for an order staying the execution on said judgment, and for the clerk of the superior court of Franklin county to place this cause on the civil issue docket, in order that the question of damages and improvements might be passed upon by a jury. It appears that on the hearing of the case before Judge Battle a writ of possession and execution, regular in all respects, was issued by the clerk of the superior court of Franklin county to the sheriff of said county. The sheriff of Franklin county returned said writ into the clerk's office on March 15, 1894, with the following indorsement on it: "Mrs. S. H. Boyer et als. vs. C. A. Garner. Writ of Possession and Execution. Received 27th February, 1894. H. C. Kearney, Sheriff. Writ of possession executed March 15, 1894, by putting the defendant, C. A. Garner, out of the possession of the land described in the within writ of possession, and delivering the said possession by direction of the plaintiffs to H. R. Perry, as agent of the plaintiffs. H. C. Kearney, Sheriff." The \$125 damages awarded by the jury in the trial of the original action had not been paid when the notice for betterments was given. The question for our determination is whether the said judgment had been executed by the sheriff of Franklin county before notice for the motion for betterments was given to the plaintiff. The return of the sheriff states that on March 15, 1894, he put the defendant out of possession of the land, and delivered possession of the land to the agent of the plaintiffs. The notice of the motion for betterments was given nearly a month later. Section 473 of the Code declares: "That any defendant against whom a judgment shall be rendered for land may at any time before the execution of such judgment, present a petition to the court rendering the same, stating that he, or those under whom he claims, while holding the premises under a color of title believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegations, suspend

the execution of such judgment and impanel a jury to assess the damage of the plaintiff and the allowance to the defendant for such improvements." We think that the sheriff's return of the writ, with the indorsement thereon, was such an execution of the judgment as is contemplated by the said section of the Code. If not so, judgment might be had for land and for damages greater in amount than the defendant could pay, and, though the plaintiffs may have been put into possession of the land, yet, so long as the damages might remain unpaid, the claim for betterments would still subsist, and, if allowed, would be a lien on the land, though the same might belong to a purchaser for value and without notice. There is no error in the ruling of his honor, and the judgment is affirmed.

(118 N. C. 170)

ARRINGTON et al. v. ARRINGTON et al.

Appeal of BUNN et al.

(Supreme Court of North Carolina. March 5, 1895.)

ATTORNEY AND CLIENT—APPEARANCE FOR BOTH PARTIES.

Where the attorney for certain executors and devisees, in a proceeding against the estate of the deceased person to sell land for the payment of debts, also represents a claimant, and procures judgment for her, such judgment cannot stand, although there may have been no actual fraud intended or perpetrated.

Appeal from superior court, Vance county; Shuford, Judge.

Action by Pattie D. B. Arrington and husband against J. P. Arrington, executor, and others, as the devisees of A. H. Arrington, and the administrator and heirs of T. J. A. Cooper, to secure the payment of a judgment. In response to an order of court directing him to report the entire amount of the outstanding liabilities of the estates of A. H. Arrington and Cooper, the referee reported the proportion of the judgment due by the Cooper estate to plaintiffs as the only liability against the Cooper estate, and the proportion of plaintiffs' judgment due by the Arrington estate to plaintiffs, and the amount of a judgment in favor of Mrs. Nancy Bunn, as the only liabilities against that estate. By subsequent orders and judgments of court in the action, the claims, as reported, were recognized, and finally judgment was rendered ordering the payment of plaintiffs' and Nancy Bunn's judgment by defendants. Defendants S. L. and J. C. Arrington thereupon made a motion to have the judgments rendered in the action, so far as they recognized the Nancy Bunn judgment, set aside, and from a judgment denying that motion those defendants appeal. From a judgment setting aside a judgment in reference to the judgment of Nancy Bunn, she and others appeal. Reversed on the former appeal, and affirmed on the latter.

Battle & Mordecai, for appellants. R. B. Peebles, for appellees.

MONTGOMERY, J. This case was begun in the name of Pattie D. B. Arrington and her husband, in Nash county, in 1879, upon a judgment against the executor of A. H. Arrington and the administrator and heirs of T. J. A. Cooper, for an account and payment of said judgment, and against the devisees of A. H. Arrington, deceased, to subject the devised lands to the payment of said judgment. The questions before this court arise upon a motion made in the case by the defendants, the said S. L., A. H., and J. C. Arrington, children and devisees of A. H. Arrington, "to set aside so much of the judgments rendered in this action as establishes or recognizes a judgment in favor of Nancy Bunn against the executors and devisees of A. H. Arrington, deceased, other than W. L. Thorpe and wife, to wit, the judgment rendered by Judge Shepherd at June term, 1885; the judgment signed by Judge Shipp as of October term, 1887; the judgment of May term, 1889; the judgment of fall term, 1890; the judgment at May term, 1891; and all other judgments rendered in this action prior to May term, 1891, relating to said claim or judgment of Nancy Bunn." The motion was heard by Judge Shuford at May term, 1893, of Vance superior court, and the following facts were found by the court:

"(1) This action was commenced in the name of Pattie D. B. Arrington and husband, as plaintiffs, returnable to the fall term, 1879, of Nash superior court, not as a creditor's bill, but as an action upon a judgment against the executor of A. H. Arrington and the administrator and heirs of T. J. A. Cooper for an account and payment of said judgment, and against the devisees of A. H. Arrington, deceased, to subject the devised lands to the payment of so much of said judgment as the personal assets were insufficient to pay.

"(2) The summons was duly served on all of the defendants. The defendant T. M. Arrington was represented by Jacob Battle, Esq., and John P. Arrington, as executor, by Messrs. Connor and Woodard. None of the other defendants were represented by counsel until at the June term, 1885, when the said Jacob Battle appeared as counsel for the said executor and all the devisees of A. H. Arrington, deceased.

"(3) At fall term, 1883, an order of reference was made to R. A. P. Cooley, Esq., on motion of plaintiff P. D. B. Arrington, directing said referee, among other things, to ascertain and report the entire amount of the outstanding liabilities of the estates of A. H. Arrington and Cooper; list of all claims unsatisfied against the two estates to be given. At June term, 1885, of Vance superior court (the action having, in 1882, been removed to Vance county), the referee filed

his report, stating, among other things, that there is due on the judgment in favor of the plaintiff \$9,247.44 December 1, 1884, and that of this there is due from Cooper's estate, the only liability against the same... \$3,489 13¼  
And from Arrington's estate.... 5,758 30¼

\$9,247 44

And that the only liability against the latter estate was 'the amount due on judgment in favor of Mrs. Nancy Bunn' \$ 853 84  
5,785 30¼

\$6,612 14¼

—The referee states in his report that the cause was heard before him at his office, in Nashville, September 22, 1884, 'all necessary parties being present, or represented by counsel.'

"(4) That there is on file in the cause no evidence other than this statement of the referee that any notice of the taking, etc., of said accounts was given to any of the defendants; and, upon the affidavit of S. L. Arrington, the court finds that no notice was given to the defendants other than John P. Arrington and T. M. Arrington.

"(5) That prior to May term, 1891, none of the defendants except John P. Arrington attended court in Vance county in person, and that the defendants other than John P. Arrington and T. M. Arrington did not consent to the order of reference made at fall term, 1883, before mentioned, and that at that time no one was authorized to consent thereto for them, and to that extent said order of reference does not speak the truth.

"(6) That the defendants other than John P. Arrington and T. M. Arrington had no knowledge of the Nancy Bunn claim until May term, 1891.

"(7) Before the referee, Cooley, B. H. Bunn, of counsel for Nancy Bunn, presented the claim of Nancy Bunn, and no objection was made to it. Jacob Battle, representing T. M. Arrington, did not object to it, because he knew of no legal defense to it, and no information was given him on the subject by T. M. Arrington, or any one else. There was no evidence returned with Cooley's report, on which said claim was based.

"(8) That no notice had been given to creditors to come in and make themselves parties to said action, and no motion had been made by Nancy Bunn, asking to be made a party.

"(9) At the June term, 1885, Jacob Battle was counsel of record for the executors of A. H. Arrington and the devisees of said Arrington. B. H. Bunn, being engaged at home, asked said Jacob Battle, just before June term, 1885 (he having been his law partner since January 1, 1880), to ask all of the parties to agree that the Nancy Bunn claim should be paid at once. Said Battle said nothing to the parties on the subject. At said June term, 1885, B. H. Bunn was not

present, and the judgment in favor of Nancy Bunn was rendered on motion of Jacob Battle, as appears of record, and was in his handwriting. This judgment was written and signed after said Battle had made a motion to be allowed to file an amended answer for the personal and real representatives of the two estates, which was allowed; the court stating that all matters must be closed, except the matters raised in the amended answer for the first time.

"(10) That all the other judgments rendered in this action, in which the Nancy Bunn judgment is mentioned, are in the handwriting of Jacob Battle, except the judgment at fall term, 1887, signed by W. M. Shipp, Judge, which is in the handwriting of Spler Whitaker, Esq., except the last eleven lines of the modified judgment, which is in the handwriting of said Jacob Battle, Esq. Some of said judgments were countersigned by some of the parties, as appears of record.

"(11) There was no adjudication of said Nancy Bunn's claim in either of said judgments signed by Judge Shipp. The only reference to it in the modified judgment is as follows: 'It having been suggested that the amount hereinbefore stated to be due on the judgment of Mrs. Nancy Bunn may be incorrect, the commissioners, Whitaker and Battle, will pay to her any less sum which they may find to be due on said judgment.'

"(12) That at May term, 1891, said Jacob Battle represented the said Nancy Bunn and the executors and devisees of A. H. Arrington. Three of the latter—Samuel L., A. H., and J. C. Arrington—were also represented by R. B. Peebles. At said term, after examining the records of the case at Vance court, said Peebles stated to said Jacob Battle that the Nancy Bunn judgments on the record at Vance court were irregularly entered, and that he would, on behalf of his clients, have to move to set them aside. That thereupon said Jacob Battle told said Peebles that Nancy Bunn had in Nash county a judgment regularly confessed against A. H. Arrington. The said Peebles had no opportunity then to examine the records of Nash county, and, relying upon this statement, said Peebles signed the judgment at May term, 1891, as of counsel for S. L., A. H., and J. C. Arrington. That in making this statement the said Jacob Battle honestly thought that the Nash county Nancy Bunn judgment was in all respects regular.

"(13) That, from the affidavits and other evidence filed, there is reasonable ground for believing that the Nancy Bunn judgment in Nash county was irregularly entered up, and that defendants, in good faith, claim to have a good and valid defense to said claim. All of the entries of record touching said judgment are here attached, as part of this finding.

"(14) That, in the motion to set aside the Nancy Bunn judgments, the said R. B.

Peebles appears of counsel for the executors and all the living devisees of A. H. Arrington.

"(15) That the motion to set aside the judgment in favor of John P. Arrington, and the one in favor of Jacob Battle, for his fees and expenses, are abandoned.

"(16) That Jacob Battle has never obtained permission from the court to retire as counsel for the executors and devisees of A. H. Arrington, or either of them.

"(17) That the Nancy Bunn judgment in Nash county was alleged to have been obtained by W. T. Dortch, as counsel for said Nancy, on a bond against H. G. Williams and S. S. Cooper, as principals, and A. H. Arrington, as surety, but the judgment is not signed, and was written by the clerk's son, at the dictation of the clerk; but it does not appear to the satisfaction of the court when said judgment was taken or written up,—in vacation, or at term time.

"(18) That the law copartnership of B. H. Bunn and Jacob Battle was formed January 1, 1880, and it did not embrace any business or cases either had at that time. According to the best recollection of B. H. Bunn, Esq., he represented the said Nancy Bunn, as to her judgment in Nash county, prior to January 1, 1880. That Jacob Battle did not, until May term, 1891, represent Nancy Bunn, as her counsel, only as his acts and conduct in reference to judgments rendered prior to that term in this action, as herein found, constitute him her attorney. And, upon the foregoing facts, it is considered and adjudged that the judgments rendered in this action at the May term, 1891, so far as it relates to the judgment of Nancy Bunn, be, and the same hereby is, vacated and set aside, for the reason that the same was signed by counsel, and Jacob Battle, Esq., was representing the said Nancy Bunn, and also the real and personal representatives of A. H. Arrington, deceased. It is further considered by the court that the acts and conduct of said Jacob Battle, prior to said May term, 1891, did not constitute him the attorney of Nancy Bunn, and that the personal and real representatives of A. H. Arrington's estate are bound by his acts; and the motion to set aside so much of the judgments rendered prior to May term, 1891, as relates to the said Nancy Bunn judgment, is refused."

Upon the foregoing facts the court rendered judgment vacating and setting aside the judgment obtained in this action at May term, 1891, so far as it related to the judgment of Nancy Bunn, for the reason that the same was signed by counsel, and Jacob Battle was representing the said Nancy Bunn, and also the real and personal representatives of A. H. Arrington, deceased. The court declared at the same time "that Jacob Battle did not, until May term, 1891, represent Nancy Bunn, as her counsel, only as his acts and conduct in reference to judgment rendered prior to that term in this

action, as herein found, constituted him her attorney; that the personal and real representative of A. H. Arrington's estate was bound by his acts and deeds,—and the motion to set aside the said judgments, as set out in the motion other than the one of May, 1891, was refused. The respondents appealed to this court from so much of the judgment as set aside the judgment of May term, 1891, so far as it affected the Nancy Bunn judgment, filing the following exceptions to his honor's findings: "(1) For that the respondents requested the court to find fully the facts as to Nancy J. Bunn's transferring her judgment debt on May 16, 1891, as stated in her affidavit and the affidavit of Jacob Battle, and the court failed to do so. (2) For that the court failed to declare, as a matter of law, that this consent judgment of May term, 1891, could not be set aside, save for fraud or mutual mistake, and that there was no evidence to show either. (3) For that the court failed to find fully the circumstances of the rendition of the judgment in favor of Nancy J. Bunn, and especially that it was rendered at a regular term of the court. (4) For that the court failed to declare, as a matter of law, that the judgment aforesaid (to wit, the said judgment in favor of Nancy Bunn) was not so irregular that it could be set aside after so many years. (5) For that the court failed to find that the judgment of May term, 1891, was made after the question in relation to the Nancy Bunn debt or claim had arisen, and that in respect to that question the said Jacob Battle and the said A. H., S. L., and J. C. Arrington, acting through their attorney, R. B. Peebles, were dealing at arms' length. (6) For that the court failed to rule that the claim of payment set up in S. L. Arrington's affidavit, dated June 1, 1892, was unreasonable, and completely negatived by counter affidavits filed by the petitioners. (7) For that the court failed to rule that there was presumption of law that, when the judgment in favor of Nancy Bunn was rendered, the bond on which it is alleged the same was rendered was canceled, and filed with the clerk, and that such presumption is not repelled by the fact that the bond cannot now be found in the clerk's office of Nash superior court."

Such of the above exceptions as relate simply to the findings of fact by his honor are not reviewable here. Upon the facts found, and especially upon the one that at May term, 1891, Jacob Battle represented Nancy Bunn and the executors and devisees of A. H. Arrington, his honor rendered judgment vacating and setting aside that part of the judgment of May, 1891, which related to the Nancy Bunn judgment, and from which the respondents appealed. As we find no error in that part of the judgment of the court, rendered by Judge Shuford, setting aside and vacating the judgment of May term, 1891, so far as it relates

to the Nancy Bunn judgment, it is not necessary to pass upon the exceptions of the respondents to the other findings of law by the court. It was not necessary for the court to have found actual fraud, intended or perpetrated, in rendering its judgment. Indeed, in *Moore v. Gidney*, 75 N. C. 34, where it appeared that the attorney for an administrator, in proceedings against the widow and heirs at law of the intestate to sell land to make assets for the payment of debts, also drew the answer in the cause, and that without fee, and a sale took place under the proceedings, which were afterwards set aside on account of this action of the attorney, this court said: "But it is denied that the counsel of the plaintiff acted as the defendant's counsel further than in drawing up her answer, and we are satisfied that no improper influence was intended. Yet the law does not tolerate that the same counsel may appear on both sides of an adversary proceeding, even colorably, and, in general, will not permit a judgment or decree so affected to stand, if made the subject of exception in due time by the parties injured thereby. The presumption in such cases is that the party was unduly influenced by that relation, and the opposite party cannot take the benefit of it." As to that part of the judgment of the court below setting aside and vacating the judgment of 1891, so far as it relates to the Nancy Bunn judgment, the same is affirmed.

**In the Appeal of S. L. and J. C. Arrington, Defendants.**

**MONTGOMERY, J.** From so much of the judgment overruling the exceptions filed to the report of J. M. Mullen, referee, at October term, 1891, by the defendants, which exceptions are as follows: "(2) For that he finds that said estate is indebted to Nancy Bunn \$1,035.89, and interest, \$12.68." "(4) For that he finds that in April, 1869, H. G. Williams, S. S. Cooper, and A. H. Arrington confessed judgment to Nancy Bunn before the clerk of the superior court for Nash county for \$1,182.32, of which \$1,100 is principal. (5) For that he finds that the so-called Nancy Bunn judgment was revived, as stated in said report,"—and also from that part of said judgment refusing to vacate and set aside all the aforesaid judgments, named in defendant's motion, and rendered in this action, in so far as they relate to said judgment in favor of Nancy Bunn, the executors of A. H. Arrington and the devisees of A. H. Arrington, other than W. L. Thorpe and wife, appealed to this court, assigning as errors in the rulings and judgment of the court below the following: "(1) In overruling said exception No. 2. (2) In overruling said exception No. 4. (3) In overruling said exception No. 5. (4) In receiving evidence of Jacob Battle to contradict the record of the judgment rendered at June term, 1885, which shows upon its face that said judg-

ment in favor of Nancy Bunn was obtained on the motion of said Jacob Battle, and was signed by him as attorney, and by Bunn & Battle, attorneys for Spier Whitaker, trustee. (5) In holding that, upon the facts found, Jacob Battle never acted as counsel for Nancy Bunn in this action prior to May term, 1891. (6) In holding that the facts found and the acts shown by the record did not constitute Jacob Battle Nancy Bunn's attorney, in obtaining said judgment for her in this action. (7) In refusing to set aside the judgment rendered in Nancy Bunn's favor in this action at June term, 1885, upon the facts found. (8) In refusing to set aside the last-named judgment upon the facts found and those appearing upon the face of the record. (9) In refusing to set aside the other judgments complained of, upon the facts found. (10) In refusing to set aside said judgments upon the facts found and those appearing upon the face of the record. (11) In refusing to set aside said judgments as fraudulent and void. (12) In refusing to set aside said judgments as being rendered without process, and without a day in court. (13) In holding that defendants represented by R. B. Peebles were bound by the acts of Jacob Battle at June term, 1885, in regard to the Nancy Bunn claim. (14) All other errors appearing upon the record."

It is unnecessary to pass seriatim upon all of the exceptions. Upon all the facts which his honor found, and especially upon his findings 4, 5, 6, 9, 10, 12, 13, 16, 17, we are satisfied that he erred when he refused to set aside and vacate all the judgments rendered in this case, and named in defendants' motion, in so far as they concern the Nancy Bunn judgment. (It appears in the respondents' appeal that the judgment of May, 1891, was set aside, in so far as it affected the Nancy Bunn judgment.) These findings of fact, when summarized, appear to be: (1) That at June term, 1885, Jacob Battle was counsel of record for the executors of A. H. Arrington and the devisees of said Arrington, including these defendants, and that at that term the judgment in favor of Nancy Bunn was rendered, on motion of Jacob Battle, as appears of record, and was in his handwriting. (2) That all the other judgments rendered in this action, in which the Nancy Bunn judgment is mentioned, are in the handwriting of Jacob Battle, except the judgment at fall term, 1887, which is in the handwriting of Spier Whitaker, except the last 11 lines of the modified judgment, which is in the handwriting of said Jacob Battle. (3) That at May term, 1891, Jacob Battle represented Nancy Bunn and the executors and devisees of A. H. Arrington. (4) That there was reasonable ground for believing that the Nancy Bunn judgment in Nash county was irregularly entered up, and that defendants, in good faith, claim to have a good and valid defense to said claim. (5) That Jacob Battle had never obtained, up to May term, 1893,

permission from the court to retire as counsel for the executors and devisees of A. H. Arrington, or either of them. (6) That the Nancy Bunn judgment in Nash county, alleged to have been obtained by a lawyer of good standing for said Nancy, is not signed, and was written by the clerk's son at the dictation of the clerk; but it does not appear to the satisfaction of the court when said judgment was taken or written up,—in vacation or in term time. (7) That the defendant appellants had no knowledge of the Nancy Bunn judgment until May term, 1891, and had no notice given them of the reference to R. A. P. Cooley at fall term, 1883.

This court cannot go behind the facts found by the court below, but the last sentence of finding 10 of the court more than authorizes us to look at the records referred to; and in doing so we find that the judgment of May, 1885, was signed "Jacob Battle, Attorney," and "Bunn & Battle, Attorneys for Spier Whitaker, Trustee." It appears also from the findings of the judge that there is reasonable ground for believing that the Nancy Bunn judgment in Nash county was irregularly entered up, and that defendants, in good faith, claimed to have a good and valid defense to said claim. There is therefore danger of loss to the defendants by reason of the judgments in Vance superior court, in this case, so far as those judgments relate to the Nancy Bunn judgment. The court found as a fact that the said Jacob Battle honestly thought that the Nash county judgment (Nancy Bunn judgment) was in all respects regular. As we said in the respondents' appeal, it is not necessary that there should have been actual fraud in the procurement of those judgments, in order that they might be set aside by motion, but that "the rule which forbids the same attorney from representing both parties in adversary proceedings rests upon the broad principle of public policy, which precludes persons occupying these fiduciary relations from representing conflicting interests that may tempt them to disregard duty, and lead to injury on one side or the other. The law will not permit its licensed attorneys to assume relations that will subject them to this temptation, upon grounds of public policy, and it is for this reason that an attorney will not be permitted to represent both sides in any litigated matter." *Gooch v. Peebles*, 105 N. C. 411, 11 S. E. 415.

After a careful review of each and all of the findings of his honor, we have no difficulty in arriving at the conclusion that those findings constituted, in law, Jacob Battle the attorney of Nancy Bunn at the times of the rendition of all the judgments named in the defendants' motion in this case, in her favor; and we are of the opinion that the judge below erred in not so finding as matter of law, and that he also erred in not setting aside and vacating each and all of the judgments in Vance superior court, named in defend-

ants' motion in this case. The said exceptions by the defendants to the report of J. M. Mullen, referee, at October term, 1891, ought to have been sustained, for the reason that there was no proof offered to the said referee, except the record pertaining to the said judgments, and that was not sufficient. The judgment below is reversed, and, that further action may be had in this case according to the decision of this court, let this opinion be certified to the superior court of Vance county. Reversed.

(116 N. C. 140)

### REDMOND v. STATON.

(Supreme Court of North Carolina. March 5, 1895.)

#### CLERK OF COURT — LIABILITY FOR NEGLIGENCE— ASSIGNMENT OF JUDGMENT.

1. The clerk of the court is liable for damages to a judgment creditor arising from his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands.

2. The mere assignment of a judgment does not carry with it a right of action which has accrued to the judgment creditor against the clerk of the court for his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands.

Appeal from superior court, Edgecombe county; Armfield, Judge.

Action by Claudia Redmond against H. L. Staton to recover damages for loss of money caused by defendant's negligence, as clerk of court, in not properly indexing a judgment. From a judgment dismissing the action, plaintiff appeals. Affirmed.

John L. Bridgers, for appellant. H. G. Connor, for appellee.

FURCHES, J. At April term, 1886, of Edgecombe superior court, O. H. Farrar recovered a judgment against B. Bryan and Joshua Killebrew, which was duly placed on the judgment docket of said court, but was not indexed and cross indexed, as required by law to constitute it a lien on the land of the defendant Killebrew, in Edgecombe county. Farrar, being pressed for money, soon thereafter sold and assigned said judgment to the plaintiff, who did not know of the defective condition of the index. Killebrew, at the date of this judgment and at the date of the assignment to plaintiff, was the owner of sufficient real estate in Edgecombe county to have satisfied said judgment, and upon which said judgment would have been a lien, if it had been properly indexed. But Killebrew, being indebted to other parties, on the — day of February, 1889, and after the rendition of the judgment assigned to plaintiff, executed a deed in trust to Jacob Battle to secure other indebtedness, in which he conveyed all his lands. That Jacob Battle, as trustee, has since sold said land; and the purchaser there-

of, in an action to remove the cloud produced by plaintiff's judgment, in which she was a party, has recovered said lands,—the court holding that, owing to the defective indexing of plaintiff's judgment, it created no lien,—and plaintiff has thereby lost her debt. *Dewey v. Sugg*, 109 N. C. 328, 13 S. E. 923. That at April term, 1886, of Edgecombe superior court, and for some time thereafter, the defendant, H. L. Staton, was the clerk of said court; and plaintiff has brought this action against him (not on his official bond) to recover damages for the loss of her money, caused by his negligence in not properly indexing said judgment. The assignment is not set out in the record, but it is admitted by plaintiff that, in form, it only assigns the judgment to plaintiff. Defendant, without controverting these facts, denies plaintiff's right to recover, as he says, for two reasons: First, that plaintiff has shown no cause of action against him; and, secondly, that, if she has, it is barred by the lapse of time and the statute of limitations,—plaintiff's action not having been commenced until 1893 (the precise date not shown, as the summons does not appear in the record).

It was admitted on the argument by the learned counsel representing plaintiff and defendant that this is a case of first impression in our courts, and that they have been unable to find any decided case like this in the other courts. And, this being the case, the court has given it careful investigation, and as much reflection as we were able to bring to bear upon the questions presented; and, after doing so, we are of the opinion that Farrar had a chose in action against the defendant (*Holman v. Miller*, 103 N. C. 118, 9 S. E. 429; *Kivett v. Young*, 106 N. C. 567, 10 S. E. 1019), and that, under our statutes, this chose might have been assigned. But that it was not assigned seems to be true, unless the assignment of the judgment carried with it this right or chose which Farrar had against the defendant. The fact that it was assignable under the Code does not help the plaintiff, if it was not assigned. The Code did not create causes of action, but only enlarged the power of assignment. Plaintiff's rights then stand as they did before the Code. And this brings us to a consideration of plaintiff's rights at common law and in equity. At common law, choses in action were not assignable, and did not pass from the bargainor to the bargainee, unless they were such contracts, and covenants, as attached to the estate, and ran with the estate, such as warranty and quiet enjoyment in conveyances of land. So the plaintiff is not benefited by this principle, as there is neither covenant, contract, nor land. And it is not always in a sale of land that these choses pass. For instance, A. sells to B. the lands of C., stating in the deed that C. has the title, but A. executes a deed to B., with full covenants of warranty and quiet enjoyment, and B. is afterwards turned out by C. B. has a cause of

action against A. But B. sells to D., with full covenants, and C. turns D. out of possession, and B. has become insolvent. D. has no right of action against A., at law, for the reason that there was no estate passed from A. to B., and, as no estate passed to B., no covenants passed, as they were not assignable, and only ran with the estate. *Nesbit v. Nesbit*, Conf. R. 318, 403. But in this case D. might bring his suit in equity against A., and recover; equity holding that B. had the right to sue, and that he had conveyed to D. with full covenants. Therefore, equity would treat B. as a trustee of D., and in that way give D. relief against A. *Nesbit v. Brown*, 1 Dev. Eq. 30. A. buys a nonnegotiable note, which gives him the equitable, but not the legal, title to the note. The note is not paid, and A. brings suit in the name of the assignor, who is the legal owner; obtains judgment; puts execution in the hands of the sheriff for collection, telling the sheriff that the money will be his, when collected, as he had bought the note before suit, which he had to bring in the name of the payee, as he had not indorsed the note. The sheriff collects the money, and pays it to the legal owner, in whose name the suit was brought. A. brings his action for the money against the sheriff, and the court sustains his action upon the ground that when the money was collected it was his. *Hoke v. Carter*, 12 Ired. 324. We are now in a court of equity, as well as a court of law; and we admit that, at the first view of these cases, they seemed to support plaintiff's contention. But, upon examination, we think they are distinguishable from the case now before the court. In *Hoke v. Carter*, supra, the money collected by the sheriff was the fruit of the judgment, which, in equity, belonged to Hoke. In *Nesbit v. Brown*, supra, there was the covenant (the contract), the chose in action; and though it did not pass from A. to B. with the estate, for the reason that no estate in the land passed, and it was not assignable at law, yet there was a contract, and equity enforced it. And the trouble with plaintiff's case is that she failed to show she contracted with Farrar for anything but the judgment, and therefore she got nothing but the judgment, with the rights that Farrar had to enforce it and have the benefit of its fruits. The case of *Timberlake v. Powell*, 99 N. C. 233, 5 S. E. 410, though not a case directly in point, involves very much the same principles and the same considerations as this case, and tends strongly to sustain defendant's first contention, and the view we have taken of the case. We therefore hold that plaintiff has failed to show that she has a cause of action against the defendant, and the judgment appealed from must be affirmed. This relieves us from the consideration of the interesting question of the statute of limitations, which has grown to be one of the most troublesome subjects our courts have to deal with. Affirmed.

(116 N. C. 57)

## PEEBLES v. BOONE et al.

(Supreme Court of North Carolina. Feb. 28, 1895.)

## CLERK OF COURT—SUIT AGAINST PREDECESSOR—POSSESSION OF OFFICIAL MONEYS.

1. It is no defense to an action by an incoming clerk of court, against his predecessor and the sureties on his bond, for failure to turn over the records, moneys, and properties of his office, that plaintiff has not been injured by such failure; Code, § 81, requiring such records, moneys, and properties to be turned over in order that the business of the office may be properly conducted.

2. An order requiring the former clerk to pay over the funds to his successor in office is not necessary in order that the latter may sue for his failure to do so.

3. The fact that the money for which such an action is brought belongs to different persons does not involve a misjoinder of causes of action.

Appeal from superior court, Northampton county; Armfield, Judge.

Action by H. B. Peebles, as relator, against James D. Boone and others for an accounting of moneys and other property in the hands of defendant as clerk of the superior court of Northampton county, and which he failed to turn over to relator as his successor in office. From a judgment overruling a demurrer to the complaint and allowing defendants to answer over, defendants appeal. Affirmed.

B. S. Gay, for appellants. R. B. Peebles, for appellee.

MONTGOMERY, J. James D. Boone, having been clerk of the superior court of Northampton county, resigned his said office about the 7th of December, 1883. On the next day the judge of the district appointed H. B. Peebles Boone's successor for the unexpired term, ending the first Monday of December, 1886, Peebles, on the day of his appointment, giving bond according to law, and entering upon the discharge of his duties as clerk aforesaid. Peebles at once, after qualification as clerk, demanded of Boone that he pay over to him all moneys which Boone held by virtue or under color of his office, and all other effects which went into his hands as such clerk. Boone refused so to do. Peebles, as relator of the state, brought this action in the superior court of Northampton county against Boone and the sureties on his official bonds, the complaint alleging breaches of the bonds, charging that the said Boone, as clerk, had received from his predecessor in office, upon his retirement, large sums of money belonging to different persons, naming them, and bonds and notes for large amounts, payable to his predecessor in office and his successors and to different individuals, and had neglected to collect a great deal of money which he ought to have collected. Since the commencement of this action the term of the office of Peebles has expired, and J. F. Buxton has been elected clerk of the

superior court of Northampton county, and has been made party plaintiff in this case in the place of Peebles. An account against Boone is asked for as to the matters set out in the said complaint. The defendants demurred to the complaint, and assigned six special grounds therefor. His honor overruled all the grounds of demurrer, and allowed the defendants to answer over, from which judgment the defendants appealed.

The first ground is "that the complaint fails to show that the relator of the plaintiff has been damaged or injured by the failure of the defendant J. D. Boone to collect or pay over the amounts mentioned in sections six, seven, nine, ten, and twelve of the complaint to said relator." These sections 6, 7, 9, 10, and 12 of the complaint contain the charges of the defendant's having received large amounts of money, valuable bonds, and neglecting to collect others that were collectible. Injury to the incoming clerk, Peebles, had nothing to do with the right of that officer, through the state, to bring this suit. Section 81 of the Code required Peebles, the new clerk, immediately after giving bond and qualification, to receive from the late clerk, the defendant, all the records, books, papers, moneys, and property of his office; and this same section provides that if any (late) clerk shall refuse or fail within a reasonable time after demand to deliver to the clerk said things demanded of him, he shall be liable on his official bond for the value thereof. The right of the clerk, Peebles, to bring this action therefore does not rest on any injury done to him, but on the ground that the law requires that each successive clerk shall receive from the retiring clerk all the records, books, papers, moneys, and property of his office, in order that the business of the clerk of the superior court may be conducted intelligently, systematically, and economically. Section 1883 of the Code, to which our attention was particularly directed by the attorney of the defendant, is only an additional remedy for the benefit of individuals who think they have suffered at the hands of unfaithful clerks, and is not repugnant to section 81 of the Code. This ground of demurrer is overruled.

The second ground is "that the complaint fails to state a cause of action, in that it fails to show that there was any proper order of the court requiring the former clerk, N. R. Odom, to pay over the funds mentioned in section 6 of the complaint to the defendant James D. Boone, as clerk of said court." No such order was necessary in this case. Section 14 of chapter 19 of the Revised Code is brought forward into the Code, and is section 124 thereof. This section concerns forfeitures only in case of the refusal of the clerk to do what is required to be done in section 81 of the Code. Its proper construction is that former clerks, for whatever cause retiring, shall transfer

and deliver to their successors in office all the things personal which were in their hands upon retirement from office, under a forfeiture of \$1,000; and no order from a judge is necessary to compel the former clerk to make this transfer to the new clerk. If, however, in vacancies in this office of clerk, the judge, before he makes the appointment of a new clerk, sees fit to temporarily put some person in charge of the office until the regular appointment is made, it is then, in such a case, necessary for the new clerk to have an order from the judge, directed to the person temporarily in charge of the office, to deliver the possessions of the office to the new clerk. A person duly elected clerk of the superior court by the people needs no order from any power or authority to demand from the old clerk the property of all kinds belonging to the office. This ground of demurrer is overruled.

The third ground is "that the complaint fails to state a cause of action, in that it fails to show that James D. Boone, as clerk of said court, was required by any proper order of said court to pay over said funds, or any of them, to the relator." For the reasons stated in overruling the second cause of demurrer, this ground is overruled.

The fourth ground is "that it fails to state a cause of action, for that it fails to show that the relator is the owner or entitled to receive the funds." This is overruled for the reasons given in overruling the first ground of demurrer.

The fifth ground is "that there is a misjoinder of causes of action, for that the several causes of action in sections six, seven, nine, ten, and twelve are improperly united, the same and each being separate and distinct causes of action, and for the benefit of separate and distinct persons or classes of persons." This is overruled for the same reasons given in overruling the first ground of demurrer.

The sixth ground is "for that the former clerk, the defendant J. D. Boone, and his sureties, the other defendants, cannot be sued on the relation of his successor in office for the causes of action alleged in the complaint, or any of them." This is overruled for the reasons set forth in overruling the other five grounds of demurrer.

There are no errors in the rulings of his honor in overruling the several grounds of demurrer, and the judgment is affirmed. The case will be remanded to the superior court of Northampton to be proceeded in according to law. Affirmed.

(116 N. C. 153)

#### FLEMING v. DAVENPORT.

(Supreme Court of North Carolina. Feb. 26, 1895.)

#### LANDLORD'S LIEN—PRIORITIES.

Under Code, § 1754, providing that a landlord shall have a prior lien on his tenant's



crops during the year subject to the landlord's share of the rent, the landlord is entitled to such prior lien only for rent during the year in which the crops are grown. *Ballard v. Johnson*, 19 S. E. 98, 114 N. C. 141, followed.

Appeal from superior court, Pitt county; Bynum, Judge.

Action by Lunsford Fleming, trustee, against J. R. Davenport, to recover balance alleged to be due plaintiff on purchase of cotton raised on plaintiff's land, and being the amount of landlord's advances. Defendant pleaded payment. From judgment for plaintiff, defendant appeals. New trial ordered.

The action was tried before Bynum, J., at March term, 1894, of Pitt superior court, on appeal from a justice of the peace. The defendant asked the following instruction in writing: "(2) In no event can the landlord call upon Davenport to pay out of the cotton which came into his possession more than the actual advances made by Fleming to his tenant in 1892, to enable him to make his crop of that year; and the court charges you that the balance of the tenant's account for 1891 is not a lien on the tenant's interest in the cotton of 1892, superior to Davenport's lien, and you can charge this against him in this proceeding." The court refused to so charge.

Jarvis & Blow, for appellant.

**FURCHES, J.** This case is controlled by *Ballard v. Johnson*, 114 N. C. 141, 19 S. E. 98, and is so fully discussed there that we see no reason for discussing it in this case.

The defendant was entitled to his second prayer for instructions to the jury. The court declined to give these instructions, and this entitles the defendant to a new trial. And, as this substantially disposes of the matters controverted, we do not consider the other questions presented by the appeal. There is error. New trial.

(116 N. C. 208)

#### STATE v. MANGUM.

(Supreme Court of North Carolina. March 5, 1895.)

#### FALSE PRETENSES—INDICTMENT—DEMURRER.

1. An indictment for fraud in a horse trade, alleging that defendant falsely, etc., represented that the horse "was sound," which was intended to cheat, and did cheat, is sufficient, as alleging a misrepresentation of a subsisting fact.

2. A motion to quash an indictment consisting of two counts should be overruled, where either count is good.

Appeal from superior court, Wake county; Bynum, Judge.

Defendant was indicted for fraud, and from an order quashing the indictment the state appeals. Reversed.

There were two bills of indictment found at September term, 1894, to wit:

"(1) The jurors for the state upon their oath present: That John Mangum, late of

the county of Wake, wickedly devising and intending to cheat and defraud, on the 1st day of February, A. D. 1894, with force and arms, at and in the county aforesaid, unlawfully, knowingly, designedly, and feloniously did unto one S. H. Perry falsely pretend that a certain horse was sound in every respect, and only about nine years old, and that he had had the horse for about four years; whereas in truth and fact the said horse was not sound, and was about fifteen years of age, and the said John Mangum had not had the horse for four years; by means of which false pretense he, the said John Mangum, knowingly and designedly did then and there unlawfully, willfully, and feloniously obtain from the said S. H. Perry the following goods and things of value, the property of the said S. H. Perry, to wit, one mule, and seven dollars in money,—with intent then and there to defraud, against the form of the statute in such case made and provided, and against the peace and dignity of the state.

"(2) The jurors for the state upon their oaths present: That John Mangum, late of the county of Wake, wickedly devising and intending to cheat and defraud, on the 1st day of February, A. D. 1894, with force and arms, at and in the county aforesaid, unlawfully, knowingly, designedly, and feloniously did unto one S. H. Perry falsely pretend and represent that a certain horse which the said John Mangum was then and there offering to trade to the said S. H. Perry was both sound and gentle, that a woman could manage the said horse, that the said horse was able to work well, that the said John Mangum had owned the horse for four years, that the said horse would be nine years old in the spring of 1894, and he, the said John Mangum had paid \$175.00 in cash for the said horse; whereas in truth and fact the said horse was not sound or gentle, a woman could not manage the said horse, and the said horse was neither able nor did work well, the said John Mangum had not owned the said horse for four years, the said horse in the spring of 1894 was very much older than nine years of age, to wit, about fifteen years of age, and the said John Mangum had not paid \$175.00 in cash for the said horse, all of which was well known to the said defendant at the time aforesaid; by means of which said false pretense he, the said John Mangum, knowingly and designedly did then and there unlawfully and feloniously obtain from the said S. H. Perry the following things and goods of value, the property of the said S. H. Perry, to wit, one mule of the value of fifty dollars, and seven dollars in money,—with intent then and there to defraud, against the form of the statute in such case made and provided, and against the peace and dignity of the state."

The defendant moved to quash. The motion was allowed, and the state appealed.

The Attorney General, for the State. T. M. Argo, for appellee.

**FURCHES, J.** The defendant is indicted for a false pretense in trading a horse to the prosecutor, Perry. The defendant moved to quash, for the reason that the bill did not charge a criminal offense, which motion was allowed by the court, the bill quashed, and the state appealed. There are two bills of indictment, which the court treats as one bill with two counts. *State v. Watts*, 82 N. C. 656, and *State v. McNeill*, 93 N. C. 552. So, if either bill is sufficient, the motion should have been refused. Then the second bill, though not very well drawn, charges that the defendant "unlawfully, knowingly, designedly, and feloniously did unto one S. H. Perry falsely pretend and represent that a certain horse which the said John Mangum was then and there offering to trade to the said S. H. Perry was sound and gentle, that a woman could manage the said horse, that the said horse was able to work well." There are other averments in this count, but we think the case turns upon those quoted above. The principles governing an indictment in this state for false pretenses is clearly stated by Justice Reade in delivering the opinion of this court in the case of *State v. Phifer*, 65 N. C. 321, which has been regarded as the leading case on this subject from that time until now. It is held in that case, to constitute this offense "there must be a false representation as to a subsisting fact intending to cheat, and which does cheat." And if we have what are apparently conflicting opinions on this subject, since the case of *State v. Phifer*, it is not because the principle of law governing such cases was not settled and understood by the court, but for the reason that there has been some trouble, at times, in applying the rule. For instance, in the case of *State v. Holmes*, 82 N. C. 607, almost identically the same language is used as in this case, that the "horse was sound and healthy," and the court in that case hold that this did not charge a criminal offense; while in the case of *State v. Burke*, 108 N. C. 750, 12 S. E. 1000, the language used was that the horse "was sound and worked well, and would not kick," and this was held to be sufficient. This case is sustained by *State v. Wilkerson*, 103 N. C. 337, 9 S. E. 415. These two cases seem to be in conflict with each other, and, if they are, we should take the last case to be the correct exposition of the law, unless we felt called upon to overrule it, as being in conflict with established authority and sound reasoning. But neither of these cases, nor does any other case in our Reports, doubt the rule of law as held in *Phifer's Case*, supra. In fact it has been quoted and approved in nearly every case on this subject from the time it was delivered down to the case of *State v. Daniel*, 114 N. C. 823, 19 S. E. 100, in which it is quoted in an able opinion by Justice MacRae. So we say the trouble has not been in not understanding the rule, but in its application. And we admit that the lines of demarkation

between what is an indictable offense and what is not an indictable offense are so close together that it is sometimes difficult to distinguish between them. So, then, leaving the case of *State v. Holmes*, supra, and the case of *State v. Burke*, supra, out of the case, and going back to the principle laid down in *State v. Phifer*, supra, we think that defendant's saying that the "horse was sound," knowing that he was not sound, was a falsehood as to a subsisting fact, calculated to cheat, and which the state says did cheat; and that the bill therefore charged the defendant with an indictable offense, and there was error in quashing the same. Let this be certified, that the case may be proceeded with according to law. Error.

(116 N. C. 410)

**MOREHEAD BANKING CO. v. MOREHEAD et al.**

(Supreme Court of North Carolina. March 12, 1895.)

**DECEDENT'S ESTATE—NOTE OF EXECUTRIX—PERSONAL LIABILITY.**

1. A decedent's estate is not liable for a note made by the executrix in her representative capacity for money to be and which was used in paying decedent's debts, the executrix being personally liable on the note.

2. The executrix takes the risk of being reimbursed the amount of the note out of the assets of the estate on her final accounting.

Appeal from superior court, Durham county; Winston, Judge.

Action by the Morehead Banking Company against Lucy L. Morehead, personally and as executrix, and others, on a promissory note. From a judgment dismissing the action as to Lucy L. Morehead, executrix, the plaintiff appeals. Affirmed.

John W. Graham and Boone & Boone, for appellant. Fuller, Winston & Fuller, for appellees.

**EVERY, J.** An executor cannot, by any contract of his, fasten upon the estate of his testator liability for a debt created by him, and arising wholly out of matters occurring after the death of the testator. *Devane v. Royal*, 7 Jones (N. C.) 426; *Halley v. Wheeler*, 4 Jones (N. C.) 160; *Beaty v. Gingles*, 8 Jones (N. C.) 302; *Tyson v. Walston*, 83 N. C. 90; *McLean v. McLean*, 88 N. C. 394. Where an executor executed a promissory note as evidence of such debt, and signs it, and renewals of it, in his fiduciary capacity, the words, "As Executor," will be rejected as surplusage, and the contract interpreted as if made in terms by him individually. *Beaty v. Gingles*, supra. The rule is not modified by the fact that the note is given, as in this case, by an executrix for money which the creditor knows at the time is to be used in the payment of the debts of the testator, but the law assumes that she consents to incur the risk of reimbursement out of the assets on her final settlement. This

is unquestionably a liability governed by this general principle. The feme defendant is not answerable in her representative capacity. The judgment is affirmed.

(116 N. C. 412)

**MOREHEAD BANKING CO. v. MOREHEAD et al.**

(Supreme Court of North Carolina. March 12, 1895.)

**DECEDENT'S ESTATE—NOTE OF EXECUTRIX—PERSONAL LIABILITY.**

An executrix is not personally liable on a note executed in her representative capacity, where, in the body of the note, it is stated that she does not execute the same personally.

Appeal from superior court, Durham county; Winston, Judge.

Action by the Morehead Banking Company against Lucy L. Morehead, personally and as executrix, and others, on a promissory note. From a judgment dismissing the complaint as to Lucy L. Morehead personally, plaintiff appeals. Affirmed.

J. W. Graham and Boone & Boone, for appellant. Fuller, Winston & Fuller, for appellees.

**AVERY, J.** It is an elementary principle that every person who is not at the time laboring under some total or partial disability, such as infancy, insanity, or coverture, has the legal capacity to enter into any agreement not prohibited by law, and that the lawful contracts of persons having the capacity to enter into them are binding upon and enforceable against the parties to them. It is equally familiar learning that all contracts between persons capable of entering into them, and not in conflict with the state or federal constitution, in contravention of common or statutory law, or condemned as contrary to public policy or good morals, are lawful. The plaintiff corporation and the defendant executrix, both being capable of contracting, entered into an agreement, wherein it was especially stipulated that she, by signing a promissory note as executrix of her deceased husband, should not be held liable in her individual capacity. Such was the obvious purpose with which the words, "Mrs. L. L. Morehead, executrix of Eugene Morehead, but not personally," were inserted in the body of the note, where the parties promising are named; and when she signed, and the bank accepted, the note, both must have understood and assented to it, interpreted according to its plain meaning. 7 Am. & Eng. Enc. Law, 337, note 2. It was intended by the parties that she should incur no personal liability by signing in her representative capacity, and, if such a purpose can be carried into effect without running counter to any rule prescribed in furtherance of public policy, the plaintiff has no right to demand a personal judgment against

her. The law does, for sufficient reason, sometimes restrict the right to limit one's liability by contract. As, for instance, where a railroad company attempts to stipulate against liability as a common carrier for injury due to its own negligence, this limitation is held to be void, as against public policy. But, on the other hand, where personal representatives, in the exercise of a power contained in a devise or acting under an order or decree of court, have been required to execute conveyances of land, it has been the habit, in order to avoid raising the question of personal liability on the usual covenants of a deed, to specially stipulate that the executor or administrator agrees to warrant and defend, etc., only in his representative capacity, and to the extent to which he is empowered to do so. The doctrine under which the personal representative, who merely promises to pay by signing or by also inserting his name in the body of the instrument in his representative capacity, has been held personally liable, was founded upon the old principle that he thereby acknowledged that he had assets of the estate in his hands, and that the assets were the consideration of the note. *Sleighter v. Harrington*, 2 Murph. 332. If, said Judge Ruffin, such a "promise were good, it made the debt personal. \* \* \* Whenever one becomes personally bound for the debt of another (no matter how), it becomes his own debt, and must be paid out of his own estate. Nothing but satisfaction, or other matter which would discharge him from any other of his own personal debts, would discharge him from this. In *Banes' Case* [9 Coke, 94], Lord Coke is express that an executor can only show on the day of trial that he had no assets at the time of the promise." It would seem that the rule applicable to a personal representative, who signs in his fiduciary capacity, was founded upon a principle that can scarcely be said to have survived modern changes, but, however it originated, it is a part of the law of this state, repeatedly affirmed previously, and last approved by us in a case between some of the same parties at this term. 21 S. E. 190. To hold the executrix bound by an implied promise in the face of an express stipulation, constituting a part of the common understanding that she should in no event be held personally liable, would be to allow a legal fiction to contradict a palpable fact. There is no principle of law which prohibits parties from inserting in a written agreement a provision that an implication, which the law would otherwise raise, shall not arise. The object of the courts in the interpretation of contracts is to arrive at the intent of the parties, where they have not expressed it clearly, or to ascertain the precise terms of the agreement, to which two or more minds assented. Where their meaning is unmistakable, there is no room

for construction, and nothing is implied when everything intended is expressed with accuracy and certainty. Where the intention of the parties is plainly expressed, and the agreement is not illegal, the law requires that the courts shall give effect to it. Rules of construction are resorted to in order to ascertain the meaning of uncertain or ambiguous language, but never to defeat a plainly-expressed purpose. Such is the rule governing the interpretation of all other contracts, and there is no reason why the same test should not be applied to those made by personal representatives. *Chouteau v. Suydam*, 21 N. Y. 182. The point directly raised in this case is one of the first impression in this state, and we prefer to let our decision rest upon sound reason and approved elementary principles, rather than to go out in search of analogous cases or authority from other courts. We have not, however, found any authority in conflict with the conclusion we have reached. The appeal is from the refusal to give a personal judgment against the executrix. The judgment against the executrix in her representative capacity is not drawn in question. It is not material, therefore, to discuss the other question suggested on the argument, whether, as executrix, the feme defendant would be held liable if the question were raised on this or the original note of her testator. The judgment of the court to the effect that the executrix is not personally liable is affirmed.

(116 N. C. 144)

**GREEN v. BALLARD et al.**

(Supreme Court of North Carolina. March 12, 1895.)

**JUDGMENT AGAINST MARRIED WOMAN—VACATION.**

A personal judgment against a married woman on a contract, not within the constitution of 1868, or within the marriage act, stating the contracts which she has capacity to make, may be set aside on motion, if the fact of coverture appears in the record.

Appeal from superior court, Franklin county; Battle, Judge.

Action by W. W. Green, administrator, against E. A. Ballard and others, to sell land for assets. The sale was ordered, and defendant E. A. Ballard became the purchaser, giving her personal note, and upon default in payment an order for the resale of the land was obtained by plaintiff, and a judgment against defendants E. A. Ballard and her husband for the balance due on the note. Defendant E. A. Ballard petitioned the court to set aside the judgment rendered against her, and from an order denying her petition she appeals. Reversed.

Shepherd & Busbee and N. Y. Gulley, for appellant. F. S. Spruill, for appellee.

**FAIRCLOTH, C. J.** Prior to 1889 a special proceeding was instituted in Franklin superior court by the administrator of W. W.

Green against his heirs at law, including the defendant E. A. Ballard and her husband, W. H. Ballard, to sell land for assets. A sale was ordered, and commissioners to sell were appointed, who sold, and the defendant E. A. Ballard bought a part of the land, and gave her personal note to the commissioners for the purchase price, with the written consent of her husband, and said sale was confirmed. The purchaser having defaulted in payment of said note, the commissioners caused a notice, treated as a complaint in this branch of the case, to issue to E. A. Ballard and her husband, that said commissioners would ask the court for an order to resell the land, and for a judgment against them on said note for the balance due thereon, after a credit for her share of the proceeds of the sale, and E. A. Ballard and her husband accepted service of the notice without waiver of legal rights. E. A. Ballard and her husband failed to appear or make any defense to said motion, and at November term, 1889, a decree to resell the land and a judgment was entered for the balance on the note against defendant E. A. Ballard and her husband in favor of said commissioners, and W. H. Ballard, the husband, died in March, 1890. In 1892, and within one year after she had actual knowledge of the terms and provisions of the last-named judgment, she instituted this proceeding to set aside the judgment rendered against her at November term, 1889, which was refused, and she appealed.

It sufficiently appears from the notice, treated as a complaint, on which the judgment at November term, 1889, was entered, that the defendant E. A. Ballard was then a feme covert, and the question is presented whether the judgment against her on the note was a nullity, and void, and can now be set aside on her motion. At common law, a married woman has no capacity *pleni jure* to enter into contracts binding on her personally or to affect her separate estate, and can only do so in cases declared by the courts of chancery, and by the provisions of our constitution, of 1868 and the marriage act, under certain conditions, none of which are present in this case. The principle was well stated in *Pippen v. Weason*, 74 N. C. 437, and the instances and requisites for subjecting a married woman's separate estate to satisfy her contracts were pointed out, and have been followed in numerous decided cases in this state. See *Dougherty v. Sprinkle*, 88 N. C. 300. If the defendant had pleaded her coverture by answer or otherwise, it is conceded that no personal judgment could have been entered against her; and the plaintiff insists, as no such plea was filed, that the judgment is valid, and relies on *Vick v. Pope*, 81 N. C. 22, and *Neville v. Pope*, 95 N. C. 346, in support of his contention, as the court refused on motion of the feme covert defendant to set aside the judgment; but on inspection we find that no complaint or other pleading was filed in either case, so that the cover-

ture did not appear to the court. Where the fact of coverture appears in the complaint, or notice, as in our case, treated as a complaint, it is expressly and directly held in the following cases that a personal judgment is a nullity and void, and may be set aside at any time by motion of the feme defendant, although no plea or answer was filed: *Griffith v. Clarke*, 18 Md. 457; *Higgins v. Peltzer*, 49 Mo. 152; *Swayne v. Lyon*, 67 Pa. St. 436. In *Baker v. Garris*, 108 N. C. 218, 13 S. E. 2, the coverture appeared from the complaint and answer also, and the judgment was refused, and it was insisted, upon the authority of *Vick v. Pope*, *supra*, that coverture must be pleaded, and the court said: "This is undoubtedly true, for, when the disability does not appear upon the face of the complaint, the plea must, of course, be by way of answer, as otherwise the fact of coverture can never be known." It is the fact of coverture, appearing to the court in the record, that will not permit a personal judgment to be entered against the feme covert on her simple contract to pay money; and we can see no reason why it should not have the same effect whether it appeared in the complaint or in the answer, and we are of opinion that his honor erred, and that he should have set aside the personal judgment against E. A. Ballard; and it is so ordered. This disposition of defendant's second exception renders it unnecessary to consider her first and third exceptions. Reversed.

(116 N. C. 514)

**BLOSSOM v. WESTBROOK.**

(Supreme Court of North Carolina. March 19, 1895.)

**MORTGAGE — NONJOINER OF WIFE — WHEN NECESSARY.**

In an action to foreclose a mortgage given by a husband, in which the wife did not join, to gain time for and secure the payment of an existing judgment against the husband, it is not error to give judgment for the debt only, and refuse an order to foreclose.

Appeal from superior court, Pender county; Boykin, Judge.

Action by Samuel Blossom against J. H. Westbrook to foreclose a mortgage. The court gave judgment for the plaintiff for the amount of the debt, with interest and costs, but refused the order to foreclose. Plaintiff appeals. Affirmed.

A. D. Ward, for appellant.

**MONTGOMERY, J.** In *Hughes v. Hodges*, 102 N. C. 262, 9 S. E. 437, this court held that the husband alone might make a conveyance of his lands, by way of mortgage, free from all homestead rights, unless one or more of three conditions named in that case existed. One of those conditions was that there must be "an unsatisfied judgment or judgments that constituted a lien upon the land when conveyed, and upon which

execution might still issue and make it necessary to have his homestead allotted." In the case before us it appears that at the time of the execution of the mortgage by the defendant he was a married man, and that his wife did not join him in its execution; and also that at that time there was a judgment against him, procured at the March term, 1887, of Pender superior court, in favor of the plaintiff, upon which execution had already been issued. The plaintiff's counsel in his argument before this court laid great stress on the case of *Hughes v. Hodges*, and on the silence of the record as to whether or not the judgment had been docketed. This is "sticking in the bark." The court in *Hughes v. Hodges* had in mind more the question as to whether there might be a necessity to allot the debtor his homestead under execution than whether the judgment against him was docketed, or simply filed away in the judgment roll. The execution in this case, whether issued upon the judgment roll or upon the entry of it upon the judgment docket, was in the sheriff's hands, and he was compelled to proceed under it, and first of all to allot the debtor his homestead; and this meets substantially the ruling in *Hughes v. Hodges*. The mortgage on its face shows that the defendant was unable to pay off the execution, and he made it to get time, and for the purpose of securing the payment of said judgment and costs on the 1st day of January, 1888. If the real estate of the defendant was worth the judgment debt over and above the homestead, why was any additional security required in the way of the mortgage, seeing that the plaintiff had a judgment, either docketed or which he could have had docketed any minute at no other expense and trouble than the costs attendant upon the execution of the mortgage? The judge below gave judgment simply for the debt, and refused to make an order for foreclosure, in which there is no error; and the judgment is affirmed.

(116 N. C. 75)

**THURBER v. EASTERN BUILDING & LOAN ASS'N.**

(Supreme Court of North Carolina. March 19, 1895.)

**MALICIOUS PROSECUTION — PROBABLE CAUSE — ADVICE OF COUNSEL.**

1. An arrest for forging the owner's name to a transfer of certificates of stock is not justified by the testimony of the owner that he assigned the stock to a third person on his false representations, and that the name of the one arrested, which appears in the transfer as an assignee, was not mentioned, and he did not know at the time that he was transferring the stock to him.

2. That a prosecution for forgery was instituted on the advice of counsel is only evidence to rebut the presumption of malice, and it should be left to the jury to determine whether malice, which might be inferred from the want of probable cause, has been rebutted by the other evidence.

Appeal from superior court, Craven county; Brown, Judge.

Action by Henry Thurber against the Eastern Building & Loan Association to recover damages for malicious prosecution for forgery. From a verdict and a judgment for defendant, plaintiff appeals. Reversed.

W. W. Clark, for appellant. M. deW. Stevenson, for appellee.

CLARK, J. The only evidence upon which the plaintiff was arrested for forgery was that the plaintiff was assignee of a certificate of stock which Latham testified he had assigned to one Smith, on the false representations of Smith, and that Thurber's name was not mentioned, and he did not know at the time that he was transferring the stock to Thurber, though it so appears now on the back of the certificate. This was certainly not sufficient to justify a warrant for forgery being sued out against Thurber. The warrant was sued out by counsel acting on behalf of this defendant. That criminal proceeding was instituted on such advice of counsel was only evidence to go to the jury to rebut the presumption of malice. *Davenport v. Lynch*, 51 N. C. 545; *Smith v. Association* (at this term) 21 S. E. 33. The court should have left it to the jury, on the evidence, to say whether the malice, which might be inferred from the want of probable cause, was rebutted by the other evidence. Error.

(116 N. C. 1012)

#### STATE v. SCOTT.

(Supreme Court of North Carolina. March 19, 1895.)

##### SALE OF LIQUORS—QUESTION FOR JURY.

Where evidence in an action against one charged with unlawfully selling spirituous liquors on Sunday without prescription (Code, § 1117) showed that the prosecuting witnesses drank from bottles of brandy peaches, and became drunk thereby, it was for the jury to determine whether the liquor was intoxicating.

Appeal from superior court, Duplin county; Hoke, Judge.

Ira J. Scott was found guilty of unlawfully selling intoxicating liquors on Sunday without prescription, and appeals. Affirmed.

A. D. Ward, for appellant. The Atty. Gen., for the State.

FAIRCLOTH, C. J. The defendant was indicted for unlawfully selling spirituous liquors on Sunday without prescription, etc. Code, § 1117, enacts: "If any person shall sell spirituous or malt or other intoxicating liquors on Sunday except on the prescription of a physician, and then only for medical purposes, the person so offending shall be guilty of a misdemeanor." These are direct and unambiguous words. Two witnesses for the state testified that they drank of bottles of brandy peaches sold by the defendant on Sunday, and were made drunk thereby. The

defendant testified in his own behalf that he sold brandy peaches without prescription, etc.; that he kept them in stock and sold them as groceries, as food; that the liquid was syrup, and not brandy. His honor charged the jury that, if they believed the evidence, the defendant had sold the articles on Sunday without prescription, etc., and the question of the defendant's guilt or innocence would depend on whether the articles sold were spirituous and intoxicating liquors, as described in the state's evidence; that if they were satisfied beyond a reasonable doubt that the liquor in which the peaches were preserved in the bottles sold was brandy or other liquor, and the same contained alcohol in sufficient quantities to make one drunk, when freely used, they would render a verdict of guilty; otherwise, not guilty. The whole evidence being before the jury, under the above charge they necessarily had to determine whether the liquid in the bottles was brandy or syrup, as claimed by the parties, without other instructions. His honor properly gave the defendant the benefit of going to the jury on the question of the quality or character of the liquid drunk from the bottles, although this court has held that when the liquor, by common knowledge and observation, is intoxicating, the court may so declare, but, if it is doubtful whether or not it be so, then the question of fact is raised for the jury. *State v. Giersch*, 98 N. C. 728, 4 S. E. 193, and several preceding decisions.

Affirmed.

(116 N. C. 528)

#### BRUCE et al. v. CRABTREE.

Appeal of HARTSFIELD.

(Supreme Court of North Carolina. March 19, 1895.)

##### SUPPLEMENTARY PROCEEDINGS—APPEALABLE ORDER.

1. An order for examination in supplementary proceedings may issue against the defendant's assignee.

2. An order for examination in supplementary proceedings is not final, and is unappealable.

Appeal from superior court, Lenoir county; Brown, Judge.

Supplementary proceedings by Bruce & Cook and others against C. W. Crabtree. Appeal by J. L. Hartsfield, defendant's assignee. Appeal dismissed.

J. B. Batchelor, for appellant. George Rountree, for appellees.

FURCHES, J. This is a proceeding supplemental to execution, commenced before the clerk of Lenoir county, an appeal from his order to Brown, Judge, and an appeal by J. L. Hartsfield from the order of Judge Brown, which is as follows: "I am of opinion that under the affidavit filed it is perfectly competent for the plaintiff to examine J. L. Hartsfield in the proceeding to ascertain what sum, if any, remains in his hands, and what may be due and belonging to C. W.

Crabtree, after discharging the trust, and to ascertain that it is competent to examine said Hartsfield concerning his administration of the trust, what he received, what he has paid out, and to whom, etc. This cause is remanded to the clerk, to proceed with in accordance with this opinion. The costs of the appeal are taxed against the appellees and appellant equally." We see no error in the order appealed from, nor do we see what right J. L. Hartsfield had to take an appeal, nor do we see what interest he has in this controversy. But this is not a final judgment, but only an interlocutory order, from which no appeal lies. *Clement v. Foster*, 99 N. C. 255, 6 S. E. 186. Appeal dismissed.

(116 N. C. 284)

## MOORE et al. v. PULLEN.

(Supreme Court of North Carolina. March 12, 1895.)

## WHAT CONSTITUTES JUDGMENT—LEGACIES—INTEREST.

1. An adjudication on the contest of a will, made in pursuance of a compromise, whereby the legatees agreed to take certain amounts in satisfaction of their legacies, which directs that an administrator with the will annexed, to be thereafter appointed, should pay such legacies, is not a "judgment," within Code, § 530, which provides that all judgments shall bear interest till paid.

2. Pecuniary legacies bear interest from one year after testator's death.

Appeal from superior court, Wake county; Bynum, Judge.

Action by Van B. Moore, executor, and others, against John T. Pullen, administrator, to recover certain balances of legacies and interest thereon under will of defendant's testator, for which a judgment had been rendered. From a judgment for plaintiffs for the balances of the legacies, but denying the interest from the date of the judgment, plaintiffs appeal. Reversed, except as to the balances of legacies found due.

In a controversy in Wake superior court, at its October term, 1891, concerning the probate of the last will and testament of Mary A. Smith, sometimes called Mary Ann Morehead, between the propounders and the caveators, by agreement between all parties interested a trial by jury was waived, and the court found that a certain paper writing of date August 10, 1863, produced for probate as the last will and testament of Mary A. Smith, was her last will and testament; and in furtherance of a compromise and agreement made at the same time the court adjudged that the administrator with the will annexed, thereafter to be appointed (the executor named in said will being dead), should pay to the legatees or their assigns respectively, and that said legatees or said assigns should receive in full of their legacies, certain sums of money named in the order. The present action was brought by the plaintiffs, some of the legatees, to re-

cover interest on the said legacies from the date of said adjudication, and \$100 each to Van B. Moore, executor, etc., and Lucy C. Henry, which defendant had tendered to them, but which they declined to receive.

John W. Hinsdale, for appellants. Smith & Boyden, for appellee.

MONTGOMERY, J. By consent of all the parties this case was heard by the judge presiding at Wake superior court (a jury being waived) at its October term, 1891, and judgment was rendered as follows: "It is considered, ordered, and adjudged by the court that interest does not begin to run on the legacies mentioned, described and set out in the complaint and in Exhibit A, until after two years from the date of the qualification of the defendant, John T. Pullen, as administrator with the will annexed of Mary Ann Smith, sometimes called Mary Ann Morehead, and that the plaintiffs, or any of them, are not entitled to interest on said legacies, or any of them, except from that date. And it appearing to the court from the admissions of the pleadings that there remains the sum of one hundred dollars due and unpaid on the legacy bequeathed to Sallie L. Gatling, and the sum of one hundred dollars due and unpaid on the legacy bequeathed to Lucy C. Henry, which amount has heretofore been tendered to them, and each of them, by the defendant herein at the date of the last payment made to them as set out in the complaint, it is considered, ordered, and adjudged by the court that the plaintiff Van B. Moore, executor of Sallie L. Gatling, and the plaintiff Lucy C. Henry, recover of the defendant herein the sum of one hundred dollars each, with interest from the date of this judgment until paid, together with their costs of this action expended; and that the defendant recover of the plaintiffs other than Van B. Moore, executor of Sallie L. Gatling, and Lucy C. Henry, his costs in this action expended." The plaintiffs excepted, and appealed from the said judgment to this court, and assigned as error: "(1) That the court erred in not awarding interest to the plaintiffs upon the several amounts due them from the date of the judgment mentioned in the pleadings; (2) that the court erred in not awarding such interest from one year after the death of said testatrix; (2½) that the court erred in not awarding such interest from two years after the death of the testatrix; (3) that the court erred in not awarding the plaintiffs Van B. Moore, executor, and Lucy C. Henry interest from two years after the death of the testatrix; (4) that the court erred in not awarding the said plaintiffs interest from two years after the letters of administration were issued to the defendant; (5) that the judgment should have been in favor of the plaintiffs for the amount claimed for them, and for costs."

The first exception is overruled. We cannot take the view that the adjudication made at October term, 1891, was a judgment of the court for money by virtue of the compromise, and without reference to the future execution of the will, and therefore, under section 530 of the Code,<sup>1</sup> to bear interest from its date. In the case of *Brewer v. University*, 110 N. C. 26, 14 S. E. 644, this court, in speaking of one of the legacies under this very will, uses this language: "When the will of the testatrix was established by the proper orders and judgment of the court, the defendant became entitled to have the fund bequeathed therein to it, not by virtue of any compromise, as suggested by the plaintiff, but by virtue of the will." The second exception is sustained. The rule is that pecuniary legacies bear interest from one year after the death of the testator. *Hart v. Williams*, 77 N. C. 426; *Swann v. Swann*, 58 N. C. 300. This makes it unnecessary to look further into the exceptions. There is error. The judgment below must be reversed, except as to the findings of the indebtedness due to Van B. Moore, executor, and to Lucy C. Henry, respectively, and they are entitled to interest on those sums, because the tender was not a sufficient one in law,—it was not for all that was due. Let this be certified to the court below, that judgment may be had in accordance with this opinion.

(116 N. C. 395)

#### SMITH v. SMITH.

(Supreme Court of North Carolina. March 12, 1895.)

#### WITNESS—CRIMINATING EVIDENCE.

Under Const. art. 1, § 11, providing that no person shall be compelled to give evidence against himself, a witness in divorce proceedings cannot be compelled to answer whether he ever had criminal intercourse with the wife.

Appeal from superior court, Durham county; Winston, Judge.

Action by P. H. Smith against Maggie J. Smith for divorce. From a judgment for defendant, plaintiff appeals. Affirmed.

J. S. Manning, Boone & Boone, and Argo & Snow, for appellant. Fuller, Winston & Fuller, for appellee.

FAIRCLOTH, C. J. On the trial a witness for the plaintiff was asked: "Did you ever have criminal connection with the defendant? If so, when was the first time?" and other questions of a like tendency. The witness declined to answer, stating that his answer would tend to criminate him. His honor found as a fact that an affirmative answer would tend to criminate the witness, and declined to compel him to answer, and the plaintiff excepted. The constitution of the

United States (fifth amendment) declares that "no person shall be compelled in any criminal case to be a witness against himself." The constitution of North Carolina (article 1, § 11) declares that he shall "not be compelled to give evidence against himself." The Code, § 1354, says that no person shall be "compellable to answer any question tending to criminate himself." We think these constitutional provisions of North Carolina governing this court ought to be liberally construed to preserve personal rights, and to protect the citizen against self-incriminating evidence. It is conceded and settled that a single unlawful act of sexual intercourse is not a criminal offense, but the question presented is, would the admission by the witness of a single act tend to criminate him? Our opinion is that it does, and that the witness ought not to be compelled to answer the question, for the reason that the admission may be the connecting link of a chain of evidence, disclosing other facts and other circumstances, leading to clear proof of a crime which would not have been known without the admission. The usual reply is that his admission cannot be used against him in any future prosecution, and that he is therefore protected. This fails to reach the mark, for, although it cannot be used against the witness, it may be the means, the link, by which other sufficient evidence has been discovered, which could not have been done without the admission. No one knows what facts and secrets are locked up in the bosom of a witness, and we think the true intent of the constitution is that the witness shall not be compelled to disclose anything that may lead to criminal conduct without absolute protection against future prosecution. This question has been much discussed in England and in our sister states. It would be too tedious to enumerate all the decisions. We are content to refer to and quote from one or two. In *Broom*, Leg. Max. p. 963, it is stated that "a witness is in general privileged from answering, not merely where his answer will criminate him directly, but where it may have a tendency to criminate him"; citing many decided English cases. In 1 Burr, Trials, 245, Chief Justice Marshall says: "If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction." In *Counsellman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, the question was fully argued, and all the pertinent authorities were examined and reviewed. The court held that "the meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself, but its object is to insure that a person shall not be compelled, when acting as a witness in any investiga-

<sup>1</sup> Code, § 530, provides that all judgments shall bear interest till paid.



tion, to give testimony which may tend to show that he himself has committed a crime. It is a reasonable construction of the constitutional provision that a witness is protected from being compelled to disclose the circumstances of his offense, or the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him." The rule may sometimes work hardship, and possibly does in this instance. The trial seems to have turned on the admission or exclusion of the question put to the witness Cole, although there was other apparently strong evidence. The policy of compelling witnesses to answer all questions, with a clause of absolute protection against future prosecution, is one for the legislative branch of the government, and not for the courts. Affirmed.

(116 N. C. 238)

## GRAM v. GRAM.

(Supreme Court of North Carolina. March 12, 1895.)

## HUSBAND AND WIFE—PROCEEDING FOR ALLOWANCE FOR SUPPORT.

1. Code, § 1292, authorizes a wife deserted by her husband to bring a proceeding to be held before the judge for an allowance for support. *Held*, that the fact that the summons is made returnable before a judge during the term, instead of during vacation, does not affect his jurisdiction.

2. In such proceedings, allegations in the answer charging the wife with infidelity, which are too vague to constitute grounds for divorce, are no defense.

3. The husband, after failure to pay or tender the sum stipulated in the agreement of separation between himself and wife to be paid for her maintenance, cannot set up such agreement as a bar to a proceeding for an allowance for her support, though the sum demanded by the wife before the commencement of the proceeding was larger than the sum stipulated in the agreement.

4. In a proceeding by a wife against her husband for an allowance for support, the question as to what is a reasonable allowance is for the court.

Appeal from superior court, Wake county; Bynum, Judge.

Action by Mary E. Gram against William C. Gram for maintenance and support. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Shepherd & Busbee, T. P. Devereux, and J. B. Batchelor, for appellant. T. M. Argo and J. H. Fleming, for appellee.

AVERY, J. The statute (Code, § 1292) provides that: "If any husband shall separate himself from his wife and fail to provide her with the necessary subsistence, according to his means and condition in life," etc., "the wife may apply for a special proceeding to the judge of the superior court for the county in which he resides to have a reasonable subsistence secured to her and to

the children of the marriage from the estate of the husband," etc. Postponing for the present the discussion of the sufficiency of the reasons offered by him for discontinuing the payment of an allowance to her, and of the validity of the agreement under which it was paid, we deem it best to first pass upon the question that confronts us in limine,—whether the plaintiff can, either under the statute or in the assertion of a right conceded to her by our courts of equity, and not destroyed by the later marriage acts, maintain this action against her husband. It is admitted that the defendant was married to her; that he separated from her, and, for some time before the action was brought, had failed to provide for her support. It follows necessarily that, if the court had jurisdiction of this proceeding, she had the right to recover, unless precluded by some matter set up in bar by the defendant. The plaintiff had the privilege of issuing a summons returnable in vacation, as in other special proceedings, except that it was required to be heard before the judge, not the clerk of the court. The fact that she did not avail herself of that right, but fixed the return day during the term, when it would be presumably more agreeable to the court and suitors to have it determined, seems to us to furnish no sufficient reason for doubting the jurisdiction of the court. The preparation by the compilers of the Code of a heading for the section, printed in different type, and intended to convey an idea of its contents without reading, and which was also a part of the index to the volume, in no way affects the construction of the language of the section itself, when its meaning is so perfectly obvious. Were we at liberty to treat it as a preamble, its aid could not be invoked in ascertaining what was the legislative intent, unless that intent had been expressed in doubtful terms. *Randall v. Railroad Co.*, 104 N. C. 410, 10 S. E. 691. Under the common-law rule, which left the husband at liberty always to contest the wife's agency, as well as the question whether supplies provided her were necessary and suitable to her station in life, the wife was often subjected to inconvenience, if not suffering, in providing for the support of herself and her children. It was because she was relieved of this hardship by being allowed to bring her action against her husband (at first by *prochein ami*) in a court of equity that the courts of equity in some of the states assumed jurisdiction of the enforcement of this obligation, as well as of some contracts, not recognized by courts of law, where her existence was deemed to be merged in that of the husband. 1 Bish. Mar. & Div. §§ 1385-1395, 1397; 3 Pom. Eq. Jur. 1299; 1 Bish. Mar. Wom. § 643; 1 Pom. Eq. Jur. § 171 (page 196, 2d Ed.); Stew. Husb. & W. § 74. It is not necessary that we should determine whether this court has aligned itself with those which sustain the exercise of this equi-

table jurisdiction or with those holding the opposite view, since, whatever may have been the rule before the enactment of the statute, there is no room for doubt as to the intention of the legislature. Whether it was passed in affirmance of an existing principle or by way of establishing a new doctrine is immaterial if, by the terms of the statute, the right to sue for a support without asking for a divorce is given to a wife who has been deserted and left unprovided for by her husband. Where the statute makes the proceeding plainly but a means of obtaining the reasonable subsistence which the law makes it the duty of the husband to furnish to the wife, the headlines cannot be allowed the effect of uselessly cumbering it with the requirements as to form prescribed for applications for divorce and alimony by section 1287, for reasons which are inapplicable to a suit of this kind.

The allegations in the answer of infidelity on the part of the wife are too vague and indefinite to constitute the basis of an action for divorce, and are entitled to no consideration in determining the question of the husband's liability in this proceeding. *Sparks v. Sparks*, 69 N. C. 319. While it is conceded that the statute (Code, § 1831) recognizes the validity of deeds and agreements of separation between husband and wife where they are living apart at the time of execution (*Sparks v. Sparks*, 94 N. C. 531, and 1 Bish. Mar. & Div. §§ 1251, 1269, 1270, 1303), it is equally true that, while such contracts are tolerated, they have not been looked upon with favor by this court. *Smith v. King*, 107 N. C. 273, 12 S. E. 57. If we concede that the plaintiff had the right to demand that the agreement mentioned in the answer be enforced, had she chosen to sue upon it, the defendant will not, nevertheless, be allowed, after repudiating it by ceasing to pay or offer to pay according to its provisions, to set it up as a bar to her recovery in this action, even though she may have demanded by letter a sum larger than that which she had stipulated in the agreement to take as a sufficient allowance. It is not the contract to pay a certain sum in lieu which quits the husband of his duty to furnish a support for the wife when he is discharged, but the actual payment, or attempt or offer to pay, in fulfillment of his agreement. *Kelly, Cont. Mar. Wom.* p. 75; 1 Cord, Mar. Wom. §§ 144, 145. Having ceased to perform his agreement to pay the monthly allowance referred to in the pleadings, it will not avail him now as a defense to this proceeding for maintenance on the part of the plaintiff, to whom he admits that he was married, and whom it is conceded that he afterwards deserted. Whether her conduct, from other standpoints, has been commendable or not, looking at this case only in its legal aspect, we find no averment in his answer that is sufficient in law to discharge him from the duty which grows out of his admitted relations to her.

The only remaining question is whether the order of the court that the plaintiff is entitled to a support and costs, and that the cause be retained for the jury to inquire as to the amount to be allowed for maintenance, was such a judgment as the court ought to have rendered. As we have said, this is denominated a special proceeding, with the special peculiarity that it is returnable before the judge, who is substituted for the clerk. When issues of fact are raised, therefore, it must have been the intention of the legislature that the judge, like the clerk, shall enter the cause on the docket for trial by a jury. Code, §§ 116, 278, et seq. If, for instance, the marriage and subsequent separation had been denied by the defendant, it would have been the duty of the judge, whether the cause had come before him in vacation or during the term, to have ordered a trial by jury of the issues of fact so raised. But it is the province of the judge, not of the jury, to ascertain and adjudge what is a reasonable allowance for the maintenance of the wife. What are necessities suitable to the station in life of an infant or a feme covert is a question for the jury, but where facts are found or admitted which entitle a wife to a statutory allowance for support, it becomes the duty of the judge, as in the case of fixing the amount of alimony, to either hear evidence himself or to order a reference to ascertain such facts, as to the income of the husband, the value of his estate, etc., as will enable him to determine what is "a reasonable subsistence according to his [the husband's] condition and circumstances," as the statute declares "it shall be lawful for such judge" to do. The judgment therefore must be modified so as to leave the judge at liberty to ascertain the condition and circumstances of the defendant, and make such allowance as he may deem just. Let the defendant pay the costs of the appeal. Judgment modified and affirmed.

(116 N. C. 437)

#### TURNER v. ROSENTHAL.

(Supreme Court of North Carolina. March 12, 1895.)

#### RES JUDICATA—DIFFERENT CAUSE OF ACTION.

An action against a receiver for failure to collect a judgment out of certain bonds and other property, alleged to have belonged to the judgment debtor, is not barred by a judgment in a former action by plaintiff, to which the receiver was not a party, in which it was adjudged that the debtor was not the owner of the bonds, and in which the other property was not involved.

Appeal from superior court, Orange county; Hoke, Judge.

Action by Josiah Turner against G. Rosenthal, receiver. From a judgment sustaining a demurrer to the answer, defendant appeals. Affirmed.

This is an action for the recovery of damages against the defendant on account of his

alleged negligent and willful failure to collect as receiver, appointed in supplementary proceedings commenced by G. W. Swepson and others against the plaintiff, a certain judgment which came into his hands as such receiver in favor of the plaintiff and against W. W. Holden. The plaintiff alleges in his complaint that the defendant could have made the money on the judgment if he had used due diligence in the matter, and that the defendant combined and conspired with Swepson and Holden to prevent him from recovering anything on the judgment. The defendant in his answer admits the receivership, and denies all the other allegations of the complaint. At a later term of the court the defendant, by leave, filed an amendment to his former answer, a part of which is as follows: "(1) That there has been pending and was tried and finally determined, at February term, 1894, of the superior court of Wake county, in said state, a civil action wherein Josiah Turner was plaintiff, and Mrs. L. V. Holden and C. A. Sherwood, administrator of W. W. Holden, were defendants, in which said action all the matters of fact, and issues as well of law as of fact, involved in this present action, were heard and determined, and more especially was it determined that there was a gift and transfer of \$5,000 of United States bonds from W. W. Holden to L. V. Holden on October 27, 1869, and of \$25,000 of United States bonds on November 6, 1869, and that at the time of such transfer W. W. Holden did retain property fully sufficient and available to satisfy his then existing creditors, and that there are no claims which were then outstanding which are now valid and existent debts against said estate, and that the gift and transfer of said bonds was not made with the actual intent to hinder, delay, and defraud the then creditors of W. W. Holden, and that the gift and transfer of such bonds was not made with design and intent to delay, hinder, and defraud the plaintiff and any subsequent creditors of said W. W. Holden; and it was adjudged that the plaintiff take nothing by his action, and that the defendants go without day. (2) That in said action the plaintiff relied upon the allegation that there had been a fraudulent gift and transfer of the United States bonds in 1869, and that the same were still liable to satisfy his judgment for \$8,000 obtained against W. W. Holden in Chatham county, and renewed in Wake county, and which he insists upon in this action, and seeks to hold the defendant, Rosenthal, as receiver, responsible, because he did not collect the said judgment of \$8,000 out of the proceeds of the United States bonds to the amount of \$30,000 alleged to have been fraudulently transferred in 1869 by W. W. Holden to L. V. Holden, the same being in fact the very matter he relies upon to support his present action, and all these matters in relation to the gift and transfer of said bonds were passed upon and determined." The

defendant also set up a duly-certified copy of the record of the case tried in Wake county, in his amended answer, and submitted "that the present plaintiff ought not to be admitted or received to urge his present action against the defendant for the reason hereinbefore set forth, and the defendant verifies this his amended answer, and prays judgment whether the plaintiff ought to be admitted or denied, against the said record now pleaded in this action by leave of the court, to urge his said action against the defendant, and more especially that the defendant, as receiver, ought to have collected the \$8,000 out of the United States bonds or their proceeds, found by the jury to have been lawfully transferred in 1869 by W. W. Holden to L. V. Holden, which is the negligence complained of; and this defendant demands judgment that he go without day, and recover his costs." The plaintiff demurred to the defendant's amended answer, upon which the court rendered the following judgment: "Upon consideration, it is adjudged that the demurrer be sustained, in so far as to decide that the matter set up in the amended answer does not constitute an estoppel or bar upon the plaintiff to further prosecute this action, but that the amended answer shall constitute and be considered a part of the pleadings in the cause. Defendant takes an appeal from the judgment sustaining the demurrer. Plaintiff then moved for judgment by default, and inquiry on the pleadings, which is denied, and plaintiff excepts."

J. W. Graham, for appellant. C. D. Turner and Frank Nash, for appellee.

MONTGOMERY, J. We find no error in the ruling of his honor. The defendant in this action was not a party to the suit in Wake county between the plaintiff and Mrs. Holden and Sherwood, the administrator of Holden; and also, while it appears from the complaint and answer that the plaintiff in this action still alleges, as a matter of liability against the defendant, his negligent and willful failure to subject the United States bonds mentioned in the suit in Wake county to the satisfaction of the plaintiff's judgment against Holden, yet he does not confine himself to that allegation. When his complaint is examined from the most liberal view, under the Code practice, it will appear most probably that he alleges, in substance, that there was other property of the judgment debtor, besides the bonds, that could have been reached by the defendant as receiver. *Temple v. Williams*, 91 N. C. 82; *Williams v. Clouse*, Id. 322. It was in this light, no doubt, that his honor viewed the pleadings, and refused to allow the plea of estoppel set up by the defendant in his amended answer; for if it be admitted that the only material matter involved in the action in Wake superior court, and in

the present one, was as to the title of the United States bonds mentioned in the amended answer, and whether or not the defendant should have subjected them to the satisfaction of the plaintiff's judgment, why, then, the plaintiff is estopped, because in an action wherein he was a party the title to the bonds was held to have been in Mrs. Holden, and not in her deceased husband, the judgment debtor. *McElwee v. Blackwell*, 101 N. C., last paragraph on page 195, 7 S. E. 893. In this last-mentioned case the court suggest the best way to make the defense of another judgment for the same cause of action available. There is no merit in the plaintiff's exception. The judgment below is affirmed.

(116 N. C. 311)

SMITH et al. v. GRAY et al.

(Supreme Court of North Carolina. March 12, 1895.)

SALE IN PARTITION—COLLATERAL ATTACK—RATIFICATION BY MINORS.

1. Where infant defendants are served with summons in proceedings for the partition of land, and a guardian ad litem is appointed, a judgment affirming a sale cannot, in a collateral proceeding by the infants, be set aside for fraud.

2. Where infants, after reaching their majority, with knowledge of the facts rendering a sale of their land voidable for fraud receive the residue of the purchase price, they ratify the sale.

3. Irregularities in a partition sale of lands of minors are cured by Code, § 387.

Appeal from superior court, Wake county; Bynum, Judge.

Action by Samuel T. Smith and others against R. T. Gray and D. W. Lilly to recover possession of land. From a judgment for defendants, plaintiffs appeal. Affirmed.

Exhibit B, mentioned in the opinion, was the proceeding by Thomas Wynne and wife for partition of the land by sale thereof.

T. R. Purnell and T. M. Argo, for appellants. R. O. Burton, for appellees.

FURCHES, J. Though we may feel called upon to affirm the judgment of the court below, we cannot say, as the learned judge below did, that in our "opinion the proceeding B was regular." And we fear that plaintiffs, while they were infants, did not receive the protection from the court they should have had. We find from the transcript of record sent up that Andrew Syme, the administrator of J. J. Jackson, father of plaintiffs, commenced a proceeding in the superior court of Wake to subject the land in controversy as assets, to pay debts and cost of administration, in which he states in his verified complaint that the property is worth \$2,000. This proceeding went on to final judgment and order of sale, without any service on the plaintiffs in this action, except that a member of the bar, professing to act for the infant defendants, had accepted service of process; and, although the defendants in

this proceeding claimed their homestead, the court proceeded to judgment. In this proceeding Mason and Syme were appointed commissioners, and sold the land, when one McGee became the purchaser at \$910, but refused to comply with the terms of sale, for the reasons that the infant defendants had not been served with process, and that the homestead had been claimed. Whereupon Thomas Wynne, who had married the oldest sister of plaintiffs, and who was unfriendly with plaintiffs, commenced another proceeding in the same court to have this property sold for partition, making the present plaintiffs defendants. In this proceeding there seems to have been a service of the summons as follows: "Served February 5th, 1880, by reading the within summons to all the defendants named within;" and there was a guardian ad litem appointed for the infant defendants, who filed an answer, admitting all the facts set out in the complaint. And a judgment and order of sale was made in this proceeding, and Andrew Syme and T. P. Devereux were appointed commissioners, sold the property for \$800, and reported that it had brought "a fair and full price," and recommended a confirmation of the sale, which was made by the court. These commissioners seem to have made this sale under the order of the court in the case of Syme, administrator, and also under the order in the case of Thomas Wynne against plaintiffs in the proceeding to sell for partition. As they report said sale in both proceedings, the court confirms it in both proceedings, and their deed to Pinkston states that it is made under both proceedings. It also appears that the same attorney who undertook to accept service in the case of Syme, administrator, for the infant defendants, acts as the attorney of Thomas Wynne in his proceedings against them to sell the property for partition. This court cannot say that such "proceedings are regular," or allow them to receive the sanction of this court; and, if the case stopped here, we would most unhesitatingly set them aside, were this a direct proceeding for that purpose. But with all this irregularity we cannot say they were void, and this is the turning point in the case in favor of the defendants. Where there is no service of process, the court has no jurisdiction, and its judgment is void. *Bank v. Wilson*, 80 N. C. 200; *Stancill v. Gay*, 92 N. C. 462. Such judgments have no force, and may be quashed on motion or ex mero motu, and will be treated everywhere as a nullity. *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716. When a judgment is attacked for fraud, the remedy is by motion in the cause, if the proceeding is still pending. But, if the proceeding has been ended by final judgment, an independent action must be brought. *Carter v. Rountree*, supra. In a proceeding to sell lands, when an order of sale has been made and property sold, this is a final judgment; and, while it may be set aside in a direct pro-

ceeding for that purpose, it cannot be attacked in a collateral proceeding. *McLaurin v. McLaurin*, 106 N. C. 331, 10 S. E. 1056; *McGawhorn v. Worthington*, 98 N. C. 199, 3 S. E. 633; *Sumner v. Sessoms*, 94 N. C. 371; *Hare v. Hollomon*, Id. 14. But it seems that this is one of the cases intended to be provided for in the act of 1879 (section 387 of the Code), and the irregularities pointed out above are cured by this act. *Fowler v. Poor*, 93 N. C. 466; *Hare v. Hollomon*, supra; *Cates v. Pickett*, 97 N. C. 21, 1 S. E. 763. As this judgment was only irregular, and not void, it would seem that the deed of the commissioners to Pinkston conveyed the legal title to the property now in dispute, and may be considered as a deed from plaintiffs while they were infants, which, though voidable, was not void, and might be ratified by them after they reached their majority. And, if this is so, we hold the fact that, after they came of age, and being in possession of all the facts, their receiving the residue of the purchase money was a ratification of what had been done, and of defendants' title; and they will not now be allowed to come into court and dispute the same. It is not contended but what defendants are purchasers for a valuable consideration and without notice, and it may be that this would be another ground of defense; but, as we have decided the case for defendants upon other grounds, we do not consider this. Judgment affirmed.

(116 N. C. 22)

**HINTON v. LIFE INS. CO. OF VIRGINIA.**  
(Supreme Court of North Carolina. Feb. 19, 1895.)

**VERIFICATION OF PLEADING—AMENDMENT OF JUDGMENT—APPEALABLE JUDGMENT.**

1. Under Code, § 633, empowering commissioners of affidavits to take oaths in matters relating to any cause in the courts of North Carolina, and section 640, giving clerks of courts of record in the other states the same powers as are given to commissioners of affidavits, a verification of a pleading made before the clerk of the hustings court of Richmond, Va., and authenticated by his signature and the seal of his court, is valid.

2. An amendment of a judgment made by the judge after the last session of the court, in his room at the hotel, without the consent of the opposing counsel, is invalid.

3. A judgment permitting defendant to verify its answer upon condition that, if the ruling of the court giving plaintiff judgment for want of a properly verified answer is sustained, defendant will submit to a judgment in a certain sum, is invalid.

4. In an action on an insurance policy, the court refused to allow defendant to amend its answer, unless it would submit to a judgment for the amount of premiums paid in by plaintiff. Defendant accepted the condition, and verified its answer, whereupon judgment for said amount was entered for plaintiff, without, however, prejudicing his claim under the policy; and the cause, as to such claim, was continued to the next term. Held that, the judgment being a partial one only, no appeal lies therefrom.

Appeal from superior court, Pasquotank county; McIver, Judge.

Action by J. L. Hinton against the Life Insurance Company of Virginia upon a policy of insurance. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

The case came on to be heard upon plaintiff's motion for judgment for default of a properly verified answer, and the court granted the motion. Before judgment was entered, defendant asked permission to verify its answer, which permission the court granted, upon condition "that, if the ruling of the court was sustained on appeal," defendant would submit to a judgment for the amount of premiums paid by plaintiff. Defendant accepted the condition, but excepted to the court's ruling, and appealed. Thereupon judgment was entered for plaintiff as conditioned, and it was ordered that the judgment should not prejudice plaintiff's claim under the policy, and that his right should be held to a subsequent term, and the cause, as to such claim, was continued to the next term. After the last session of court, but before the formal adjudgment thereof, the judge amended the judgment by inserting therein the words "that if the ruling of the court was sustained on appeal," as quoted above.

MacRae & Day, for appellant. Pruden & Vann, for appellee.

CLARK, J. The Code (section 258) permits verification of pleadings to be made before "any judge, clerk of the superior court, notary public or justice of the peace." This refers to those officers in this state, and in *Benedict v. Hall*, 76 N. C. 113, it was held that a verification before a notary public out of the state was insufficient. Thereupon this section was amended (Acts 1891, c. 140) by inserting after the words "notary public" the words "in or out of the state." The verification in the present instance would therefore have been insufficient, under section 258. But the Code (section 633) gives to commissioners of affidavits full powers to take oaths or affirmations in matters "relating to any cause depending in the courts of this state," and every such "affirmation made before him shall be as valid as if taken before any proper officer in this state." And section 640 gives to clerks of courts of record in other states the same powers as are given to commissioners of affidavits.

The verification in this case was made before the clerk of the hustings court of Richmond, Va., and is authenticated by his signature and the seal of his court. We are constrained, therefore, to hold that the verification has been made before a properly authorized officer. For such purposes, courts take judicial notice of the seal of the courts of other states, just as they do of the seals of foreign courts of admiralty and notaries public. 1 Greenl. Ev. § 479, note 4. The authorities cited to the contrary refer to the proof of the record of a court of another state under the act of congress of 1890, and

do not apply as to the qualification of an officer of another state to take the verification of a pleading to be used in a court of this state.

The amendment made by the court in the judgment "after the last session of the court, in his room at the hotel, without the consent of the opposing counsel," who, indeed, was absent, was invalid. *Delafield v. Construction Co.*, 115 N. C. 21, 20 S. E. 167. Indeed, had this condition been in the judgment originally, or been made by consent, or at a legal time and place, it would of itself have vitiated the judgment, since conditional judgments are invalid. *Strickland v. Cox*, 102 N. C. 411, 9 S. E. 414; *In re Deaton*, 105 N. C. 59, 11 S. E. 244; *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1. An order allowing an amendment in the pleadings or process upon conditions or terms is valid. *Crump v. Thomas*, 89 N. C. 241. It is otherwise as to judgments which must be unconditional.

The judgment was only a partial one, not disposing of the whole matter. The court has repeatedly held that "fragmentary appeals" will not lie. *Clark's Code* (2d Ed.) p. 563, and cases there collected. Though the appeal must be dismissed for the reason given, we have passed upon the point intended to be presented, as this court has sometimes, though rarely, done. *Milling Co. v. Finlay*, 110 N. C. 411, 15 S. E. 4; *State v. Wylde*, 110 N. C. 500, 15 S. E. 5. Appeal dismissed.

(116 N. C. 122)

**COMMERCIAL BANK OF DANVILLE v. BURGWIN.**

(Supreme Court of North Carolina. March 19, 1895.)

**ADMISSIBILITY OF EVIDENCE—WAIVER OF OBJECTIONS.**

Exceptions to questions in depositions which had been admitted without objection in two previous trials of the same case were properly overruled.

Appeal from superior court, Vance county; Shuford, Judge.

Action by the Commercial Bank of Danville against W. H. S. Burgwyn. From a judgment for plaintiff, defendant appeals. Reversed.

Pittman & Shaw, R. B. Peebles, and John W. Hinsdale, for appellant. J. B. Batchelor and J. W. Graham, for appellee.

MONTGOMERY, J. After hearing thorough argument, and making a painstaking examination of the pleadings and the testimony, we are unable to discover any material difference in any aspect between the case presented at this term of the court and the one heard and determined at February term, 1892, and reported in 110 N. C. 267, 14 S. E. 623. The opinion delivered in that case, for the court, by Justice Shepherd, renders it unnecessary for us to go over the ground again. It is true, however, that when the case was last tried, at Vance superior court,

objection was made (for the first time) by the defendant to each and every question in the depositions in the case which went to connect the Southern Electric Light Company with the notes, either as indorser or indorsee. But these depositions had been offered in evidence by the plaintiff on two former trials of this action, and no objection was made on said first two trials, and no objection was made and noted at the time said depositions were taken, nor at the time they were opened by the clerk. The court properly overruled the exceptions. *Carroll v. Hodges*, 98 N. C. 418, 4 S. E. 199. Also, at the last trial there was suggestion of a variance between the complaint and the evidence. In the two former trials this suggestion was not made, and upon inspection the variance in its nature is immaterial, and did not mislead the defendant. *Clark's Code*, § 269, and cases thereunder cited. Upon a close inspection of the additional testimony for the defendant, introduced on the last trial of the case, we do not find anything that adds in value to the testimony offered in the former trials. The court below charged the jury in these words: " \* \* \* That the defendant having pleaded that the notes sued on were obtained by the fraudulent representations of the payees, and the plaintiff having admitted that allegation, and consented for the second issue to be answered in the affirmative, the burden was on the plaintiff to show that it was a bona fide purchaser for value, and without notice of such fraudulent representations. That the plaintiff had offered testimony tending to show that it had acquired the notes bona fide for value, in the usual course of business, and while they were still current, and if the jury believed this evidence the prima facie case of the plaintiff was restored, the burden of proof was then upon the defendants to establish knowledge on the part of the plaintiff, at the time of its purchase, of the alleged fraudulent representation, and that the defendants had offered no sufficient evidence for that purpose, and hence, if the jury believed the testimony offered by the plaintiff, they should answer the first and third issues in the affirmative." We think that the court took a correct view of the character and weight of the testimony, properly instructed the jury thereupon, and applied the law thereto. There is no error, and the judgment of the court below is affirmed.

(116 N. C. 531)

**TAYLOR v. SMITH.**

(Supreme Court of North Carolina. March 19, 1895.)

**AGREEMENT BETWEEN JOINT OWNERS—PROVISION FOR SURVIVORSHIP—GIFT—CONFLICTING FINDINGS—CONSTRUCTION OF CONTRACT—"LIVING HEIR."**

1. A verbal agreement between two parties holding a note payable to them jointly, that upon the death of either without living issue it shall belong to the survivor, is valid.

2. Code, § 1326, abolishing survivorship in estates held in joint tenancy, does not prohibit contracts making the rights of the parties dependent on survivorship.

3. When the jury have found that a contract existed between two sisters, whereby the survivor should have the whole of certain property owned by them jointly, a second finding that one of the parties at a later date made a gift of her share in such joint property to the other is not inconsistent with the first.

4. In a contract between two sisters, providing that, should either of them die before the other without a "living heir," the survivor should become sole owner of a note held by them jointly, the words "living heir" should be construed to mean "issue."

Appeal from superior court, Greene county; Brown, Judge.

Action by G. W. Taylor, administrator, against Addie O. Smith. From a judgment for defendant, plaintiff appeals. Affirmed.

The material portions of the testimony were as follows: George M. Smith testified for the defendant: "I executed the note for seven hundred dollars." Said witness further testified: "I paid this note to Addie O. Smith, December 24, 1891. Paid fifty-six dollars in cash, and gave her a deed for a tract of land worth seven hundred dollars. She surrendered me the note. After the note was assigned to Cora and Addie Smith, I paid one-half the annual interest to each. After Cora died, which was on June 12, 1891, I paid the whole note and interest to said Addie, as before stated. She had possession of note, and surrendered it to me. I know Cora owned one-half of the note during her life. Cora Smith married the plaintiff about eighteen months before she died. I paid Cora her part of the interest before she was married. I do not think I paid her any interest after she was married. I then paid the interest to Addie Smith." Deposition of Talitha Smith is offered in evidence, which is as follows: "Q. 1. What is your age, name, and residence? A. My name is Talitha Smith; am sixty-seven years old; and live in Falkland township, Pitt county, N. C. Q. 2. Is your health too feeble for you to attend court? A. It is. I have not been able to go out of the room for five or six months. I have rheumatism. Q. 3. How are you related to Cora L. Taylor, deceased, and Addie O. Smith and George M. Smith? A. They are all my children. Q. 4. Do you know anything about what note your daughter Cora Taylor owned before her death, and how she disposed of the same? If so, state all you know about it. A. She had a note against George M. Smith for three hundred and fifty dollars, if I remember correctly. I think her part was three hundred and fifty dollars. A short while before she was married,—say, about twelve months before her marriage,—she handed this note to her sister Addie, and told her to put it away and take care of it. At same time and place they agreed with each other that should either of them die before the other without a living heir, that the sur-

vivor should have the note, and that during the life of both of them they should collect the interest together in equal shares. At the time she handed note to Addie, she said, 'Keep it until I call on you for it, if I ever do, and, if I never do, you keep it.' This note was given to Cora and Addie jointly by the administrators of Bryant Smith, deceased, whose name is W. S. E. Smith, my son. They were both present when he handed them the note. I meant Cora L. and Addie O. Smith were both present. This note was given them in settlement of their father's, Bryant Smith's, estate. Q. 5. Do you know the whole amount of the note in controversy? A. Yes; it was seven hundred dollars. Q. 6. Did you ever hear Mrs. Taylor speak of this transaction at any other time? A. I have. A short while before her death, she told me she wanted Addie to keep and have the note, and that she had told George she wanted Addie to have it. No one was present except Cora and myself at that time. (All the answer to the last question objected to as incompetent, because irrelevant, and because the husband of said Cora L. Smith was not consenting to the alleged transfer or alleged statement deposed to in that answer.)"

Issues: "(1) Did the said Cora Taylor, about twelve months before her marriage to plaintiff, deliver said note, described in the pleadings, to Addie O. Smith, upon a mutual agreement between herself and said Addie that the survivor should take the whole of said note, as alleged by defendant? Response of jury: Yes. (2) Did Cora Taylor, prior to her marriage about twelve months, make a gift of her interest in the note described in pleadings to said Addie O. Smith, as alleged by defendant? The jury responds: Yes. (3) If so, did said transaction take place prior to the engagement of marriage between George W. Taylor and said Cora? Response of jury: Yes."

J. B. Batchelor, for appellant. Geo. M. Lindsay, for appellee.

EVERY, J. Two sisters, the plaintiff's intestate and the defendant, "agreed with each other that, should either of them die before the other without a living heir, the survivor should have" a note in which both were payees and each had an equal undivided interest, "and that, during the life of both of them, they should collect the interest together in equal shares." About 12 months afterwards, one of the sisters married, and subsequently died, leaving the defendant, her unmarried sister, surviving her, but no issue. In the connection in which they appear, the words "living heir" were manifestly intended to mean issue, and we will so interpret them in construing the agreement. *Howell v. Knight*, 100 N. C. 254, 6 S. E. 721; *Patrick v. Morehead*, 85 N. C. 67. To say that one sister died "without a living heir," and at the same time leaving a surviving sis-

ter, would be palpably absurd, unless we construe "heir" to mean "issue."

The first question suggested upon the argument was whether the agreement was a contract upon mutual considerations, or a nudum pactum. Counsel contended that it could not be enforced, because it was a gambling agreement, and therefore void, as in contravention of public policy. It is settled law in North Carolina that a bona fide assignment of a contingent interest in land for a valuable consideration will be enforced as an equity. *Bodenhamer v. Welch*, 89 N. C. 78; *McDonald v. McDonald*, 5 Jones, Eq. 211; *Watson v. Smith*, 110 N. C. 9, 14 S. E. 640; *Foster v. Hackett*, 112 N. C. 555, 17 S. E. 426. If the equitable right to such contingent interest can be assigned for money or anything of value, it follows, of course, that the equitable right to two such interests could be lawfully exchanged, the one in consideration of the other, like all other assignable interests in land. Upon the same principle, one of two joint owners of a fund may sell bona fide, for a valuable consideration, the contingent equitable right to the whole fund, where it is so limited as to depend upon survivorship. When the two sisters agreed with each other to hold the note, in which each had an individual moiety as joint tenants, subject to the right of survivorship, these mutual rights of survivorship, when once created, were assignable equities, constituting mutual considerations sufficient to support the agreement. The act of 1784 (Code, § 1326) abolishes survivorship where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship. It would seem needless to cite authority in support of the proposition that mutual prospective benefits are sufficient to support mutual stipulations between parties. The right to the fund in case of survivorship was a valuable assignable interest, and the two sisters, therefore, entered into a valid contract, which secured to each the benefit, like that provided often by an insurance policy, of the ownership of the whole fund in case she should survive the other. The jury have found that such was the contract entered into by the defendant and her deceased sister, the plaintiff's intestate and former wife.

The mother of the two sisters, Mrs. Smith, deposed, further, that, at the time of making the contract, the plaintiff's intestate handed the note to the defendant, saying: "Keep it until I call on you for it, if I ever do; and, if I never do, you keep it." Upon her testimony, together with that of another witness (who was obligor in the note), to the effect that he paid the whole of the interest to the defendant after her sister's marriage, and eventually all of the principal, the court sub-

mitted two other issues, in response to which the jury found that plaintiff's intestate, about 12 months before her marriage with the plaintiff, and prior to her engagement of marriage with him, made a gift of her interest in the note to her sister. It is insisted for the plaintiff that the finding that a gift was subsequently made is inconsistent with the contract as to the right of each in case of survival. We do not think so. Plaintiff's intestate might, after making the contracts, have made the gift; but, if she did not subsequently give her interest in the note to her sister, the contract, of course, remained in full force. So that if it be conceded, as was contended by plaintiff's counsel, that the testimony was insufficient in its most favorable aspect to show a valid gift, the only result would be to leave the contract in full force. Nothing but a subsequent valid gift by the intestate of her interest to the defendant would have altered or impaired the validity of the contract, and either the contract or such a gift would warrant the rendition of the judgment. If the court erred in telling the jury that the testimony of Mrs. Talitha Smith, if believed by them, was sufficient to justify them in responding to the second issue in the affirmative, it was not erroneous to tell them that hers was the only evidence relied on by the defendant, and, if believed, was sufficient to show the mutual agreement. As the jury found separately on the specific issues, and they are in no wise dependent on each other, we think that any error in defining indirect terms, or inferentially what constituted in law a gift, was harmless. The evidence of the mutual agreement, which was entered into before the alleged gift, was to be considered distinct from that relating to the gift; and the finding upon it, having established the contract, will support the judgment of the court, even if the other findings should be set aside for error. The specific reference to the testimony of Talitha Smith as the only evidence upon which the defendant did or could contend for a verdict in her favor bears no analogy to the cases where the judges have erred in selecting, among several witnesses to the same transaction, one whose testimony was more unfavorable to a party than that of the others, and making the response to an issue or issues dependent upon the credibility of such witness. For the reasons given, we think that the judgment below should be affirmed.

(116 N. C. 1007)

STATE v. WORTH et al.

(Supreme Court of North Carolina. March 19, 1895.)

LICENSE TAX ON TRADE—POWERS OF CITY—CONSTRUCTION OF STATUTE.

1. The word "trade," where it is used in defining the power to tax, includes any employment or business for gain or profit.



2. Laws 1876-77, c. 192, § 9, conferring authority upon the city of Wilmington to levy taxes on all subjects liable to taxation under Const. art. 5, § 3, which authorizes the legislature to tax trades, professions, franchises, and incomes, "and also on all other subjects of taxation on which authority to levy taxes enumerates," authorizes a tax by the city upon the manufacture and sale of ice.

3. A municipality authorized to tax trades, professions, franchises, and incomes is not bound to tax them uniformly as to amount.

4. An act authorizing the levy of a tax by a city on a particular date will be construed as authorizing the levy on that date, or within a reasonable time thereafter.

Appeal from criminal court, New Hanover county; Meares, Judge.

W. E. Worth and others were convicted of violation of a city ordinance, and appeal. Affirmed.

J. D. Bellamy, Jr., for appellants. P. B. Manning and the Attorney General, for the State.

EVERY, J. The constitution of North Carolina (article 5, § 3) authorizes the legislature to tax trades, professions, franchises, and incomes. This power may be exercised directly for state purposes, or delegated by statute to the counties and towns as governmental agencies in order to provide for municipal expenses. The statute (Code, § 3800) empowers cities and towns to levy taxes "on all persons, property, privileges and subjects within the corporate limits, which are liable to taxation for state and county purposes." The amended city charter (Laws 1876-77, c. 192, § 9) confers authority to levy taxes on all subjects liable to taxation under section 3, art. 5, of the state constitution, "and also on all other subjects of taxation on which authority to levy taxes enumerates." The power to tax trades, etc., is superadded to the general authority to impose a uniform ad valorem tax on all property. One of the levies made by the city of Wilmington is described in its tax ordinance as follows: "For storage, manufacture, or sale of ice at wholesale, with privilege of retailing, \$66 per annum." Does the power to tax trades authorize the imposition of this tax on the defendants as manufacturers of ice? The appeal hinges upon the answer to this question. The power delegated by the state to its political subdivisions must be exercised within the scope of a strict construction of the language used by the legislature, and especially must governmental agencies show authority of law for the levy of taxes. Cooley, Const. Llm. pp. 636-638; Sedg. St. & Const. Law, 448; Suth. St. Const. § 378. But, while this principle is well established, we do not think that the city has transcended its authority. The word "trade" is often used in a more restricted sense to mean either the particular occupation of a mechanic or a merchant; but, where it is used in defining the power to tax, its broadest signification is given to it, and it is interpreted as comprehending not only all who are engaged in buying and sell-

ing merchandise, but all whose occupation or business it is to manufacture and sell the products of their plants. It includes in this sense any employment or business embarked in for gain or profit. The Nymph, 1 Sumn. 516, Fed. Cas. No. 10,388 (opinion by Justice Story); Bank v. Wilson, 3 Exch. Div. 108; May v. Sloan, 101 U. S. 231.

We think that the city is empowered by the act of 1876-77, certainly, if not by section 3800 of the Code, to impose the tax on manufactures of ice. It would be "sticking in the bark" to so construe the law as to restrict the authority to levy to the particular date (June 1st) mentioned in the act. The city may every year, either on or within a reasonable time after the day mentioned, alter, by increasing, diminishing, or abrogating, this specific levy on any of the subjects comprehended under the terms used in the constitution, but it was not intended that the right to exercise the power should be limited to a particular day, or that the city should be deprived of revenue upon any taxable trade because the authorities failed to formally declare on the 1st of June whether each specific levy should be increased, diminished, or discontinued for the ensuing year. We see no force in the suggestion that the legislature or the city, as a sub-agency of the government, established by it, is bound to tax uniformly, as to amount, the different subjects of taxation comprehended under the general description as "trades, professions, franchises and incomes." It was not intended to limit the exercise of a sound discretion by compelling the city authorities to make the amounts exacted for converting meats into sausage and for manufacturing and selling ice exactly the same. No such rule of uniformity is prescribed in our organic law. When the power delegated to a city or town is abused in this respect, the legislature may restrict their discretionary authority by fixing a maximum or minimum limit for the tax on any or all of the subjects specifically taxed. But they have not done so, and we see no evidence or abuse of power, if we had authority to correct or remedy such a wrong. For the reasons given, we think that there was no error.

(116 N. C. 563)

WILMINGTON, O. & E. C. R. CO. v.  
BOARD OF COM'RS OF  
ONSLOW COUNTY.

(Supreme Court of North Carolina. March 19, 1895.)

RAILROAD COMPANIES — MUNICIPAL AID BONDS —  
ELECTIONS — DUTY OF COMMISSIONERS.

1. A substantial compliance by county commissioners with Act 1885, c. 233, as amended by Act 1887, c. 89, in submitting to the vote of electors of the county the question of subscription of bonds in aid of a railroad, is, in the absence of fraud, sufficient.

2. Where, at such an election, a majority of the qualified voters of the county vote for the subscription, it is the duty of the county commissioners to issue the bonds.

Appeal from superior court, Lenoir county; Boykin, Judge.

Action of mandamus by the Wilmington, Onslow & East Carolina Railroad Company against the board of commissioners of Onslow county. From a judgment of nonsuit, plaintiff appeals. Reversed.

A. M. Waddell and N. J. Rouse, for appellant. M. DeW. Stevenson, for appellee.

FURCHES, J. This action is for a mandamus to compel defendant to issue to plaintiff \$30,000 in coupon bonds, under an act of the legislature of 1885, c. 233, as amended by the act of 1887, c. 89, in which plaintiff contends that defendant submitted the question under said acts to the qualified voters of Onslow county, and that a majority of the qualified voters of said county voted in favor of "subscription," thereby authorizing and making it the duty of defendant to issue said bonds to plaintiff. This demand is resisted upon the ground that plaintiff has no right to said bonds, and that defendant is not authorized to issue the same; and defendant alleges that the election held on the 24th day of January, 1888, was irregular, in that the act of 1887 required said election to be held within 40 days, which was not done; that it does not appear that 30 days' notice of said election was given, as the law required; that a new registration was ordered, which was contrary to law, and therefore void; that a majority of the qualified voters of Onslow county did not vote to issue said bonds, and, if they did so vote, it has never been so declared by defendants, and they now refuse so to declare, and to issue said bonds. It is too clear for argument that defendant has no authority to issue the bonds demanded in plaintiff's complaint, unless a majority of the qualified voters of Onslow county have by their vote given, in pursuance of law, authority to defendant to do so. Const. N. C. art. 7, § 7. And on the other hand, it seems clear to us that if a majority of the qualified voters of said county, at an election held under and pursuant to law, have voted for the issue of said bonds, then it is the duty of defendant to issue the same, and the court will compel defendant to do so. Then it is not denied that the acts of 1885 and 1887, *supra*, authorized the holding of an election, and it is not denied that an election was held under said acts for the purpose of determining the question whether said bonds should be issued or not. This much is undisputed ground. But defendant says, although this is true that said election was held in pursuance of said acts, it was not held according to the requirements of said acts; that said acts required that said election should be held within 40 days from the date of the order of defendant calling the same, and this election was not held within 40 days from the date of the order of defendant calling the same, and is therefore

void. But plaintiff, in reply to this, says that time was not of the essence; that being the will of qualified voters, and where it is not shown that there was fraud or design in postponing the election, it will not vitiate or make the election illegal and void (*Board of Sup'rs of Fulton county v. Mississippi & W. R. Co.*, 21 Ill. 338; *People v. Cook*, 14 Barb. 259; *Coles Co. v. Allison*, 23 Ill. 437); that the time mentioned in the act was not mandatory, but only directory (*Grady v. Commissioners*, 74 N. C. 101). But defendant says, if said election is not void for the reason that it was not held within the time mentioned, there was a new registration of voters ordered, which vitiates and renders said election void, and cites *Smith v. Wilmington*, 98 N. C. 343, 4 S. E. 489. But, upon examination of this case, we find it is put expressly upon the charter of Wilmington, which provided that there should not be a new registration of voters ordered oftener than once in every two years, and it was shown there had already been one registration during that year; while the general law (Code, § 2675), which applies to the case now under consideration, expressly provides that the county commissioners may order a new registration before any election, and Chief Justice Smith so states in his dissenting opinion in the case of *Smith v. Wilmington*, *supra*. But defendant again says it is not shown that said election had been advertised for 30 days, as the law requires. But, when defendant admits there was an election held under defendant's directions and management, the law will not be so unjust to defendant as to presume that defendant did not perform the duties required by law; but, on the other hand, it will presume it did its duty. But defendant again says, if said election is not void for any of the reasons above stated, it was necessary that the commissioners should pass upon and declare the result of said election; that this has never been done, and they do not propose to do so; and cite *Claybrook v. Commissioners*, 114 N. C. 453, 19 S. E. 593, as authority for this position. But, upon examination of this case, we find that it holds that if the commissioners had declared that a majority of the qualified voters of the town had voted for the subscription, bonds had been issued, and gone into the hands of innocent purchasers for value, the town would have been bound to pay them, though in fact a majority of the qualified voters had not voted for the subscription. But it does not hold that, because the commissioners had not declared the result showing that a majority had voted for subscriptions, the election was void, but that the commissioners, having failed to declare that a majority had voted for the subscription, left it an open "question for the jury to determine" upon the evidence. And this case brushes away the straws,—such as that the election was held on the 30th, and reported on the 3d; that

they voted "For subscription" and "Against subscription," instead of voting "Subscription" and "No subscription," as provided in the act authorizing the election; and that the petitioners styled themselves "voters and taxpayers," instead of "residents and taxpayers," as provided in the act,—and takes a broad catholic view of the whole matter, which goes to the merits of the controversy. Suppose, then, we were to try the question as to whether a majority of the qualified voters of Onslow county voted for this subscription, what would necessarily be the result? The plaintiff, upon this point, introduced the following evidence without objection: "The record of the officer of register of deeds of Onslow county, showing the vote of the different precincts, tabulated result," etc., "of said election held on the 24th of January, 1888, as follows: 'Election Held 24th January, 1888, for Subscription or No Subscription for Wilmington, Onslow & East Carolina Railroad. To the Board of Canvassers or the Clerk of the Superior Court of Onslow County: Abstract of votes cast at an election held for, etc., and chapter 233, Laws 1885 [giving returns from each precinct, aggregating, for subscription, 935; no subscription, 345; with registered voters, 1,648].' 'To the Board of Commissioners for Onslow County: Having opened, canvassed, and judicially determined the original returns of the election in the several precincts in the county, held as above stated, do hereby certify, as chairman of said board, that the above is a true abstract thereof, and contains the number of said ballots cast in each precinct for subscription and no subscription, and the number of votes given in said election for said purpose. January 26, 1888. [Signed] E. L. Frank, Jr., Chairman Board County Canvassers. Hill King, Secretary [et al.]. I hereby certify that this is a true copy of the original filed in the office of the clerk of the superior court of Onslow county, North Carolina. [Signed] E. L. Frank, Jr., Chairman Board of County Canvassers.' It is admitted that said election was held on the 24th January, 1888,"—and the defendant introduced no testimony. Now, it seems to us that it was the duty of the judge trying the case to have instructed the jury, if they believed the evidence, to find the second issue, "Yes." This is assuming that the commissioners had not declared the result of the election of the 24th of January, 1888, and that the case was being tried upon the evidence, under the law as declared in the case of *Claybrook v. Commissioners*, supra. But it appears to us that a reasonable and fair construction of this evidence shows that the vote was canvassed, and the result ascertained and declared, showing that a majority of the registered voters of said county had voted for subscription, and that a majority of the registered voters was a majority of the qualified voters of the county. *Southerland v. City of Goldsboro*, 96 N. C.

49, 1 S. E. 760. We think the object of all elections is to ascertain, fairly and truthfully, the will of the people,—the qualified voters; that registration, notice of elections, poll holders, judges, etc., are all parts of the machinery provided by law to aid in attaining the main object,—the will of the voters,—and should not be used to defeat the object which they were intended to aid. This being so, it is held that a substantial compliance with the formalities of the statute is all the law requires. 1 Cook, Stock & Stockh. p. 143; *Atchison, T. & S. F. R. Co. v. Board of Commissioners*, 21 Kan. 309. And we are of opinion that where there is no fraud alleged, and no design shown on the part of those executing the law, and where it appears that the will of the voters was fairly taken and ascertained, a substantial compliance with the provisions of the statute under which the election is held is sufficient. We have treated this case as if the plaintiff was a taxpayer, or some one interested in defeating the result of this election; and we have been showing it would be valid against the attacks of such parties. But that is not the case here. The plaintiff is trying to sustain its validity, while the defendant is trying to defeat the plaintiff by alleging its own faults, and thereby trying to take advantage of its own wrong. How far this would be allowed is not necessary for us to say here. And, not to be misunderstood by this observation, we again repeat what we have heretofore said: That defendant had no power to submit the question of subscription to the voters of Onslow county, outside of the powers given by the legislature; and it had no power to issue the bonds demanded by plaintiff, unless a majority of the qualified voters voted for the subscription. But, having the power to submit the question, a substantial compliance with the formalities of the statute in submitting the question to the people, if there was no fraud practiced, and no design in doing so to impose on the people and get them to do what they would not have done if there had been a literal compliance with the terms of the statute, then a substantial compliance with the terms of the statute in submitting the question is sufficient; and, if a majority of the qualified voters of the county voted for the subscription, it is the duty of defendant to issue the bonds. There is error, and the plaintiff is entitled to have the judgment of nonsuit set aside, and a new trial. It is so ordered.

(116 N. C. 157)

HOOKER v. NICHOLS et al.

(Supreme Court of North Carolina. March 19, 1895.)

SHERIFFS' DEEDS—PRIORITIES—DATES OF REGISTRY.

Under Act 1885, c. 147, providing that no conveyance of land shall be valid, as against

purchasers for a valuable consideration from the donor or bargainor, but from the registration thereof, a sheriff's deed duly registered takes precedence of a similar deed which, though made first, was registered later.

Appeal from superior court, Pitt county; Bynum, Judge.

Action by Oscar Hooker against Nelson Nichols and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

J. E. Moore, for appellant.

**FAIRCLOTH, C. J.** The lappage of lots Nos. 37 and 38 in the schedule of William Whitehead is the land in controversy, it being admitted that Whitehead's title was good, who was the judgment debtor. On December 1, 1890, the sheriff, under executions against Whitehead, sold lot No. 37, and the plaintiff purchased; and immediately, on the same day, he sold lot No. 38, and the defendant purchased. Each purchaser paid the amount of his bid, and the sheriff subsequently executed to each a deed for the lot purchased by him. The defendant's deed was registered on 13th of December, 1890, and plaintiff's deed was registered in March, 1891. After the sale, and before the defendant paid the sheriff, he (the defendant) was duly notified by plaintiff that lot No. 37, bought by plaintiff, covered lot No. 38, "and that he could not hold." It does not appear that the sheriff or either of the parties to this action had knowledge of the lappage at the sale. Upon these facts, found by the court by consent, his honor held that plaintiff could not recover, and he took a nonsuit, and appealed.

So we have a clear-cut case of two innocent purchasers of the same land, on the same day, for value, and without any notice at the sale of any defect of title or otherwise, with the second purchaser's deed first probated and registered. At common law and until recent legislation, the first purchaser at a sheriff's sale acquired the title, and his deed, when registered, related to the day of sale, and the priority of liens among the creditors did not affect his title. *Woodley v. Gilliam*, 67 N. C. 237; *Ricks v. Blount*, 4 Dev. 128. The proceeds of the sale were applied according to the creditors' rights. *Randall v. White*, 66 N. C. 102. At an early day in our state history, registration laws in many respects became necessary; and in *Leggett v. Bullock*, Busb. 283, will be found a brief recital of all such acts, until recently. Act 1829, c. 20, provided that "no mortgage or deed of trust shall be valid at law to pass any property as against creditors and purchasers for valuable consideration but from the registration of such mortgage or deed of trust." The words "at law" in said act do not mean in a court of law only, but in all courts. "At law" is an expression, in a statute, which does not mean merely a legal tribunal as distinguished from an equitable jurisdiction, but generally our system of ju-

risprudence, whether legal or equitable. This act of 1829 has been now in force more than 60 years, and has been well understood by lawyers and laymen, and was intended to uproot all secret liens, trusts, unregistered mortgages, etc.; and under its force it has been held that no notice, however full and formal, will supply the place of registration. *Robinson v. Willoughby*, 70 N. C. 358. See Code, § 1254, and the numerous cases there cited. The present case turns on the construction of Act 1885, c. 147, which says, after repealing Code, § 1245, that "no conveyance of land, nor contract to convey or lease of land for more than three years, shall be valid to pass any property, as against creditors or purchasers for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof within the county where the land lieth," etc. It will be noted that the effective words of this act are identical in substance with section 1254 of the Code; and we are driven to the conclusion that the legislature, with full knowledge of the meaning and effect of the said act of 1829, intended to apply the same rule to all conveyances of land as declared in the late act of 1885, c. 147, and we must give the same effect to it. This view has been held and recognized by this court in *Maddox v. Arp*, 114 N. C. 585, 19 S. E. 665; *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99; *Allen v. Bolen*, 114 N. C. 560, 18 S. E. 964; and in *Barber v. Wadsworth*, 115 N. C. 29, 20 S. E. 178. In support of the above conclusion is the rule that, when the equities are equal, the legal title controls. His honor's intimation that the plaintiff could not recover was agreeable to law. No error.

(24 Ga. 624)

#### SHARP v. HICKS et al.

(Supreme Court of Georgia. July 16, 1894.)

EXECUTION — CLAIMS OF THIRD PERSONS — SEPARATE TRIALS — EVIDENCE — TESTIMONY OF DECEASED WITNESS — FRAUDULENT CONVEYANCES.

1. Where a husband and wife filed a joint claim to land which had been levied upon, and the court thereafter allowed each to file an amendment, alleging ownership of an undivided half of the land, and passed an order reciting that these amendments were allowed "so as to stand as separate claims, each for one undivided half interest in the property," and no exceptions pendente lite were filed and allowed, it was too late, 12 months afterwards, to move to dismiss the original claim affidavit or the amendments to the same, it not appearing that the motion to dismiss was based upon any alleged inapplicability or insufficiency of the claim bond relatively to the claim as amended.

2. In view of the above-recited order, there was no error in ordering, over objection of plaintiff's counsel, a trial of the claim of the husband separately from that of the wife.

3. There was no error in rejecting evidence of declarations alleged to have been made by the grantor, before conveying to the claimant and his wife the land in dispute, to the effect that the grantor had given one-half or all of the land to his daughter, the claimant's wife; it being strongly inferential from the evidence as a whole that, at the times these alleged declarations were

made, the claimant and his wife were in possession of the property, and that the grantor was not, and there being no clear and positive evidence that the latter was in possession at any of the times when the alleged declarations were made, and the conveyance reciting a valuable consideration, and not purporting to be founded in whole or in part upon any other.

4. A deceased witness, whose testimony was taken on a former trial, and is reproduced through another witness who heard it, and is thus before the jury on a present trial of the same case, cannot be impeached by contradictory statements made by the deceased witness before he testified, no foundation for such impeachment having been laid by interrogating him as to such statements.

5. Where one honestly and in good faith purchased property from another who was at the time in failing circumstances, the mere fact that the consideration paid for the property was inadequate would not authorize a creditor of the vendor, who afterwards obtained judgment against the latter, to subject the property to the satisfaction of his judgment by tendering, after a levy upon the whole, and pending the trial of an ordinary claim case, the price the claimant had paid for the property.

6. Where a conveyance is attacked by a creditor of the grantor as fraudulent, and the claimant, his son-in-law, stands upon a conveyance purporting to be made to him as a purchaser for value, evidence tending to show that the grantor was liable, at the date of the conveyance, as surety upon a tax collector's bond, and that an execution for a large amount was, after the conveyance, issued thereon by the comptroller general against him, together with his principal and co-surety, is material; and the execution is admissible as prima facie evidence of the liability.

7. After the loss of account books in which the claimant kept accounts against his vendor of the land in controversy, evidence that the accounts were still open on the books until the present controversy had arisen was relevant evidence upon the question whether the land was paid for in whole or in part by extinguishing the accounts; and, the fact whether the accounts remained open or were closed or credited not appearing from an abstract of the books preserved and put in evidence, it was error to exclude the offered testimony of the actual condition of the accounts on the books in this respect.

8. The requests to charge, so far as legal and pertinent, were covered by the general charge of the court; the charge excepted to was substantially correct; and there was no impropriety in the conduct of court or counsel of which complaint is made in the motion for a new trial. (Syllabus by the Court.)

Error from superior court, Newton county; R. H. Clark, Judge.

To property levied on under execution in favor of W. H. Sharp against one Turner, T. W. Hicks and another interposed a claim of ownership. There was judgment for claimants, and plaintiff brings error. Reversed.

The following is the official report:

An execution in favor of Sharp against Turner was levied upon certain land, known as the "Oak Hill Place," containing 100 acres. Hicks and his wife interposed a joint claim, and gave a joint claim bond. A jury found an undivided half interest in the property subject, and the other not subject. Plaintiff and claimants made motions for new trial, both of which were overruled, and both sides excepted. This court reversed the ruling of the court below, denying the motion

made by claimants, and affirmed, with directions, the ruling upon the motion made by plaintiff. 89 Ga. 311, 15 S. E. 314. The directions were that the whole case be tried over again, because of errors complained of in the bill of exceptions of claimants. The case coming on again in the court below, the court allowed claimants to amend their claim affidavit, by allowing Hicks to make affidavit claiming one-half undivided interest in the property, and Mrs. Hicks to make affidavit claiming the other undivided half, and ordered the trial of the case of Hicks separate from that of Mrs. Hicks. There was a verdict finding the undivided half claimed by Hicks not subject, and, the motion for new trial made by plaintiff being overruled, he excepted. Upon the trial the following appeared, among other things: On December 20, 1882, Turner made a mortgage to Sharp of the Oak Hill place and other property, to secure payment of a note for \$1,050. The mortgage and note were drawn by Livingston, and executed in the presence of Livingston. There was a judgment of foreclosure of the mortgage, and levy of execution issuing therefrom made on the Oak Hill place, which levy was afterwards dismissed. Sharp obtained common-law judgment in September, 1888, execution issuing from which was levied on the Oak Hill place, and claim interposed by Hicks and wife. In 1881 and following years, Turner was largely indebted. Turner bought the Oak Hill place in 1877, for \$1,025. Hicks gave in the Oak Hill place for taxes in 1884, at a valuation of \$1,000. In 1880 or 1881, Almand loaned Turner \$900, and, to secure this loan, Turner made him a deed to the Oak Hill place. T. M. and T. W. Hicks were not known in this transaction. Afterwards Turner gave Almand \$1,000 in notes on T. M. Hicks, and a deed to 200 acres of land, and Almand reconveyed to him the Oak Hill place. Witnesses considered Turner solvent in 1883 and 1884, and one of them considered him solvent up to 1886. Various witnesses valued the Oak Hill place, from 1882 to 1886, at from \$1,200 to \$1,600. The dwellings, store, and fences on the place were badly in need of repairs in 1880. The place would have sold for more than \$500 at sheriff's sale at any time since 1879. The place was in bad repair in 1882, and Hicks improved it; but, a witness testified, the place was worth \$1,000 to \$1,200 before any improvements were put there. In 1882 or 1883 a witness proposed to buy a strip of the place from Hicks, and Hicks refused to sell it, giving as a reason that Turner had given Della, Hick's wife, half of the place the store was on, and he (Hicks) had bought the other half for \$500. Turner is father-in-law of Hicks. Sharp testified that in 1882 Turner owned and controlled the place; that Hicks said he was staying in the store and working for Turner, for \$200, in 1881 and 1882; that in April, 1886, Hicks asked him if he had a mortgage against the Oak

Hill place, and, on Sharp saying he had, asked Sharp if it had been recorded, and when Sharp replied, "No" (the mortgage was recorded May 3, 1886), remarked that Sharp had slept over his interest in not having it recorded. Sharp replied that he went by what Livingston told him, and perhaps Livingston had made a mistake or did not know. Hicks replied that he had heard there were papers against the place before he bought it, and he got Livingston to go through the ordinary's office, and examine the records, and they found nothing, and he bought it. He professed to be an innocent purchaser, and expected to hold it. He said he asked C. W. Turner and his uncle P. W. Turner and Livingston about it, and they told him there were no papers against it. The deed from Turner to Hicks and wife conveying the Oak Hill place was dated March 29, 1884, and recorded April 30, 1886. The consideration recited therein was \$500. There was evidence for claimant to the effect that no part of the place was given to Hicks and his wife, but that Hicks bought it straight out, and the deed was made to both because Mrs. Hicks helped to pay for it; that she attended to the store, and her husband worked in the field, and by that means they paid for it; that the place was reasonably worth, in 1882, 1883, and 1884, \$5 or \$6 an acre, and was in bad repair; that Turner was regarded as solvent until 1886. A witness testified that he thought the place was reasonably worth \$7 or \$8 an acre in 1883 and 1884, and regarded Turner as perfectly good in 1883 and 1884, and until 1885, when some notes were placed in his hands for collection. Livingston testified, among other things: That Turner is now dead. That Turner testified on the trial of the other case that he was worth in 1883 and 1884, above all his indebtedness, after he had sold the place to Hicks, from \$200 to \$2,000; that he sold the place right out to Hicks, and no part of it was given to his daughter; that he asked Sharp if he might sell the place to Hicks, as Sharp had a mortgage on it; that he could not have sold the place for cash for more than \$500, and had sold it for a little less to Hicks than he would have sold it to any one else, because Hicks was his son-in-law. That witness never heard of the solvency of Turner being questioned until after 1884, etc. The claimant testified, among other things, that he had no information of Turner being embarrassed until 1886; that he had no knowledge of the Sharp debt until 1886; that he made the trade for the place in April or May, 1883; that the place was then in bad shape, and, as soon as he bought it, went to work and improved it; that, at the time they traded, Turner owed him \$50 on a salary Turner had been paying him previously, and he paid Turner cash along, and Turner traded with him some in the store; that he gave no notes for the land until Turner made him the deed, in 1884; that he was due Turner \$70,

and gave Turner due bill for that; that he (claimant) drew the deed, and put his wife's name in it, on his own account; that she clerked in the little store while he worked in the field, and that is where they made the money and paid for it. He denied saying that any part of the property was given to his wife.

The motion for new trial contained the grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in allowing claimants to amend their claim affidavit, and in permitting claimants to make two separate affidavits of amendment to the original affidavit, as set forth above, over objections of plaintiff. The order allowing the amendment recites that it was allowed after submitting the amendment to counsel for plaintiff. Error in refusing to dismiss the affidavits so amended, and also in refusing to dismiss the joint affidavit with the amended affidavits, on motion of plaintiff's counsel, because, when the claim affidavit was so amended, the claim bond made on the original claim affidavit fell or became inoperative against the securities on that bond, and they were discharged, and there was no new bond given with the new or amended affidavits, and they should be dismissed, the securities not having ratified the bond with the amendment. Error in ordering the trial of the case of Hicks separate from that of Mrs. Hicks, over objection of plaintiff's counsel. Error in ruling out the following evidence of W. S. Veal: "I heard C. W. Turner in December, 1882, or about a year after Turner made me a deed, say that he had given one-half of the Oak Hill place to his daughter Mary V. Hicks, and had sold the other half to his son-in-law Thomas W. Hicks." Error in ruling out evidence of James A. Parker offered by plaintiff: "I lived about two miles from the Oak Hill place in '82, '83, and '84, and still live at same place. Have known the Oak Hill property 33 or 34 years. Think it was worth \$10 per acre in 1881, and \$12 in 1885. I had conversation with C. W. Turner in 1881, with reference to building church on the Oak Hill place, and in the conversation he stated that he had given the Oak Hill property to his daughter in 1881. T. W. Hicks was in possession. Hicks has improved the place. Neither Hicks nor his wife was present during conversation with Turner." Movant alleges that this evidence was admissible to contradict C. W. Turner, "and sworn by Livingston," and as to sayings of Turner which are in proof. Error in ruling out evidence of R. L. Griffin, when offered by plaintiff: "I had a conversation with C. W. Turner about Oak Hill place. I went to Turner in 1881, in December, to lease the place from him. He said he had given it to Della, T. W. Hicks' wife, but would see her, and find out if he could get it from her. In February or March, 1882, he wrote me that he had seen Della, and could not get it. I have searched for the letter,

and cannot find it. Neither Hicks nor his wife was present at the conversation, and no one was present, so far as I remember, but Turner and myself. I don't know whether Hicks was living there or not at that time, but my best recollection is that he was. I have stated, in substance, all the conversation with Turner." Movant alleges that the exclusion of this evidence was error because in rebuttal of what Livingston swore Turner testified on former trial and the sayings of Turner, defendant, when in possession. Error in refusing to let plaintiff in *fi. fa.* read to the jury the plea of tender by plaintiff, and also in refusing to allow plaintiff's counsel to show by plaintiff that he filed the plea at the first term of the court to which the claim was filed, and tendered the \$500 to claimants in open court, and had the \$500 ready to pay over to them ever since the tender at the first term, and now has it ready to pay over to them, to save them harmless. The plea was: "Even if the property levied on was purchased in good faith, the consideration for the same, to wit, \$500, was greatly inadequate, and plaintiff now brings into court and tenders to claimant said \$500, the amount claimed to have been paid defendant for the property, and asks that said property may be held subject to sale under his *fi. fa.* on said inadequacy of consideration." Error in ruling out the tax *fi. fas.* of 1883 and 1884, for \$3,000, against Langly, defaulting tax collector of Newton county, and L. F. Livingston, C. W. Turner, securities on his bond, when tendered in evidence by plaintiff. These *fi. fas.* are not set out in the motion, nor attached thereto, and are no further described than as above stated. Error in rejecting the following evidence of plaintiff when offered by him: "The accounts of T. W. Hicks and C. W. Turner on the books kept by Hicks the years 1881, 1882, 1883, 1884 were standing open and unsettled on the books." In a note to this ground the judge states: "The testimony was rejected because the book was in evidence on first trial, and has been lost since; but what the book showed was placed in the brief of evidence, and, because of the loss of the book since, the brief of evidence on that point had been heard in evidence on the trial." Error in allowing the following remarks made by Judge Boynton, counsel for claimant, before and in the presence of the jury, and also the following remark of the court, made before and in the presence of the jury: Plaintiff's counsel asked him: "You tendered Mr. Hicks and his counsel on the other side \$500, the amount he paid for the land? A. Yes, sir. Q. You have been ready to pay it ever since? By Judge Boynton: We object to this. The only question here is. Is the property subject or not subject? The gentlemen cannot buy Mr. Hicks' property without his consent. By the Court: I don't think you are entitled to make that

proof. If it is an element in the case, it can be put in the verdict." Error in failing and refusing to charge on the subject of the tender of \$500. Error in refusing to give the following written charge, requested by plaintiff: "If you believe the evidence that the defendant and C. W. Turner sold the property in dispute, and made a deed to the same to the claimant T. W. Hicks, for the purpose of defrauding, delaying, or hindering his creditors, and T. W. Hicks had notice of such intention, or reasonable ground for suspecting such intention, then such deed would be void as to C. W. Turner's creditors; and, if the plaintiff in *fi. fa.* was at the time one of his creditors, you would be authorized to find the property subject to the plaintiff's *fi. fa.*" "If you believe from the evidence that the price claimed to have been paid for the property in dispute was so grossly inadequate as, combined with other circumstances, would amount to fraud, then the contract of such sale would have been void as to C. W. Turner's creditors; and, if the plaintiff in *fi. fa.* was at the time one of Turner's creditors, the transaction would have been void as to the plaintiff in *fi. fa.*, and you would be authorized to find the property subject to the plaintiff's *fi. fa.*" "If you believe from the evidence that T. W. Hicks purchased the property in dispute in good faith from the defendant, C. W. Turner, and paid Turner for it, and that the price paid for it was an inadequate one, and that Turner was at the time in failing circumstances, and that at the time the plaintiff, W. H. Sharp, was one of Turner's creditors, then you would be authorized to find the property subject to the plaintiff's *fi. fa.*, to the extent of the difference between the actual value of the property at the time of the purchase and the amount paid by Hicks for it; and, if you should so find, you will state in your verdict the amount of this difference." "Fraud voids all contracts, and whilst fraud may not be presumed, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence. When a person who is in debt disposes of his property, and the transaction is attacked by his creditors on the ground of its being fraudulent, the alleged fraud may be established by various circumstances, such as the insolvency of the debtor at the time, grossly inadequate consideration or price paid the debtor for the property, when the sale is out of the usual course of business, an unusual mode of payment, false recitals of the consideration of the alleged sale of the property, and near relationship of the parties concerned in the transaction." In a note, the judge states that the request was not given unless embraced in the general charge. Error in charging: "The existence of fraud, gentlemen, makes all contracts void when established by proof to the satisfaction of the jury. But fraud cannot be presumed; it



must be proved. And yet, fraud being in its nature subtle, slight circumstances may be sufficient to prove its existence. Now, that is the rule which covers all transactions of fraud, and which covers this transaction upon the question of fraud. Another is where there is a near relation a party to it. Now, then, it is claimed here that this being a contract or sale to a near relation, that it is a badge of fraud. My understanding of the law, as pronounced by the supreme court in this case, is that if there are other badges of fraud besides the matter of relationship, which require explanation, then the transaction for this cause should be more closely scrutinized. Now, it is for you to determine whether there are badges of fraud which require to be passed upon in addition to the fact of the parties being closely related. If you do not think there are badges, why you will not do so. If you think there are, then you must examine the transaction closely." Movant alleges that the court should have stated what are badges of fraud, and then left the jury to determine if any such were proved.

G. W. Gleaton and Capers Dickson, for plaintiff in error. Jas. S. Boynton and E. F. Edwards, for defendants in error.

PER CURIAM. Judgment reversed.

(93 Ga. 692)

**BALDWIN v. WESTERN UNION TEL. CO.**

(Supreme Court of Georgia. April 9, 1894.)

**ACTION AGAINST TELEGRAPH COMPANY — FAILURE TO TRANSMIT MESSAGE — DAMAGES — LOSS OF EMPLOYMENT — AMENDMENT OF DECLARATION — CLAIM FOR PENALTY.**

1. Where one, having an offer of employment at a specific compensation per month, properly delivered to a telegraph company for transmission a message accepting the offer, failure of the company to transmit and deliver the message, in consequence of which the offer expired by reason of nonacceptance within the time limited in its terms, and thus the opportunity of employment was lost, the sender of the message may recover of the company for its breach of duty such damages as he actually sustained by reason of the failure to transmit and deliver his message of acceptance. Prima facie such offer of employment would cover the term of at least one month, and if he remained unemployed for that length of time, and could not obtain employment elsewhere, he would be entitled to recover at least one month's wages.

2. The penalty provided by statute for failure to transmit and deliver messages promptly is a separate and distinct cause of action from the damages recoverable under the general law for like default; and, while the statute allows both causes to be joined in the same action, there is no authority, where one is omitted, for introducing it by way of amendment to the declaration pending the action.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by J. R. Baldwin against the Western Union Telegraph Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. J. Bull, for plaintiff in error. Gustin, Guerry & Hall, for defendant in error.

SIMMONS, J. The plaintiff sued the telegraph company for \$2,000 damages on account of the neglect and refusal of its agent to transmit a message from the plaintiff accepting a situation which had been offered him, in consequence of which he failed to obtain the situation; and for \$50 on account of expenses and time lost in going to obtain it. The declaration alleges that on the 3d of July, 1892, the plaintiff received a message from W. E. Martin, a conductor in the employ of the Central Railroad & Banking Company, that, if he would come to Macon at once, Martin would give him a position on his train as flagman at a salary of \$45 per month, and for plaintiff to notify Martin of his acceptance of the offer or come to Macon immediately. Plaintiff was out of employment, and was needing and seeking a position on the railroad, as he had some experience as a flagman on a railroad train; and on Monday, July 4, 1892, he wrote a telegraphic message directed to W. E. Martin at Macon, Ga., notifying him of his acceptance, and that he would come to Macon by the first train, which message, on the same day, about half past 9 o'clock a. m., was delivered to J. A. Potice, an authorized agent of the defendant, at its office at Bostick, Ga., a station on the Southwestern Division of the Central Railroad, with instructions to transmit the same by the wires of the defendant to W. E. Martin immediately, Martin being at Macon, Ga. The message was received by Potice while in the office of the defendant, and during the hours the office was open for receiving and transmitting messages over its line. Potice willfully neglected and refused to transmit the message to Martin, who, failing to receive it, and expecting to hear from plaintiff, after holding the place open for him until late Monday evening, July 4, 1892, gave the place offered plaintiff to another person. There was only one passenger train a day from Columbus to Macon on the Central Railroad, there being no other nearer and convenient way for him to reach Macon, and said train arrived at Bostick about 6 o'clock p. m. He went to Bostick the same day, arriving there about 5 o'clock p. m., to take the train, and inquire of Potice if he had sent the message to Martin, when he was informed by Potice that he had not, as he "did not think Martin was in Macon." Said agent failed and refused to notify plaintiff that he would not send the message after receiving it, and yet he had ample opportunity to do so, or to return the message to plaintiff. Nevertheless plaintiff took the train to Macon, and immediately on his arrival saw Martin, who informed him that, in consequence of not receiving a message accepting the position during the day, he had given the position to another person, but that if he had received



plaintiff's message he would have held the place for plaintiff until he arrived in Macon. The salary of flagman is worth \$45 per month, and plaintiff would have received that salary, and could have kept his position as long as he discharged his duties faithfully; and plaintiff lost the position offered him by the wrongful and fraudulent acts of the defendant's agent in not transmitting the message, or in not notifying him at the time it was delivered that he would not transmit it. Plaintiff is still out of employment, and unable to secure a position, although he has tried repeatedly. The declaration was filed August 16, 1892. The defendant demurred to so much of the declaration as sought to recover damages from failure to obtain the situation. The demurrer was sustained, and to this ruling the plaintiff excepted.

1. We think the court erred in sustaining the demurrer. That the plaintiff lost the situation through the defendant's breach of duty in failing to transmit his message accepting the offer, and that he thereby sustained actual damage, which could be definitely measured and assessed, we think is clear enough from the allegations in the declaration. It appears that the message was delivered to the agent of the telegraph company at an early hour the next morning after the receipt of the offer, and that the party tendering the situation treated the offer as open until late that evening. Had the message been transmitted and delivered before the offer expired, a binding contract of employment would have existed. The offer was definite as to the situation and the salary, and covered a definite period of employment. An offer of employment at so much per month will, in the absence of anything further indicating the period of employment intended, be treated as meaning employment for a term of one month. See *Magarahan v. Wright*, 83 Ga. 773, 777, 10 S. E. 584, and authorities cited. As it is alleged that the plaintiff was unemployed at the time he received the offer, and remained so up to the time the suit was filed, more than a month afterwards, and was unable during that period to obtain other employment, it appears that he was damaged to the extent at least of one month's salary. As to the measure of damages in such cases, see *Thomp. Electr.* (Ed. 1891) § 326, and cases cited.

2. The court did not err in holding that the plaintiff could not amend the declaration so as to claim the statutory penalty for the failure to transmit the message. The penalty provided by the statute is a separate and distinct cause of action from the damages recoverable under the general law for like default; and, while the statute allows both causes to be joined in the same action, there is no authority, where one is omitted, for introducing it by way of amendment to the declaration pending the action.

No amendment adding a new and distinct cause of action is allowable, unless expressly provided for by law. Code, § 3480. Judgment reversed.

(93 Ga. 700)

PARKER et al. v. BARLOW et al.

(Supreme Court of Georgia. April 23, 1894.)

SALE OF TIMBER — WARRANTY AS TO QUANTITY — DAMAGES FOR BREACH — REFUSAL TO DELIVER — ACTION AGAINST VENDOR'S EXECUTORS.

1. One who sells a mass of timber, consisting of trees suitable for firewood which have been cut down and are still lying upon his land, receiving a gross price therefor, upon an estimate that the quantity will prove to be so many cords of wood, and warranting that the quantity will prove to be so many cords of wood, and warranting that the quantity shall consist of that number of cords, is liable upon his warranty for any deficiency in the estimated quantity; but the measure of damages for a breach of the warranty is not the market value of the wood, but a due proportion of the purchase money, with interest thereon.

2. In such case, if some of the wood was actually received by the buyer, and no act remained to be done by the seller to complete delivery of the residue, title to the residue, as well as to the part received, vested immediately in the buyer; and if, after the death of the seller, his executors, whether acting professedly in their representative capacity or not, prevented the buyer by any wrongful act from entering upon the land, and converting the trees into cord wood, and removing the same therefrom, this would be a mere personal tort by the executors, for which they would be liable personally, but not in their representative capacity. If they merely objected to an entry, without doing or threatening to do any violent act to prevent it, the objection could and should have been disregarded, as the license of the testator to enter for removing the wood was not revocable either by himself or by his personal representatives.

3. If the delivery of the residue was incomplete at the death of the testator, it was the duty of the executors to complete the delivery, and they were subject to an action in their representative capacity for refusing so to do; and the measure of damages would be the market value of the trees as they lay upon the ground at the time delivery ought to have been made. As to any deficiency in the quantity, the breach of warranty would be the basis of action, and the measure of damage the same as indicated above in the first headnote.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by Barlow and Coleman against Malissa and Joseph Parker, executors. Judgment for plaintiffs, and defendants bring error. Reversed.

The following is the official report:

Barlow and Coleman sued Malissa and Joseph Parker, as executors of Barney Parker, alleging that Barney Parker sold them a lot of wood, in trees unsplit, lying upon his land, for \$150, verbally guarantying that it contained 440 cords; that petitioners, under the terms of the sale, were to split and haul the wood off the land; that they paid Barney the \$150 before his death, and in accordance with the contract had hauled off and sold five cords of wood; that after Barney's death defendants refused to permit petitioners to enter upon the land and split

and sell the wood, but took charge of the wood, split and sold it, and appropriated the proceeds to the account of Barney Parker's estate, thereby damaging petitioners \$950. By amendment, petitioners alleged that they bought of Barney 440 cords of wood, and paid him \$150 therefor; that when the wood was bought it was in trees lying on the ground, not cut up, and, Barney being anxious to have it cut up and hauled off, petitioners bought it, and paid him the purchase price, and prepared to cut and haul it, and partly executed the contract, and afterwards Barney died; that the wood was on Barney's land in the shape of trees, and undelivered at the time of his death, and never was afterwards delivered, but delivery was refused by defendants; that, after defendants had qualified as executors, petitioners went after their wood to cut and haul it to market, but defendants refused to deliver it to them, and to allow them to have said trees, or to cut the trees into wood, and thereby petitioners could not get their trees or wood contained in the trees, but defendants retained the wood, and used it for the benefit of the estate, the wood being worth \$900, or other such sum. There was a verdict for plaintiffs for \$391.50, for value of 435 cords of wood. Defendants moved for a new trial, and, their motion being overruled, excepted. The motion contained the general grounds: That the verdict was contrary to law, evidence, etc.; further, because the court erred in not sustaining the demurrer to the declaration. What the demurrer was does not appear, nor is it specified as material in the bill of exception. Error in not sustaining defendants' motion for a nonsuit. The court erred in charging the jury the second supplementary charge, without any request from them to do so; and upon said charge the court erred in giving the jury in charge the following charge: 'I charge you, if you believe from the evidence that the plaintiffs, Steve Barlow and Fred Coleman, bought 440 cords of wood from Barney Parker, or a lot of wood from Barney Parker which he guaranteed to contain 440 cords, and they paid him for the wood, and the wood was on Barney Parker's land at the time the plaintiffs bought it, and it was agreed or understood between the plaintiffs and Barney Parker that the plaintiffs were to have the right to go on the land and cut up that wood and haul it away, if that was the agreement, and at the time of Barney Parker's death they had not hauled it all away, had not gotten all they had purchased, and after his death J. C. Parker and Malissa Parker, as executor and executrix of Barney Parker, went into possession of the land on which that wood was cut; if they took charge of the land as the estate of Barney Parker, and took possession of the wood, and refused or objected to the plaintiffs going on that land and cutting that wood and hauling it away, as Barney Parker had agreed that

the plaintiffs should do, if that was the agreement,—then I charge you the plaintiffs would be entitled to recover against the executors for the market value of the wood that they failed to cut by reason of the refusal or objection of the defendants to permit them to go on the land and cut up and haul away; and I charge you, if that is the truth of the case, they would be liable for the market value of the wood that the plaintiffs did not get on that account; and, if that was the truth of the case, it would make no difference whether the executors, or either of them, after that time appropriated the wood to their own use and benefit; I mean, if either of the executors objected or refused, and the plaintiffs did not get it on that account.' Error in refusing to charge the following written request from defendants: "If you believe from the evidence that Barney Parker in his lifetime fully completed his part of the contract of sale, and delivered the wood in controversy to the plaintiffs in his lifetime, and allowed them in his lifetime to take charge of the same, and that Barney Parker had fully completed his part of the contract, then the plaintiffs could not recover in this form of action, and therefore the estate of Barney Parker would not be liable, and the plaintiffs could not recover against the estate of Barney Parker; and if you believe from the evidence that after the death of Barney Parker the plaintiffs entered upon the land on which the wood was, without the consent of the executors, it is a circumstance going to show that Barney Parker had fully completed his part of the contract." As to this ground, the court below states that all of this request which is proper was substantially charged. Error in charging, as set forth in the ground first before the last-mentioned ground, and prior to the charge therein mentioned: "So it is important for you to inquire and decide, according to the evidence in the case, whether or not there was a delivery of this wood, whether or not it was taken by the executor, or whether or not it was taken by the executrix." Also, the following charge: "If, however, this is not the true theory of the case, but if the wood was delivered by Barney Parker to the plaintiffs, either by an actual delivery or a constructive delivery, or if a delivery was intended to be deferred, not by agreement of the plaintiffs and Barney Parker, and after Barney Parker's death his executors, or one of them, took the wood and converted it to his own use, and the estate got no benefit from it or its proceeds, then the estate would not be liable, and the plaintiffs could not recover in this case."

L. J. Blalock and E. C. Speer, for plaintiffs in error. J. C. Mathews and J. A. Ansley & Son, for defendants in error.

SIMMONS, J. 1. The pleadings and the evidence, so far as material, will be found

in the official report. It will be seen by reference to the pleadings that the plaintiffs sought to recover upon one or the other of two theories set out in the declaration. One of these theories was that they had purchased a quantity of wood, consisting of a number of trees which had been felled by the testator of the defendants, and were lying upon his land; that he warranted that there were 440 cords; that they paid him \$150 for the trees as they lay upon the land; and that there was a breach of the warranty, in that they did not receive that many cords, because the executors refused to allow them to enter upon the land and cut, split, and remove the trees. The other theory was that they purchased from the testator this quantity of wood, and that he delivered to them five cords of it before his death, and that after his death his executors refused to deliver the rest of the wood when requested to do so, whereby the plaintiffs were damaged, etc. Upon both of these theories the trial judge gave the same charge to the jury in relation to the measure of damages. After reciting the pleadings, he instructed them that the plaintiffs would be entitled to recover against the executors the market value of the wood the former had failed to cut by reason of the refusal or objection of the defendants to allow them to go upon the land and cut or haul it away. We think this charge was error, as applied to the original declaration, which, in substance, was an action for breach of warranty. Where one sells to another a quantity of wood lying upon his land, receiving a gross price therefor, upon an estimate that the quantity will prove to be so many cords of wood, and warranting that the quantity shall consist of that number of cords, he is liable upon his warranty for any deficiency in the estimated quantity; but the measure of damages for a breach of the warranty is not the market value of the wood, but a due proportion of the purchase money, with interest thereon. To illustrate: If the testator guaranteed that there were 440 cords, and the purchasers received only one-fourth of this quantity, the vendor or his executors would not be liable for the market value of the three-fourths not delivered, but would be liable only for three-fourths of the purchase money, in an action for the breach of the warranty. Upon the other theory of the case, if the testator had not completed the delivery of the wood at the time of his death, it was the duty of his executors to complete it; and, if they failed or refused to do so when requested, an action could be maintained against them in their representative capacity, and the measure of damages in that case would be different from that above announced. In the latter case they would be liable for the market value of the wood as it lay upon the ground at the time the delivery ought to have been made. This measure would apply to all the wood actually there which

the executors ought to have delivered, but would not apply to any shortage. Touching the shortage,—that is, any deficiency in the quantity warranted,—the recovery would not be for a failure to deliver, but for a breach of the warranty by reason of the nonexistence of some part of the wood paid for; and, as to this, recovery would be measured by a due proportion of the price paid.

2. The defendants were sued in their representative capacity, it being claimed that as executors they refused to allow the plaintiffs to enter upon the land and haul the wood. The defendants denied that they were liable as executors. In our opinion, their liability would depend upon whether the delivery of the wood was completed in the lifetime of the testator. If some of the wood was actually received from the testator, and no act remained to be done by him to complete the delivery of the residue, title to the residue, as well as to the part received, vested immediately in the buyers; and if, after his death, his executors, whether acting professedly in their representative capacity or not, prevented the buyer by any wrongful act from entering upon the land and converting the trees into cord wood, and removing the same therefrom, this would be a mere personal tort by the executors, for which they would be liable personally, but not in their representative capacity. If they merely objected to an entry upon the land, without doing or threatening to do any violent act to prevent it, the plaintiffs could and should have disregarded the objection, because the law is that, where an owner of land sells trees lying upon the ground, they are personal property, and by the act of selling them he gives the purchaser an implied license to enter upon the land and remove them, if the purchaser does so within a reasonable time. Having sold the trees, and received the purchase money for the same, the title vests in the purchaser, and the implied license to enter upon the land and remove the trees is irrevocable, either by the seller or his personal representatives. See *Tied. Sales*, § 97, and authorities cited.

3. The other question in the case is fully covered by the third headnote, with what has been said above under the first head of this opinion. Judgment reversed.

(94 Ga. 500)

#### DOBBINS v. BLANCHARD et al.

(Supreme Court of Georgia. April 16, 1894.)  
LIABILITY OF WIFE ON JOINT NOTE — POWER OF HUSBAND AS WIFE'S AGENT—EVIDENCE.

1. A joint note and mortgage being executed by husband and wife for a consideration in money afterwards to be advanced by a creditor, the wife is bound only to the extent of so much of the consideration as she afterwards received; and in order to charge her with advances made to her husband on drafts drawn and signed by him individually, and not as agent for her, the

creditor must show, not only that he was authorized to act as her agent, but that he so acted in drawing the drafts and receiving their proceeds, or else that the proceeds were actually used for her benefit in the business to which his agency related.

2. A power of attorney, by which a wife appoints her husband to act for her, reciting that she has this day nominated and appointed, and does by these presents nominate and appoint and authorize, him to transact all and any business for her, make for her all necessary purchases for cash or on credit, and execute and sign such notes, mortgages, deeds, and other papers as to him may seem proper and right for the advancement and proper management of her business of every sort, and declaring that she ratifies and confirms all his acts made for her "in pursuance of the aforesaid purposes from and after this date as fully and completely as if done by" herself, is no authority for or ratification of drafts previously drawn by the husband in his own name, and consequently this power will not of itself justify any charge against her for the amount of such drafts; nor will she be chargeable with the amount of similar drafts drawn by him after the execution of such power, without extrinsic evidence showing that he acted as her agent or attorney in drawing the drafts and receiving the proceeds, or, if he did not, that he actually applied the proceeds to her use, and not to his own use.

3. The action being upon a joint promissory note made by husband and wife, evidence that in point of fact the credit was given to the wife only is not competent. This would contradict the written contract on which the action is founded.

4. One of the plaintiffs, testifying as a witness, having stated in his evidence that he was not personally acquainted with the defendant when she shipped certain cotton, and that all communication between them had been by letter, and the letters themselves being in evidence, it was not competent for him to testify that she shipped the cotton for a specified purpose, inasmuch as this purpose could not be known to him except from the correspondence or by hearsay.

5. In an action against the wife upon a joint promissory note made by her and her husband, evidence is relevant which shows that a part of the consideration went directly from the creditor to the husband on a draft or check drawn by him individually, and was used by him or by a firm of which he was a member. As to money obtained by a husband on the joint credit of himself and wife, and applied to his own use, he is the real primary debtor, and the wife is in the position of a surety.

(Syllabus by the Court.)

Error from superior court, Clay county; J. H. Guerry, Judge.

Action by Blanchard, Humber & Co. against Mrs. A. G. Dobbins. Plaintiffs had judgment, and defendant brings error. Reversed.

Following is the official report:

Blanchard, Humber & Co. brought assumption against Mrs. Dobbins on a promissory note dated February 17, 1890, and foreclosed a mortgage given to secure the note, both of which were executed by the defendant and by her husband, Dr. W. O. Dobbins, who died December 16, 1890. The suit was commenced in July, 1891. Both cases were consolidated and tried together, and the jury found for the plaintiffs the balance they claimed to be due on the note and mortgage, \$1,271.59 principal, besides interest and attorney's fees. The defendant's motion for a new trial was overruled, and she excepted.

She set up by her pleas: (1) That the note sued on was not her debt, but that of her husband, and made by Dr. Dobbins and herself to cover whatever advances the plaintiffs might make or had made to her husband during 1890; that at the time of making the note she had not obtained for herself or on her own account any advances or money, nor was she in any way indebted to plaintiffs, nor was Dr. Dobbins at that time indebted to them, except for about \$340.98 previously obtained by him, and of that indebtedness she knew nothing until long afterwards; that she had no voice in fixing the amount of the note; that plaintiffs and Dr. Dobbins were trading and dealing among themselves without any consultation with her, only just as her signature was needed to a note or mortgage to secure the indebtedness of her husband; that he was a physician, doing a large and successful practice, and that it was only a device, to secure the drafts to be drawn by him for his business ventures, that her signature to the note was required and given. (2) At no time has she obtained money or anything else of value from plaintiffs before December 25, 1890, after which date she obtained at different times the aggregate amount of \$1,366.89, and from January 1 to March 1, 1891, she shipped 96 bales of cotton to plaintiffs, who were cotton factors at Columbus, and they, on March 13th, sold same for more than enough to pay said \$1,366.89, and same has been fully paid; and plaintiffs illegally applied the balance of the proceeds of sale to the payment of advances made by them to Dr. Dobbins, and to the payment of drafts and checks drawn by him on them in furtherance of his various individual and personal enterprises. In addition to the general grounds, the motion for a new trial alleges that the court erred in refusing to charge, as requested, thus: "Whether or not Mrs. Dobbins is bound for this debt depends upon whether or not the note was to get money for a venture of her own, or whether she signed as security for her husband in his business or to pay his debts; and, if either of the latter considerations induced her to sign it, she is not liable, and you should so find. I charge you that the test in this case is whether Mrs. Dobbins shared in the benefit of said note and mortgage. If she did not share in the consideration, she is not bound." The following instructions to the jury are assigned as error: "If you believe this was Dr. Dobbins' debt created by him, and she signed it as security for him, you should find for the defendant; but if you should believe it was a joint debt of her and her husband together, you should find for the plaintiffs." The movant alleges that the court gave the jury no other instructions as to her liability on a joint debt. "If you should believe it was a debt created by Mrs. Dobbins, and the credit given to her, and not the husband, and she signed the note and mortgage for the

amount, you should find for the plaintiffs. If she ratified the acts of her husband by signing the note and mortgage, and borrowed the money, you should find for the plaintiffs, no matter where the money went. If the husband drew the money out by drafts, and she afterwards ratified it by giving him a power of attorney to do so, she would be bound. To render the note void, it becomes the duty of the defendant to show that Mrs. Dobbins did not contract this debt either by herself or through her husband, or in connection with him, or that it was his debt secured by her. If at the time Dr. Dobbins was acting for his wife, doing so as her agent, with her knowledge and authority, and if she ratified his acts by entering into a note and mortgage, she would be bound by it, and the jury should find for the plaintiffs."

Two grounds of the motion assign as error that the court failed and omitted to construe the power of attorney from Mrs. Dobbins to Dr. Dobbins, and failed to call to the attention of the jury that the power contained words of limitation, and made no reference to the power in charging the jury, except in the instruction excepted to (already set forth), wherein the power is spoken of as a ratification of the drawing of money by Dr. Dobbins. Plaintiffs' counsel argued, in conclusion, that the power was a ratification of all the acts of Dr. Dobbins before and after its execution. This power was dated March 22, 1890. It states: "That I do nominate and appoint and authorize my husband, Dr. W. O. Dobbins, to transact all my business for me; and to that end and purpose he is hereby authorized to make for me all necessary purchases, for cash or on credit, and to execute and make and sign such notes, mortgages, deeds, and other papers as to him should seem proper and right for the advancement and proper management of my business of every sort or character; and I hereby ratify and confirm all the acts of said Dr. W. O. Dobbins made for me in pursuance of the aforesaid purposes, from and after this date, as fully and completely as if done by myself." In connection therewith the plaintiffs introduced a letter from themselves to Dr. Dobbins, dated March 14, 1890, stating: "We notice that your drafts are signed by yourself. We are keeping the account against Mrs. Dobbins. Hence it has occurred to us that, as a matter of business, we would ask Mrs. Dobbins to send us in writing a power of attorney to you, showing that you have full power to make drafts and transact this business, etc. We know that you have, and that if you live there will be no trouble; but, as before said, this is the business way to do it." Another ground is that the court failed and omitted to charge that, before she could be bound by any act or words of apparent ratification, the jury must believe that she was fully informed and knew all about her liabilities, her rights,

and the demands against her, although the facts in evidence brought up that issue, and the jury were not instructed at all thereon by the court. Further errors are assigned on the court allowing Blanchard, one of the plaintiffs, to testify that they gave the credit to Mrs. Dobbins, although he admitted that they and their agents never had any communication, correspondence, or negotiations with her about the matter, except by letters from her husband, the power of attorney, and the note and mortgage. The objection to this testimony was that the whole matter was in writing, and that Dr. Dobbins was dead. Also in allowing the same witness to testify that Mrs. Dobbins shipped the 96 bales of cotton to plaintiffs for the purpose of paying this debt she created under this note and mortgage; the ground of objection being that the witness had stated he did not know Mrs. Dobbins, and whatever transactions occurred between them were in writing, there being no showing or claim that any letter or paper was lost or mislaid. Error is assigned on the ruling out of the testimony of Wimberly, a witness for the defendant, under the following circumstances: He testified that he was a member of the firm of W. O. Dobbins & Co., and that about May 23, 1890, Dr. Dobbins sent a check on plaintiffs for something over \$200 for the benefit of the firm to the Terry Manufacturing Company. Witness never saw the check. The court sustained an objection to this testimony, stating that "defendant had better show the check." Defendant's counsel stated that they had served plaintiffs with notice to produce this check. Plaintiffs' counsel stated that they had produced every check they had been called on to produce. Then defendant called Blanchard, one of plaintiffs, who testified: "I expect we have the check you are inquiring about, and am willing to admit the check was drawn on the order of Dr. Dobbins. The check is either here or in Columbus. It was our check on the bank. The bank paid the check before it came back to me as a voucher. Defendant did not call on us for checks." Wimberly was then recalled, and testified that the money that paid the claim of the Terry Manufacturing Company against the firm of W. O. Dobbins & Co. did not come out of the firm. To this plaintiffs objected, because irrelevant, and the objection was sustained.

J. D. Rambo, F. B. Dillard, and Harrison & Peeples, for plaintiff in error. W. C. Worrell, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 519)

GRESS LUMBER CO. v. COODY.

(Supreme Court of Georgia. April 23, 1894.)  
DEEDS—SUFFICIENCY OF DESCRIPTION—TRESPASS  
—EVIDENCE.

1. A deed which conveys 134 acres on the north side of a lot of land, described by its num-

ber, district, and county, the lot being by statute a square, is sufficiently certain to embrace such a parallelogram as would result from drawing a line across the lot, parallel with its northern boundary, so as to cut off 134 acres.

2. A lease which specifies that it is to embrace as many as 50 lots of land within certain described boundaries may be applied by parol evidence to particular lots within those boundaries, notwithstanding the boundaries may comprehend more than 50 lots; the assignee of the lessee having entered under the lease upon the premises now in controversy, and the lessor, so far as appears, not contesting his right so to enter.

3. Deeds and other writings applicable to the matter in issue, and broad enough in their terms to comprehend the premises in dispute, though not describing them specifically, were admissible in evidence in connection with the parol testimony offered therewith.

4. Had the defendant proved that the plaintiff's predecessor in title had, before the plaintiff purchased, sold and conveyed the timber upon the premises, the plaintiff's knowledge of the fact at that time would have been relevant testimony; but for lack of this preliminary evidence it was irrelevant when offered.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Action in trespass by S. B. Coody against the Gress Lumber Company. Plaintiff had judgment, and defendant brings error. Reversed.

The following is the official report:

Coody sued the Gress Lumber Company in an action for trespass alleged to have been committed from December 1, 1886, to August 2, 1887, the date of bringing suit, by cutting and carrying away the pine timber on 134 acres of lot of land 174 in the Twentieth district of Dodge county. Verdict and judgment for \$268 in favor of the plaintiff were rendered on January 10, 1893, and the defendant excepted to rulings of the court at the trial.

Plaintiff introduced a deed to himself from Elijah Jones, dated December 4, 1885, and recorded in the same month, for "one hundred and thirty-four acres of land on the north side of lot number one hundred and seventy-four." Defendant objected, on the ground that this description was insufficient, but the objection was overruled. Plaintiff testified: "I went in possession of the land mentioned in the deed before I bought it. Was in possession under this deed. Put a clearing on it. Also a barn and dwelling, in January, 1886. Had ten or twelve acres cleared in spring of 1886. Moved on it in October, 1886. Had tenant in possession after February, 1886. Gress cut the timber in December, 1886. Began after Christmas, and finished about the time this suit was brought. The timber they cut on my 134 acres was worth \$300, and I was damaged that much by their cutting it. They cut it without my consent. I bought it specially for the timber. No one else on the land. I was in possession when Gress cut the timber. I notified the hands, and afterwards Gress, not to cut it, but they did so. I notified them to stop." Handley

swore that he knew the land and timber on the 134 acres claimed by plaintiff on lot 174, and the timber defendant cut and carried therefrom was worth from \$250 to \$275. Defendant moved for a nonsuit, and the motion was overruled.

Defendant offered in evidence a lease contract between McAthur & Griffin and A. B. Steele & Co., dated September 20, 1881, reciting that McAthur & Griffin, in consideration of \$400 per lot for all timber suitable for the manufacture of lumber, shingles, etc., thereon, have sold to Steele & Co. the timber upon as many as 50 lots of land embraced in the Twentieth district of Dodge county, "to begin one lot above the district line between the 15th and 20th districts, and to go as high as one lot above station 14; and thence along the original land line towards the Ocmulgee river, to the corners of lots 205 and 216; and thence at right angles along the original line, in a south-east direction, to within one lot of the district line between the 15th and 20th districts; thence along the original land line back to the Macon & Brunswick Railroad; thence up the southwest side of said railroad to one lot above station No. 14"; further agreeing that Steele & Co. shall have 20 years from date within which to finish cutting the timber upon said lots, and that they shall pay \$1,000 cash, three payments of \$3,000 each at one, two, and three years from date, and two payments of \$4,000 each at four and five years from date. This contract was not recorded, but its execution was proved; and J. A. Wooten testified for defendant that the lot in controversy was embraced in the territory described therein. He did not know the numbers of the lots embraced in the territory therein described that were to be cut, nor the numbers of those that were not to be cut, nor whether defendant cut the timber on the 134 acres claimed by plaintiff. He knew the boundaries in the lease. There were at least 75 lots in said boundaries, and lot 174 is within the same. The court rejected the lease on the ground that it was void for want of description, and the lot in controversy was not described therein; and held that it was not competent to prove by parol that the timber on said lot was conveyed or intended to be conveyed by the lease, nor that defendant cut the timber on said lot under said lease, or paid for it, as therein provided; but that all these facts would be shown by the lease itself. Defendant offered in evidence a bond for title from A. B. Steele to G. V. Gress, dated January 26, 1885, the execution of which was duly proved, conditioned to execute to Gress or his assigns a good and sufficient title to all the right, title, and interest of Steele (the same being a two-thirds interest) to all the property in Dodge county owned by Steele and Gress in the firm name of A. B. Steele & Co., consisting of their leases, uncut timber,

buildings, machinery, etc., and all other things used in or connected with the business carried on by A. B. Steele & Co., except notes and accounts, upon condition that Gress assume and comply with all outstanding contracts, and assume and pay all the indebtedness from said firm as it may fall due to McAuthur & Griffin for land and timber, for \$40,000 to be paid in monthly installments, with interest, etc. Also the deed made in pursuance of this bond, dated February 17, 1886, properly witnessed, and recorded March 23, 1886, for the same property as set forth in the bond for title. Also deed from G. V. Gress to J. C. Williams and J. W. Pope, dated February 17, 1886, properly witnessed, and recorded March 23, 1886, conveying a third interest in the property mentioned in the bond for title and deed from Steele to Gress. Also deed from Gress, Williams, and Pope to the defendant, dated February 17, 1886, properly witnessed, and recorded March 23, 1886, conveying the interests of the vendors in the property mentioned in the deed and bond for title from Steele to Gress. In connection with these papers, defendant offered to prove by Wooten that the land in controversy was cut and paid for by defendant under said bond and deeds; that it was embraced therein, and in the lease from McAuthur & Griffin to Steele & Co., and that defendant paid McAuthur & Griffin for the timber on said lot under said lease, bond, and deeds. The court rejected this testimony, and ruled out all the papers so offered, on the same grounds as those on which the lease and the testimony offered therewith were rejected. Sapp testified that the timber on the 134 acres was not worth over \$150 when defendant cut it. Some of it had already been cut off by witness. Defendant offered to prove by him that plaintiff knew, when he bought the land in controversy, that the timber had previously been sold by his predecessor in title to those under whom defendant claims, and that he knew when he bought the land he was not buying the timber, because it had previously been sold, and that he was only buying the soil. The testimony was rejected on the ground that defendant had not shown any written evidence of title to the timber.

De Lacy & Bishop, for plaintiff in error.  
Roberts & Smith, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 560)

**CENTRAL RAILROAD & BANKING CO.  
OF GEORGIA v. NEWMAN.**

(Supreme Court of Georgia. June 25, 1894.)  
ACCIDENT AT RAILROAD CROSSING—MUTUAL NEGLIGENCE.

1. Where the injury complained of was the result of mutual negligence by the plaintiff's servant and the defendant, there can be no re-

covery, unless the servant was less in fault than the defendant.

2. When the defendant's wrongful act was not only a failure in diligence, but was willful, or so grossly negligent as to be wanton and reckless, the mere failure of the plaintiff or his servant in the exercise of ordinary care will not defeat a recovery.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by M. Newman against the Central Railroad & Banking Company. Plaintiff had judgment, and defendant brings error. Reversed.

The following is the official report:

Action by Newman against the railroad company for killing a horse and destroying a baker's delivery wagon and harness and a load of bread, laying damages at \$1,000. The jury found for the plaintiff \$322.80, and the defendant excepted to the denial of a new trial. The declaration alleged that the injuries were done on Elm street, a public street in the city of Macon, while the defendant's passenger train was being run at a high rate of speed, in a grossly negligent and reckless manner, without due caution and circumspection, and without conforming to the requirements of law in approaching and crossing a public street or highway. The special grounds for new trial are as follows: "(1) Under the sole defense as stated at first to the court and the jury, that the plaintiff could not recover, because, by the exercise of ordinary care, he could have avoided the consequences to himself, caused by defendant's negligence, the judge erred in charging the jury as follows: 'And further, if the defendant should fail to that extent, but should prove that the plaintiff himself was partly to blame,—partly at fault himself for the injury,—although he might not have been able to avoid it entirely by the exercise of ordinary care, still, if he was at fault partly, and the railroad was at fault also, then the amount of recovery would be lessened by the proportion that the fault of the plaintiff bore to the fault of the defendant. In other words, if the damages were \$500, and they were both, in your opinion, according to the evidence, equally to blame, the plaintiff would not be entitled to recover but \$250; and, if the plaintiff was three-fourths to blame and the defendant was one-fourth to blame, the same proportion would hold good; or, if the plaintiff was one-fifth to blame and the defendant four-fifths to blame, these proportions would still be carried out. You catch the idea: That if you should find that the plaintiff could not have avoided the injury entirely by the exercise of ordinary care on his part, and yet that he and defendant company were both to blame, you would then determine from the evidence the relative degree of their negligence, by the fault which contributed to or caused the injury and damage, and would lessen the plaintiff's recovery according to

the amount of his proven damage, according as his negligence or fault was proportioned to the negligence or fault of the defendant company.' (2) The court charged thus: 'Now, I charge you the law to be that, whatever negligence the defendant company may have been guilty of, unless it amounted to gross and wanton negligence and utter disregard of the right of others, and wanton negligence and gross negligence which amounts to willful misconduct on the part of the agents or employes of the defendant company, whatever their negligence may have been, even though they were negligent, unless it was such negligence as that the plaintiff would not have any right to recover if, by the exercise of ordinary care on his part, he could have avoided any injury consequent upon the negligence of the defendant.' And thus: 'You understand, therefore, that whatever may have been the negligence of this railroad company in this matter, unless that negligence amounted, in your opinion from the evidence, to wanton, willful negligence, or at least to gross negligence that amounts to wanton willfulness, the plaintiff cannot recover, if he could have avoided this collision by the exercise of ordinary care on his part.' The defendant insists that the court erred in qualifying the plaintiff's inability to recover in case he could have avoided the consequence of defendant's negligence by ordinary care, by the exception, unless it was gross and wanton negligence or willful negligence, because there was no evidence that there was any wanton or willful negligence or gross negligence on the part of the defendant, and because the statute makes no such exception or qualification in favor of the plaintiff's right to recover if he could have avoided the consequences of defendant's negligence."

R. F. Lyon, Steed & Wimberly, and John R. Cooper, for plaintiff in error. Jas. A. Thomas and Benj. B. White, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 553)

#### SIMS v. LIDE.

(Supreme Court of Georgia. June 18, 1894.)

VALIDITY OF CONTRACT TO CONVEY LAND—ENFORCEMENT.

A contract under seal, to convey land to another upon the payment by him of a stipulated price, provided such payment be made within six months of the date of the contract, is obligatory, if supported by a consideration of five dollars actually paid by the obligee to the obligor. After the former has made his election to pay the stipulated price, and has actually tendered the same within the time specified in the contract, and demanded a conveyance, there is no want of mutuality, but both parties are bound absolutely, and specific performance may be en-

forced at the instance of the obligee, suing in behalf of a third person, to whom he has sold all his interest in the premises, or in the contract sought to be enforced, such assignee being a co-party plaintiff, as usee.

(Syllabus by the Court.)

Error from superior court, De Kalb county: Richard H. Clark, Judge.

Action by R. L. Sims, for the use of one Webster, against Mrs. M. A. Lide, to enforce a contract to convey land. There was a judgment for defendant, and plaintiff brings error. Reversed.

The following is the official report:

The declaration of Sims, for the use of Webster, against Mrs. Lide, alleged: On December 7, 1889, Mrs. Lide entered into a written contract to make Sims a good and sufficient title to certain lands, described, upon which she then resided and now resides, on condition that Sims should pay, or cause to be paid, to her, within six months from that date, \$4,000; that on April 22, 1890, relying upon this contract, for a valuable consideration, he contracted with Webster to sell him all the interest he (Sims) had in the land by reason of the contract; that, in compliance with his contract with Mrs. Lide, he (Sims) caused the sum of \$4,000 to be tendered her May 28, 1890, and a deed to be demanded, whereupon she stated that she was willing to sign the deed, but, being instructed by her husband (S. W. Lide, Sr.), he being then present, not to abide her contract, she refused to execute the deed or receive the money, which money was tendered to her, and the execution of the deed demanded of her, at her residence on the premises. He prayed for such verdict, order, or decree as might be necessary to compel her to perform the contract, and to do as might otherwise to justice appertain. Attached to the petition was a copy of the contract. It stated that, in consideration of five dollars "to me in hand paid, I hereby agree" to make Sims a good and sufficient title to the place "upon which I now reside" (describing it), upon condition that Sims pay or cause to be paid "to me [S. W. Lide, Sr.] \$4,000 within six months from date." The contract was dated December 7, 1889, and signed, "M. A. Lide." Defendant moved to dismiss the declaration, because (1) it did not set out that the contract was based on a consideration; (2) the contract provided that the money therein agreed to be paid was to be paid to S. W. Lide, and not to defendant; (3) there was no mutuality in the contract, plaintiff not having signed it; (4) no assignment of the contract to the usee was alleged.

Haygood, Lovett & Plyer and Candler & Thomson, for plaintiff in error. J. A. Anderson and John S. Candler, for defendant in error.

PER CURIAM. Judgment reversed.



(84 Ga. 295)

## NIGHTENGALE et al. v. STATE.

(Supreme Court of Georgia. March 5, 1894.)

## LARCENY—WHAT CONSTITUTES—DESCRIPTION OF PROPERTY—REASONABLE DOUBT—INSTRUCTIONS.

1. An indictment for stealing a cow sufficiently designates the species to which the animal belongs, though, in lieu of the word "cow," it uses this phraseology: "An animal of the female sex, and of that species of animals known as 'cattle.'"

2. If, on a trial for larceny, the jury have no reasonable doubt as to the identity of the animal alleged to have been stolen, or as to any other essential fact involved in the commission of the offense, it will be no cause for acquittal that they entertain a reasonable doubt as to the truth or accuracy of some of the descriptive terms applied in the indictment to the animal. Although a needlessly minute or comprehensive description must be proved as alleged, the superfluous elements need not be established with the same degree of certainty as is requisite touching the essentials of the case.

3. Where one kills a cow not intending to steal it, he is not guilty of cattle stealing, although immediately afterwards the animus furandi enters his mind, and he thereupon steals and appropriates the carcass.

4. Though open to verbal criticism, the charge of the court touching the evidence of an accomplice was substantially correct.

5. The charge of the court on the subject of confessions was erroneous as applied to the facts of the case.

(Syllabus by the Court.)

Error from superior court, Camden county; J. L. Sweat, Judge.

Tony Nightengale and another were convicted of larceny, and bring error. Reversed.

The following is the official report:

Tony Nightengale and Elijah Miller were indicted for simple larceny. They demurred to the indictment, and the demurrer was overruled. They were found guilty, and their motion for new trial was overruled. They excepted to both rulings. The indictment alleges that the defendants, on September 6, 1892, in Camden county, "one animal of the female sex, and of that species of animals known as 'cattle,' red in color, marked crop in each ear, and branded with the letter P, of the personal goods of D. R. Proctor, and of the value of \$12, unlawfully, wrongfully, and fraudulently did take and carry away, with intent to steal the same." The grounds of the demurrer are, in brief, that the indictment alleges no offense, and that the description of the property alleged to have been stolen is insufficient. At the trial, D. R. Proctor, the prosecutor, testified: "On or about the date named in the indictment, I owned a red cow bearing the earmarks therein described, which ranged about the premises of Israel Littlefield. She was worth \$15. About that time she disappeared, and I have not seen her since. A short time thereafter notice came to me that a cow had been butchered upon Littlefield's premises, and about 60 yards from his residence. I saw signs of a cow having been butchered. This was in Camden county. I own about 250 head of

cattle, among them a number of red cows. I remember distinctly having seen one of my red cows around Littlefield's premises. That is the cow which disappeared. From time to time numbers of my cattle disappear. I cannot say by what means. Some may be snake-bitten; some perish by the inclemency of the weather. My brand is the letter P. I cannot say that this particular cow was branded. All of my cattle are not branded. Some of them are, and some are not. Those not branded usually range in a different neighborhood than that where this cow was killed. Soon after the disappearance of this cow, I had the defendants arrested, and charged them with larceny of this animal. They were bound over to answer the charge, and some time thereafter they came to me, and asked me to let the matter be settled. I declined to do this, and told them I believed they stole my cow. They made no reply to this statement, but simply said it was hard that it could not be settled. All they said to me was said freely and voluntarily, and without the slightest hope of reward or remotest fear of injury from me to induce this statement." Israel Littlefield testified: "In September, 1892, one of Proctor's cows, a red cow, bearing the earmarks with which he marked his cattle, ranged upon my place, and got to breaking into my crop. One day she broke in, and I could not run her out of the field. I was feeble, and had no one except my little granddaughter, whom I sent after Tony Nightengale to come up and run the cow out. Tony soon came, bringing his gun, and he shot the cow in the field, and killed her. I did not know he was going to kill her when he came. Did not tell him to do so. He went off, and in about an hour returned with Elijah Miller, and they skinned the animal, gave me some of the meat, and took the balance off themselves. I gave no information of the circumstances until Abe Moody came and told me he had heard about beef being in the neighborhood, and thought that I was connected with the killing of the cow, and that I had better tell about it. I then told him what I have told here. I am a very old negro, about 100 years old. I do not know whether this cow had any brand on it. Did not look to see." The defendants each made statements that they had nothing to do with the killing of the cow, and knew nothing about it until several days afterwards, when they were arrested.

The motion for new trial alleges that the verdict is contrary to law and evidence, and without evidence to support it, and sets forth the following special grounds: (1) Refusal to charge: "In order to convict Tony Nightengale and Elijah Miller, the defendants in this case, it is necessary to prove to a moral and reasonable certainty, and beyond a reasonable doubt, each and every of the material allegations as they are laid in the indictment,

including all of the descriptive averments of the animal alleged to have been stolen; and if the evidence should fail to prove to a moral and reasonable certainty, and beyond a reasonable doubt, that the animal was branded with the letter P, as alleged in the indictment, both of the defendants should be discharged and acquitted, although all of the other material averments should be so proved." (2) Refusal to charge: "If it shall appear from the evidence that Tony Nightengale shot the cow, and afterwards went off and got Elijah Miller to assist in skinning the cow, then Miller could not be convicted under this indictment, unless it shall appear that he was with the other defendant, prior to the killing of the cow, engaged in the execution of a common criminal design to take and carry away the cow with intent to steal the same; that, if he had no connection with the criminal design of Tony Nightengale until after the cow was killed and appropriated by Nightengale, then, under this indictment, he could not be convicted, and the jury must acquit him." (3) The court charged, touching the testimony of Littlefield: "If you shall find that these defendants are guilty of the offense charged against them,—simple larceny,—as alleged, and that this witness was a participant with these defendants, and engaged with them in the commission of the crime, then he would be an accomplice; and in that event, while you would still be authorized to consider his evidence, provided that you find that he was an accomplice, and weigh it as the evidence of an accomplice, yet if such evidence was unsupported by other corroborating circumstances connecting these defendants with the commission of the crime, sufficient to satisfy you of their guilt, you would not be authorized to convict them." This is assigned as error, because it required the jury first to find that defendants were guilty before they were authorized to inquire whether the witness was an accomplice, because it required the witness to have participated with defendants in the commission of the offense before the jury could find him to be an accomplice, and because the jury were required first to be satisfied from all the evidence, including the testimony of the accomplice, that defendants were guilty, and, after their minds were so satisfied, the finding might be impeached by the further inquiry as to the participation of the witness in the commission of the offense. (4) The court charged: "All admissions should be scanned with care, and confessions of guilt should be received with great caution. A confession alone, uncorroborated by other evidence, will not justify a conviction. To make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or the remotest fear of injury. You will look to the testimony, and, applying these rules of law just given you in charge, determine whether or not

there has been anything in the conduct upon the part of the defendants shown to you amounting to an admission or confession of their guilt. Inquire whether or not they went to the prosecutor in this case, and, if so, the circumstances under which they went there. Scan with care all that occurred on that occasion. Inquire whether or not, in connection with what took place on that occasion, these defendants were charged with having committed this crime. See whether or not, if they were charged with it, they admitted or denied its commission. Was the charge made, and, if so, was it made under such circumstances as called for a denial on their part? If you shall so find, and find that they made no denial, that would be a circumstance which you would be authorized to consider, and in the nature of a confession, subject to the rules of law which the court has given you as to whether or not it was freely and voluntarily made, without the slightest hope of benefit or remotest fear of injury, that being a matter for the jury to determine from the testimony submitted." Assigned as error, because there was nothing in the evidence to justify a charge upon the subject of confessions, because such charge amounted to an intimation by the court that a confession had been made, and because the effect of the charge was to withdraw from the jury the consideration of the real issues made by the defendants, and divert them to an inquiry into the effect and nature of a confession. (5) Because, when the jury was instructed to inquire as to what took place at the time the conversation referred to by the court was alleged to have occurred, the jury should have been instructed that, if the declarations of the defendants were equivocal and capable of two constructions equally favorable to the guilt or innocence of defendants, then the jury should have placed that construction upon such declarations which would be most favorable to the theory of innocence. (6) Error in charging: "If in this case you are satisfied that the description of the stock as laid in the indictment, its flesh-marks and color, marks of the ears or brand, have been proven to your satisfaction,—that is, to a moral and reasonable certainty and beyond a reasonable doubt,—being otherwise satisfied of the guilt of the defendants, you would be authorized to convict them." (7) "The court charges you that if the evidence upon the question of this description of the stock or its identification is not at variance and does not conflict with the description, showing the stock was of another color or different earmarks or of a different brand, but does prove sufficiently that it comes up to the description as made, to satisfy you to a moral and reasonable certainty and beyond a reasonable doubt that the description as laid has been proven, and the stock alleged to have been stolen has heretofore been sufficiently identified, then, being otherwise satisfied of the guilt of these defendants, that

would be sufficient to authorize a conviction." Error, because the jury were thus instructed that, before there could be a variance between the proof and the allegations, the evidence must show that the animal stolen was either of a different color or of different earmarks or of a different brand than as laid in the indictment; whereas the jury should have been charged that if the indictment alleged a particular brand, and the evidence failed to show that the animal was branded at all, this would be a fatal variance.

Spencer R. Atkinson, for plaintiff in error.  
W. G. Brantley, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(94 Ga. 477)

### MARTIN v. WALKER.

(Supreme Court of Georgia. April 9, 1894.)

EJECTMENT—VALIDITY OF DISCLAIMER—MORTGAGE  
LIEN—RIGHTS OF LIFE TENANT.

1. In an action of complaint for land, the plaintiff being an administratrix cum testamento annexo, and being also devisee of the land, a disclaimer of title made by her in both characters, pending the action, no consideration therefor being recited or otherwise appearing, cannot be used to defeat the action; she at the trial resisting the disclaimer, and showing that it was obtained from her in the absence of her counsel, and without advice from him or any one else learned in the law.

2. The owner of land having mortgaged or conveyed the same as security for a debt, and the secured creditor having, at her instance, procured another person to advance the money to pay off the debt, and having surrendered to her (the debtor) the deed or mortgage made as security, the person so advancing the money not taking, or, so far as appears, requiring, any security, the latter obtained no title to the land, and had no right to take possession of it after the death of the owner, as against the legal representative of her estate; nor did a deed to him from her husband, made after her death, although the land was devised to him by her for the term of his own life, entitle the grantee in the deed to retain possession after the death of his grantor, the tenant for life. But, if it affirmatively appeared that the devise for life was assented to by the executor or by the administratrix cum testamento annexo, this assent would assure to the devisee in remainder, and might serve to defeat the present action, to which such devisee is not a party in that character, but only as administratrix with the will annexed.

(Syllabus by the Court.)

Error from superior court, Baldwin county;  
W. F. Jenkins, Judge.

Action in ejectment by Lucinda Martin, administratrix, against Samuel Walker. Defendant had judgment, and plaintiff brings error. Reversed.

The following is the official report:

Lucinda Martin, administratrix cum testamento annexo of Catherine Banks, sued Samuel Walker to recover 220 acres of land. There was a verdict for defendant. Plaintiff's motion for new trial was overruled, and she excepted. The motion was upon the grounds that the verdict was contrary to law and evidence. Plaintiff introduced the fol-

lowing evidence: Eighteen or twenty years ago, Leroy Snipes lived two years in the same house with Andrew and Catherine Banks, on the disputed premises, under contract with the latter, who had sole control of the place. Snipes often heard them talk about the place, both of them recognizing her sole ownership by gift of her mother. Andrew claimed no interest in it. Mrs. Banks lived on the place more than 30 years. It was her land, given her by her mother. Berry King died on the place, working on the land in dispute. Plaintiff lived with Catherine and Andrew Banks many years on the place, Catherine owning and controlling it. Last court (the case was tried in January, 1893), Mr. Brown brought plaintiff a paper to sign, and read it three times to her. She could not understand it, and refused to sign it. He insisted. She told him to bring it over to Mrs. Scoggins, who could tell her what to do. He refused. She told him she could go with him to town and see somebody about it. He refused, and told her to touch the pen, and she touched it. Berry lived on the place about a year. The tax digests for 1884-86 showed that Andrew Banks returned no land for himself, but 320 acres for his wife, Catherine. Plaintiff put in evidence her letters testamentary and the will of Catherine Banks. By this will, testatrix devised all her estate to Andrew I. Banks for life, with remainder in 220 acres to plaintiff, and 50 acres each to Gabe Banks and Alex Banks. The will was probated January, 1888. The death of Andrew I. Banks before suit was admitted. For defendant: A written disclaimer of title for herself, as administratrix or individually, in the disputed premises, signed by plaintiff with her mark. A deed dated in 1890, from Andrew I. Banks to defendant, covering the land in dispute. Two promissory notes for \$100 each, dated February 8, 1886, payable to A. I. Banks, agent or bearer, "for price of land," due, respectively, November 1, 1888 and 1889, and signed by Berry King. Indorsed on these notes was: "Catherine Banks. Teste: The above was signed in my presence, this February 15th, 1887. W. I. T. Ray, J. P." Brown testified: "Carried the paper last court to plaintiff, and got her signature to it, after reading it to her three times. Defendant sent it. I explained it fully to her, and told her there was no use to go to Mrs. Robinson's, because of her great age." Defendant testified: "I am in possession of the land by tenants. Papers shown me were turned over to me by Y. Joel, to whom I paid \$500. Joel held a debt against Mrs. Banks for the amount I paid. I hold the land in payment of that debt. These notes of Berry King were turned over to me by Joel at the same time the deed was made. Joel gave his papers to Mrs. Banks. The land in dispute is the same that Berry King purchased." The disclaimer of plaintiff was thus: "Some negroes brought a message last

court, and I told Whitfield of it. He wrote it out, and I sent it to plaintiff by Brown, to sign." Whitfield testified: "Some time before the death of Mrs. Banks, Y. Joel employed me to collect a debt which she owed him, for about \$500, secured by a deed or mortgage. She was unable to pay it, and came with her husband and Joel to my office, having notes of Berry King now in court and other papers. She had used two notes of Berry King besides those in court. She asked Joel to see if the money to pay her debt to him could not be obtained from Sam Walker. This was done. Joel received the money, and his papers against her were given up. The notes and other papers now in controversy were given up to Walker. These things were done at her request and for her."

C. P. Crawford, for plaintiff in error.  
Whitfield & Allen, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 572)

LEWIS et al. v. EQUITABLE MORTGAGE CO.

(Supreme Court of Georgia. June 25, 1894.)

MORTGAGES—FALSE REPRESENTATIONS AS TO VALUE—PRINCIPAL AND AGENT—NEW TRIAL.

1. Where one is induced to make a loan of money by the fraud of the borrowers and their confederate, and as a consequence of the fraud the security for the loan, taken at the time of the lending, is essentially inadequate and insufficient, the lender, on discovering the fraud, may, without surrendering the security, or offering to surrender it, follow the money lent, or its proceeds, if they can be identified, in the hands of the borrowers, their confederate, or any one for whom the confederate acted as agent while aiding in the commission of the fraud. In such case, the court having jurisdiction of the matter, with power to administer equitable remedies and relief, would control both the security and the proceeds of the loan so as to administer appropriate redress to the creditor, and at the same time protect the legitimate interests and rights of the wrongdoers.

2. Where a person, acting as agent for his wife, commits a fraud in her behalf, and she takes the fruits thereof, although in ignorance of the fraud, she cannot retain them, as against the person defrauded, if the agent himself could not have retained them had they been his own, and his fraud had been committed for his own benefit. Notice to the agent is notice to the principal.

3. Where the written title to land is in the husband, although he may have paid for it with his wife's money, so that he holds it in trust for her, yet, if no trust appear on the face of the title, purchasers for value from him or from his vendee are protected against her equity, unless they had notice of it, actual or constructive, when they acquired their interest and parted with their money. There was not enough evidence (even including all that was offered and ruled out) tending to show notice to make notice a substantial issue in this case.

4. Agents to inspect land offered or about to be offered as security for a loan, the inspection being for the sole purpose of ascertaining its character and value, are not agents of the lender to receive notice of an adverse title or an outstanding equity.

5. An agent to examine, form an opinion, and report to his principal, with no duty to ex-

press his opinion to others, cannot, by his declarations, affect the rights of his principal, or of those in whose behalf the principal was acting.

6. The fraud attributed to certain of the defendants in the plaintiff's petition, being that, for the purpose of procuring a loan, they represented to the plaintiff that they had bought the land in question from another of the defendants for the sum of \$15,000; that they made oath before a notary public that the terms of their purchase were \$8,000 cash and \$7,000 payable when they obtained the contemplated loan; that the representations and oath were false; that the defendants who bought and the one who sold conspired together to defraud the plaintiff by falsely representing that the purchase was for \$15,000, so as to procure a loan on the security of the land for \$8,062.50; that to effectuate their object they conclusively resorted to the artifice of a pretended sale and conveyance by one of the defendants to some of the others for the nominal sum of \$15,000, expressed in the deed, pretending that \$8,000 of it had been paid in cash, when none of it was so paid, but only a very insignificant part was paid at all, and this payment in land; the petition not alleging that the plaintiff did not examine or inspect the land, or have it examined or inspected, nor that the plaintiff, in making the loan and taking the security, relied upon or was influenced by the representation, nor that the oath taken before the notary was ever seen or read by the plaintiff (a corporation), or by any of its officers or agents; and the evidence produced at the trial showing that there was an actual inspection made of the land by persons whose report as to its value the plaintiff had strong reasons to trust, and, in the nature of things, probably did trust, on the faith and credit of a certain corporation who employed these inspectors, and there being no evidence that the plaintiff reposed any trust or confidence whatever in the representations made by the defendants as to the value of the land or as to the cost of it, or the payment of the purchase money, and the value of the security not being affected either with respect to title or any other matter by the question of payment or nonpayment of the purchase money,—it was error to charge the jury, in effect, that if certain of the defendants conspired to borrow the money upon representation that the land was worth the amount represented, when in fact it was worth "a great deal less," and the representation was false, and the money was procured by fraud, the finding on the issue of fraud should be for the plaintiff. This instruction was defective in two respects: it left out the question whether the representation was trusted and acted upon by the plaintiff, and also the question whether the deficiency in value was so great as to render the land inadequate security for the loan.

7. It is no cause for dismissing a motion for a new trial that the brief of evidence, filed in due time under the approval of the court, consisted of a stenographic report of the trial, no motion being made to vacate the judgment and entry of approval. And it is competent, at the hearing of a motion for a new trial, to allow the document previously approved as a brief of the evidence to be amended, even by substituting therefore a more condensed statement of its contents, together with additional matter improperly omitted from the document when it was approved as a complete brief.

(Syllabus by the Court.)

Error from superior court, Gordon county;  
I. W. Milner, Judge.

Action by the Equitable Mortgage Company against J. T. Lewis and others. There was judgment for plaintiff, and defendants bring error. Plaintiff also assigns error to rulings on motions subsequent to verdict. Reversed on defendants' exceptions, and affirmed on exceptions by plaintiff.

The following is the official report:

The Equitable Mortgage Company brought its action against Cornellison et al., and on August 31, 1892, during the August term of the superior court, a verdict was rendered in favor of the plaintiff. During that term defendants moved for a new trial, and on the filing of the motion the court passed an order allowing defendants 30 days in which to prepare and file a brief of the testimony as required by law. Within the 30 days thus allowed, but after the adjournment of the August term, defendants filed the stenographer's report of the oral testimony, the same not having been abridged or condensed as required by law, but being a full report of the questions and answers, rulings of the court, and objections and remarks, and arguments of counsel on questions made before the court during the progress of the trial, and not containing any portion of the documentary evidence or interrogatories read on the trial. This paper was filed under the approval of the court as a brief of the evidence produced on the trial of the cause. At the February term, 1893, the motion came on for hearing, when plaintiff moved to dismiss it, because defendants had failed to file any brief of evidence during the term at which the case was tried, and because the paper filed within the 30 days was not a condensed and succinct brief of the material portions of the oral testimony, and did not include any brief at all of the interrogatories, nor any brief of the documentary evidence read on the trial. Plaintiff's motion to dismiss was overruled. Defendants then offered a paper, and asked to be allowed to file it as a brief of the evidence. To this plaintiff objected, because the time had expired within which a brief of evidence could be filed. The objection was overruled, and the paper thus offered was allowed by the court to be filed in the place of the original stenographer's report. Plaintiff then moved to dismiss the motion for new trial on the ground that the paper thus offered and filed by defendants was not a condensed and succinct brief of the material portions of the oral testimony, and this motion was overruled. To each of the foregoing rulings the plaintiff excepted by cross bill, the court having overruled the motion for new trial.

It appears from the record that on November 30, 1889, the plaintiff made a loan to B. W. Cornellison, W. M. Cornellison, and D. P. Cline, taking their note for \$8,062.50, with interest at 6 per cent., and taking also, as security for the payment of that amount, a deed, under section 1969 of the Code, conveying 990 acres of land in Gordon county. On May 8, 1891, the note having become due, according to the terms of the contract, by reason of default in paying interest, suit was brought by the plaintiff against the Cornellisons and Cline, which was subsequently amended by alleging as follows: The note sued on was given for money borrowed by

said defendants from plaintiff, and was secured by deed to the 990 acres of land (describing it), which lands were conveyed to said defendants by Jackson T. Lewis on November 7, 1889, for the nominal consideration of \$15,000. Defendants, for the purpose of procuring the loan, represented to plaintiff that they had bought the land for that sum from Lewis, and made oath before E. P. Reed, notary public, on November 7, 1889, that they had bought it for \$8,000 cash, and \$7,000 when the loan was closed. Said representation and oath were false. The only consideration paid by said defendants to Lewis, except a small piece of land, worth less than \$1,000, was the \$7,000 procured from plaintiff; and Lewis and said defendants conspired together to defraud the plaintiff by falsely representing that said consideration was for \$15,000, so as to procure a loan on the land for \$8,062.50, by making said false and fraudulent representations. Lewis owned the land, and applied to plaintiff for a loan on it, but, being afraid it would not bear the loan he wanted, he resorted to the artifice, in collusion with said defendants, of selling it to them for the nominal sum of \$15,000, pretending that \$8,000 of it had been paid in cash, when no cash whatever had been paid, and only a very insignificant piece of land had been conveyed to represent the pretended cash consideration. Thus it was represented to plaintiff that \$15,000 had been paid for it, for the purpose of furnishing evidence of a value which was fictitious and false. The lands so conveyed to plaintiff are not worth anywhere near the amount of the loan so made upon them, and are not worth over \$3,000 or \$4,000. Said defendants are wholly insolvent and irresponsible. Lewis got the money so advanced by plaintiff to defendants in pursuance of the scheme between them and him, has invested the same in certain lands in Bartow county (describing them), and has withheld his deed from record. Said property was returned by Lewis as agent for his wife, and plaintiff supposes that he has conveyed it to her for the purpose of further covering up his tracks. Wherefore, waiving discovery, plaintiff prays that Lewis and his wife be made parties defendant, and that, after the lands conveyed to plaintiff by the other defendants shall have been sold, the lands conveyed to Lewis, and by him to his wife, be sold to make up the deficiency. By further amendment plaintiff alleged that the amount loaned on November 30, 1889, was \$7,500, but the note was taken for \$8,062.50, payable five years after date, with interest at 6 per cent., the intention of all parties being to make a loan of \$7,500, with interest at 8 per cent.; and plaintiff prays to recover \$7,500 with interest from November 30, 1889, at 8 per cent., to wit, \$8,250 principal, besides interest.

Lewis and his wife answered severally, admitting that the note sued on was for the loan made to the Cornellisons and Cline, se-

cured by the deed to the 990 acres of land, but denying that Lewis or his wife was in any way a party by act or word in obtaining the loan. They set up that in 1873 Lewis married his wife, who had an estate of her own, inherited from her father, and Lewis being without property or money. After his marriage, he located in Bartow county, and engaged in farming and trading, using his wife's money and property in this business. With her property, and the proceeds thereof, he bought for her and in her name a plantation in Bartow county for \$1,780, taking a deed to the same in her name, where they resided about four years. This plantation he swapped to his father, John L. Lewis, paying him \$300 in addition, for a valuable plantation in Gordon county, taking a deed in his own name; and he made improvements thereon to the value of \$2,500. With her property and its proceeds he bought two other places adjoining this farm, all of which constitute the 990 acres which he sold and deeded to the Cornelisons and Cline, and upon which the loan was made by plaintiff to them. Lewis denies any sort of collusion by himself or on the part of his wife in the sale to the Cornelisons and Cline, or any other way, to procure an unreasonable loan from plaintiff by them. It is untrue that the consideration set forth in the deed from him to them was so stated as to authorize them to procure an unreasonable and unjust loan of money from plaintiff, or to secure any loan whatever. The 990 acres of land conveyed to plaintiff for the loan of about \$7,000 is most valuable, and well worth double the amount of the loan. The actual amount of money received on the loan by the Cornelisons and Cline was only about \$6,615, which sum they paid to Lewis for his wife, and he reinvested the same as part payment of the purchase money of the land whereon his family reside. On these lands he, for his wife, and with her funds, has paid \$7,200, and she now holds a bond, transferred by him to her on August 4, 1890, on demand by her upon him to make said transfer. These lands were bought under a contract of purchase for the sum of \$10,000, which contract was made for and in the interest of Mrs. Lewis, with her funds, with a hope of the proceeds by farming thereon to pay the balance of the purchase money. Lewis in no way assisted the Cornelisons and Cline or any one else in making overvaluation of the lands conveyed by them to plaintiff, and is informed that the valuation of the lands at the time of the loan was made by Messrs. Mundy and Reed, agents sent by plaintiff to the lands, who, after thorough examination of them, made their valuation, and recommended the loan. Lewis has made crops thereon, the net income of which was a good interest on \$15,000, as compared with other lands in Gordon county, and more than the comparative income from the lands whereon he and his family now reside.

Under the evidence and charge of the

court, the jury found for the plaintiff \$7,500 principal, besides interest and attorney's fees. They found against defendant Lewis, and further found in favor of plaintiff a special lien upon the property described in the bond for title taken by Lewis and transferred to his wife. The motion for new trial made by Lewis and wife alleges that the verdict is contrary to law and evidence, and that the court erred in giving the following instructions to the jury: "The burden is upon the plaintiff to show fraud as alleged in the petition, and if you find that Lewis did conspire, participate, or procure or persuade Cornelisons to borrow this money upon representation that the Lewis land was worth the amount alleged in the petition, when in fact you find from the evidence that it was worth a great deal less, and you find that the representation was false, and find that the money was procured by fraud, then you would find in favor of the plaintiff on this issue of fraud. And in that event you will find a verdict such as I will give you before I conclude this charge. On the contrary, if you should find that Lewis did not procure or participate in any fraud that was perpetrated upon plaintiff in this transaction of negotiating this loan, that he was in no way connected with it, but that he in good faith simply sold his land to Cornelison, and Cornelison conducted the negotiations without any promise of participation or solicitation on the part of Lewis, and he received the money in good faith as the purchase money on the place, and you are satisfied of that from the weight of evidence, then you will find in favor of Lewis on this issue. So far as the rights of Mrs. Lewis are concerned in this case, there is no evidence, as I understand it, charging this plaintiff with any notice whatever of any equity of hers in the land, or any property mentioned, and for that reason I direct, so far as that is concerned, a verdict against her, provided you find a verdict against her husband." The errors alleged as to the foregoing charges are that the court assumed that the petition contained a statement of facts that would amount to such fraud, if proved, as would entitle plaintiff to the relief sought; whereas movants insist that the facts charged amounted only to a misrepresentation as to the value of the land upon which the money was loaned, and would not constitute such a fraud as would entitle the plaintiff to the relief sought. Further, in the second part of the charge excepted to, the court intimated its opinion as to what had been proved on the subject of fraud, and charged the jury upon the assumption that a fraud had been perpetrated upon the plaintiff in the negotiation of the loan, which would entitle plaintiff to relief; whereas defendants insist that no such fraud had been proved, and this was a question for the jury, without the intimation of any opinion of the court; that

there was some evidence of notice to plaintiff, at the time of the loan, of the rights of Mrs. Lewis in some of the property, and it was error to direct a verdict against her, instead of submitting this issue to the jury. It is further assigned as error that the court refused to allow G. W. Reed to testify what valuation was put upon the land by Fullerton and Mundy, agents for the company negotiating the loan, at the time they went over and inspected it. Movants insist that said evidence was relevant and material, and that the relations between plaintiff and the Atlanta Trust & Banking Company, by whom Fullerton and Mundy were sent, and for whom they were acting at the time, were such as to authorize the admission of the evidence to the effect that at the time of the examination they valued the land at \$22,000. The court ruled out the statement made by John L. Lewis on redirect examination in behalf of defendant, that "the place I took in Bartow county was his wife's place." Mrs. Lewis contended on the trial that she bought the place on which the loan was made, and paid for it with her own means and separate estate, and that in equity she was entitled to it, though her husband had taken a deed to it in his own name; and that plaintiff had notice of her equity when it made the loan. It is alleged that this testimony was admissible to show her ability to purchase the place, and notice to plaintiff, and that the court erred in ruling it out. Defendant Lewis testified, "I notified the inspector that I was her agent." On motion the court ruled this out, which ruling is assigned as error, movants insisting that the inspector to whom this notice was given was plaintiff's agent, and that the evidence was relevant and material to show notice to plaintiff of Mrs. Lewis' equity in the land on which the loan was made. Two other grounds of the motion set up newly-discovered evidence. A part of this is contained in the affidavit of W. M. Peeples, who seems from the record to have been a witness at the trial. The affidavit states that he was acquainted with and had knowledge of the plans and the original designs of the original organization of the Equitable Mortgage Company and the Trust Banking Company of Atlanta, Ga.; that he had several interviews with Charles N. Fowler, president of the Equitable Mortgage Company, in regard to getting up loans on real estate in Georgia, and was advised by him to get up a joint-stock company, which deponent endeavored to do, and, not having time to complete it, abandoned it; that subsequently the Atlanta Trust & Banking Company was organized, as he understood it, for the same purpose, having negotiated a loan for his wife through that company, payable to the Equitable Mortgage Company; and that he did not communicate any of these facts to any of the parties or their attorneys in this case prior to the trial. The other testi-

mony is in an affidavit of David Lamar, to which is attached a letter dated at New York, December 5, 1892, addressed to David Lamar, and signed by Charles N. Fowler, president, stating, "Your recent favor is at hand, and in reply I have to say that all of our loans taken in your state are through the Atlanta Trust & Banking Company, to which we would respectfully refer you." Lamar swears that this letter was received by him in response to a letter directed to the Equitable Mortgage Company in reference to loans in that company; and that he has knowledge from other correspondence, and from checks signed, which he has seen, that this letter was signed by Charles N. Fowler, president of the Equitable Mortgage Company.

J. C. Fain, W. R. Rankin, E. J. Kiker, O. N. Starr, and W. H. Dabney, for plaintiffs in error. Hall & Hammond and W. J. Cantrell & Son, for defendant in error.

PER CURIAM. Judgment on main bill of exceptions reversed; on cross bill of exceptions, affirmed.

(94 Ga. 413)

NASHVILLE, C. & ST. L. RY. CO. et al. v. CLEGHORN et al.

(Supreme Court of Georgia. March 19, 1894.)

ATTACHMENT AGAINST NONRESIDENT—VENUE.

Section 3272 of the Code, declaring that an attachment against a nonresident of the state, where the debt sworn to exceeds \$100, may be made returnable to the superior court of any county, construed in the light of section 3270, seems to mean that such an attachment may be made returnable to the superior court of any county, without respect to whether or not the debtor has effects therein, either in the form of property subject to levy, or of credits subject to garnishment.

(Syllabus by the Court.)

Error from superior court, Chattooga county; C. G. James, Judge.

Action in attachment by J. S. Cleghorn & Co. against the Nashville, Chattanooga & St. Louis Railway Company and others. From a judgment overruling a motion to dismiss the writ, defendants bring error. Affirmed.

Code, § 3270, reads as follows: "When the plaintiff in attachment wishes to levy his attachment upon property in a different county from that in which the same is returnable, it shall be the duty of the magistrate, or other officer issuing such attachment, upon the request of the plaintiff, his agent or attorney at law, to make out a copy or copies of the original attachment, bond and affidavit and certify the same, officially, to be a true copy or copies; and upon such copies being delivered to any officer to whom the same is directed, of the county where the property of the defendant is, it shall be the duty of such officer to levy, forthwith, the same upon the property of the defendant in such county, and to return the same, with his actings and doings entered



thereon, to the court to which the original attachment is returnable."

The following is the official report:

Attachment was sued out in Chattooga county against defendants, as nonresidents, returnable to Chattooga superior court. Copies of the attachment, together with the affidavit therefor and the bond, were certified as such by the magistrate by whom the attachment was issued, and it was levied by the sheriff of Whitfield county. At the first term thereafter the defendants moved to dismiss the levy, on the ground that the attachment was void, being returnable to Chattooga superior court, when defendants had no property to attach, and none was in fact attached, in Chattooga county, nor was there any personal service on either of defendants; and because the attachment should have been made returnable to Whitfield superior court. The motion was overruled, and defendants excepted.

R. J. & J. McCamy, for plaintiffs in error.  
J. M. Bellah, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 433)

DIOKEN v. WESTERN UNION TEL. CO.

(Supreme Court of Georgia. April 2, 1894.)

QUI TAM ACTIONS—JURISDICTION OF COUNTY COURT.

There being no court in this state on which jurisdiction to entertain suits for penalties is expressly conferred by the constitution or by statute, and, with the exception of equity cases, suits for divorce, and cases involving titles to land, restricted jurisdiction in civil cases being generally with reference to the amount in controversy, and this restriction being applied expressly to justice's courts both in the constitution and the statutes, it follows that an act imposing a penalty of \$100 upon telegraph companies for neglect of duty, and declaring that the same "may be recovered by suit in a justice or other court having jurisdiction thereof," should be construed as intending to confer jurisdiction upon any court whatsoever whose jurisdiction in any class of actions against telegraph companies would extend to suits for \$100. It is no argument against this construction and this interpretation of legislative intent that the attempt to invest justices' courts with jurisdiction was defeated by the constitutional provision which restricts the jurisdiction of these courts, in cases of tort, not only to \$100, but to injuries to personal property; thus excluding penalties for the nonperformance of a public duty. The case of *Solomon v. Telegraph Co.* (decided March 27, 1893) 17 S. E. 265, 92 Ga. 360, reviewed and affirmed.

(Syllabus by the Court.)

Error from superior court, Morgan county;  
W. F. Jenkins, Judge.

Action by W. B. Dicken against the Western Union Telegraph Company. Defendant had judgment, and plaintiff brings error. Reversed.

The following is the official report:

Action against the telegraph company for the statutory penalty for failure to transmit and deliver a message. The suit was brought

to the county court of Morgan county, where the judge, on hearing the evidence and argument, found for the defendant. Plaintiff appealed to the superior court, where defendant filed a demurrer on the ground that the county court had no jurisdiction of the case, it being a suit to recover a penalty, and the jurisdiction of the county court being limited to suits on contracts and torts. The demurrer was sustained, and plaintiff excepted.

W. R. Mustin, for plaintiff in error. Gustin, Guerry & Hall, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 463)

NATIONAL CASH-REGISTER CO. v. ISON.

(Supreme Court of Georgia. April 2, 1894.)

APPEAL—RULINGS ON EVIDENCE—CONTRACT OF EMPLOYMENT—CONSTRUCTION.

1. It is not apparent that the court erred in admitting evidence; the motion for a new trial not disclosing any ground of objection, nor setting out any of the evidence objected to.

2. An agent employed to sell a commodity in a given state, or in several given states, at a fixed percentage on the amount of sales, with a stipulation in the contract that he is to pay all his own expenses, has no authority merely by virtue of his power as agent to employ others at the expense of the company, either to act as subagents or to advertise and commend the commodity in a particular locality or to a particular community. Persons employed by him for such service must look to him for compensation, and cannot charge the company with the same without its consent. The finding of the judge was not warranted by the evidence, and the court erred in not granting a new trial.

(Syllabus by the Court.)

Error from superior court, Spalding county;  
James S. Boynton, Judge.

Action by O. H. Ison against the National Cash-Register Company on account. Plaintiff had judgment, and defendant brings error. Reversed.

The following is the official report:

Ison sued the National Cash-Register Company by attachment on an account. The account does not appear in the record. The case was submitted to the presiding judge for trial without the intervention of a jury. He rendered a judgment for plaintiff for \$78.75 principal, with interest. Defendant's motion for a new trial was overruled, and it excepted. The motion was upon the grounds that the judgment was contrary to law, evidence, etc. Also because the court erred in allowing plaintiff to testify as to sayings of Behre as agent of defendant, the agency not having been proved. It is not stated in this ground what objection was made to the evidence when offered. Also because the court erred in allowing plaintiff to testify as to sayings of Behre, plaintiff having proved that Behre was only special agent for a specific purpose, with limited power and authority, and with no power to make a contract for defendant. Upon the trial plaintiff intro-



duced a contract between defendant and Behre, made in September, 1888. By this contract defendant agreed to establish Behre as "sales agent" for the sale of the register in Georgia and other states, on the following conditions: Continuance in the agency to end at the option of either by a written notice to the other; Behre to have a commission on all registers sold in his territory, whether by him or others, of 30 per cent. of the present printed price list; he to sell all machines at list price, allowing no other discount than the 5 per cent. for cash; no commission to be due him until the purchaser had settled with defendant either by cash or acceptable note; defendant to send bills direct to purchaser, who was to pay defendant direct, and, immediately upon purchaser's settlement with it as above, it to send Behre draft for amount due for commission. Where a settlement was made by note, defendant reserved the privilege of not paying the commission until the note was paid, or until it was satisfied that amount would be paid in full. If the purchaser failed to pay any note, and Behre's commission on the same had been paid to Behre, or credited to his account, commission on the part unpaid to be charged back to Behre. All machines sold to be according to the printed forms sent Behre by defendant, and no sale to bind defendant unless reported to and approved by it, unless by other written instructions. Behre to report immediately all sales and conditions of sales, and to pay his own expenses. Also modification of this contract made February 12, 1889, increasing Behre's commissions to 35 per cent. Also another modification, December 18, 1889, limiting Behre's territory to Georgia, from January, 1890. After introduction of this evidence, Ison testified: "Behre introduced himself to me by presenting his card. This card was: 'The National Cash-Register Company, Dayton, Ohio, U. S. A. Chas. H. Behre, General Southern Agent, 4 E. Alabama Street, Atlanta, Ga. James' Bank.' Said he wanted to sell me a cash register, and asked me to come to the hotel and examine one. Went and examined the register, and finally bought one. Sent a check for it direct to defendant, less 5 per cent. for cash and 5 per cent. as my commission. Behre said he would give me 5 per cent on all registers sold in Griffin in 12 months, if I would talk up the machine. When the 12 months had expired, only one had been sold there. Several months after the 12 months had expired I saw Behre, and between that time and when I again saw him several machines had been sold. I told him I had talked up the register, and did show a good many people how it worked, and thought he ought to pay me something for my trouble. He said he had several registers about sold; and, with the exception of those, he would pay me from that time 5 per cent. on all registers sold in Griffin. He did not say whether he would

pay me or defendant would pay me. He did not mention defendant. I dealt with him by the card he presented, and I dealt with him as agent of the company. There were nine machines sold, at \$175, on which I am entitled to 5 per cent. commissions." One Hudson testified that he bought a register from Behre, paid cash for it, got the regular discount for cash, and also got 5 per cent. to pay Ison. Told Behre that Ison said he was to have 5 per cent. commission on the sale, and Behre said that was right, and allowed it. Witness deducted that amount, and gave Behre a check for the amount, less the discount of 5 per cent. commission. This check was made payable to C. H. Behre, "manager," or order, and was indorsed, "C. H. Behre, Manager." For defendant its president testified: "Behre is sales agent of defendant, and has no authority to bind it in any manner to pay commissions on sale of registers. His sole authority and duty under his contract with defendant is to solicit and forward to it written orders from purchasers for registers. These are sent in by him, and accepted by it, if it is deemed advisable, and purchaser notified directly by it. Past-due papers have sometimes been sent to Behre for collection, but when this is done a special arrangement was made with him as to each collection, and no general authority exists under which he can make collections for it. As its president, I have sole authority to employ agents, and pay them commission, and this I have never delegated to anyone. Neither defendant, nor any one authorized to represent it, ever employed plaintiff to sell registers for it, or ever agreed to pay him a commission. He may have been employed by Behre to take orders, and Behre may have promised to pay him out of his commission allowed him (Behre) by defendant, but I have no personal knowledge that he did so, and defendant was never bound by the contract. It has fifty-one sales agents, who employ about two hundred and fifty salesmen, and a large proportion of the latter are wholly unknown and outside of the control of defendant. We do not know who they are, or what are their contracts with the sales agents. We have therefore taken the precaution in our contracts with sales agents to limit their authority, as nearly as possible, to the simple taking and forwarding orders to defendant. All of the card, except 'Charles H. Behre, General Southern Agent, 4 E. Alabama Street, Atlanta, Ga. James' Bank,' was printed probably at the job printing rooms of defendant at Dayton. If the words in quotation were printed there, it was upon Behre's written order to the printer, and without the knowledge and authority of any officer of defendant. I cannot say what kind of cards defendant furnished to agents at the time Behre was employed. I attach to my answer two different samples of cards which have been in use by Behre, and state that as

soon as it came to the knowledge of defendant that sales agents were using cards representing themselves as 'managers' and 'general agent' they were immediately cautioned not to do so, and to destroy all cards in their possession of that kind. Some time before April 1, 1892, defendant sent Behre a lot of cards upon which his name appears simply as sales agent, and instructed him to destroy all others bearing any other inscription. I cannot give dates more specifically, and cannot tell what kind of cards Behre used at different times. If he used such as are attached, or the one bearing the word 'manager,' which is attached to the answer, it was without authority of defendant, and in plain violation of his contract." Attached were three cards, one of which has been above set out; another was similar, except instead of "General Southern Agent" was substituted, "Georgia Department, Chas. H. Behre, Manager"; and the third was similar, except for the substitution, "Chas. H. Behre, Sales Agent." Defendant introduced a draft drawn April 16, 1891, by it at Dayton, Ohio, payable to its order there, for \$15, drawn on a firm in Griffin, and similar drafts on two others, all marked "Paid" by the parties on whom drawn. The contracts between Behre and defendant, and the two samples of cards attached to the answers of the president of defendant, were produced by defendant in response to notice from plaintiff.

Stewart & Daniel, for plaintiff in error. E. W. Hammond, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 486)

#### BETHUNE v. WELLS et al.

(Supreme Court of Georgia. April 9, 1894.)

CORPORATIONS—ACTION BY STOCKHOLDER—PARTIES.

A single stockholder in a corporation aggregate cannot, without suing in behalf of all the interested stockholders, and allowing them to become coparties, maintain an action against the directors for misfeasance or nonfeasance in their official conduct, whereby the income or earnings of the corporation, and consequently the value of the plaintiff's stock, were less than they otherwise would have been. If the plaintiff was the sole stockholder whose interest was affected by the default attributed to the directors, he should so have alleged in his petition. As the corporation is, in contemplation of law, the party directly and immediately aggrieved by any want of diligence or fidelity in the conduct of its directors, it should be a party defendant to an action brought by the stockholders, in order that the result may bind it, and bar any future action which it might bring for the same cause.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by A. J. Bethune against Elbert L. Wells and others. Defendants had judgment on demurrer, and plaintiff brings error. Affirmed.

The following is the official report:

To the petition of Bethune against Wells and others a demurrer was interposed. The demurrer was sustained, and to this ruling Bethune excepted. The petition alleged: Defendants have damaged plaintiff \$1,000, for that, at the May term, 1881, of Muscogee superior court, the Chattahoochee Building & Loan Association was incorporated, and afterwards said corporation was organized and commenced business. Defendants were chosen directors of the corporation by its stockholders, and accepted the trust, and elected Wells president. Petitioner became a stockholder, in series "A," and owned 10 shares of the capital stock. Under the charter and by-laws, one dollar was required to be paid in each month on each share of stock, and each stockholder was a borrower to the extent of his stock. Under the constitution, rules, and by-laws, each stockholder was entitled to an advance of \$200 on each share of stock owned and held by him, and the sum paid in upon the capital stock should be put up at each regular meeting of the association at the following rates of premium: For the first year, 48; for the second, 44; for the third, 42; for the fourth, 40; for the fifth, 38; for the sixth, 36,—and the stockholder bidding the highest advance on said rates should be entitled to the sum on which his bid was made, but, should no advance be bid, then any stockholder who should bid the fixed rate should be entitled to have the sum so paid in to the extent of his stock. Should there be no bids at any meeting, the names of all the stockholders for each five shares of stock held by them should be placed in a receptacle, from which the president should draw a name, and the stockholder thus designated should be compelled to take an advance on the five shares of stock represented by the stockholders as aforesaid at the then fixed rate, and should have the privilege of his stock warranted of taking all the funds of the association offered at the meeting, and, if all the available funds be not taken by the stockholder so drawn, another name should be drawn, and name after name until all the funds so paid in were disposed of. Should such stockholders or holder fail to take the sum or advance so drawn within one month from the day aforesaid, and give security as required by the constitution, charter, and by-laws, then such stockholders or holder should pay and be charged with the month's interest. When a share of the stock so paid in should become worth \$200, said series of said loans should terminate, or should continue and end with the eighty-fourth installment or payment, so that each share of stock should be worth \$128 at the expiration of said term, to wit, the eighty-fourth installment. Said eighty-fourth month terminated June 7th last, and each share not borrowed upon as aforesaid should have been worth \$128.

It was the duty of defendants, as directors of the corporation, to attend the monthly meetings of the stockholders, and to have monthly meetings of said directors, and dispose of the funds of the corporation as above stated. Defendants neglected their duty as directors, and did not attend the monthly meetings of the stockholders, nor have monthly meeting as directors, and dispose of the funds, as provided by the charter, constitution, and by-laws, so that, at the expiration of the 84 months or 84 installments, such shares of stock were only worth \$93; and, by reason of the negligence of defendants as directors, petitioner's stock was not worth \$128 per share, but only \$93 per share, to his damage \$1,000.

The demurrer was upon the grounds: (1) Want of proper parties defendant. (2) Defendants, as directors, are not liable to respond to plaintiff, as a stockholder, for damages sustained by reason of negligence. (3) The allegations in the declaration show no cause of action against defendants.

Thornton & McMichael and H. C. Cameron, for plaintiff in error. W. A. Little and L. F. Garrard, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 525)

#### DENSON v. DENSON et al.

(Supreme Court of Georgia. April 23, 1894.)

##### EJECTMENT—EQUITABLE RIGHTS OF PLAINTIFF.

1. Where equity, under section 3187 of the Code, would enforce the specific performance of a contract for the sale of land by reason of the purchaser's entering into possession and paying a part of the purchase money, it will secure the enjoyment of the land to the purchaser so long as he is in no default in making payment of the balance.

2. Thus, where a husband and wife, owning land, for the purpose of dividing the same among their children and a daughter-in-law, who was the wife of a deceased son, and allowing each his or her portion, caused the land to be divided into separate parcels, and placed the daughter-in-law in possession of one of them, she then and there agreeing to pay to the owners annually, while they lived, a fixed sum for their support, or such part of that sum as they might demand, and she occupied the land set apart to her for 10 years, complying during this period with the terms of her agreement, upon equitable principles she had the right, as against the owners, to retain possession so long as she continued to comply with such agreement, although the actual value of the premises for rent greatly exceeded the annuity she was to pay; and, the owners having evicted her from the premises, an action by her against them to recover possession for the purpose of carrying out the original agreement was maintainable, the question arising upon a general demurrer admitting the facts as alleged. In such action she would also be entitled to recover any excess of rents and profits received by the owners while they were in possession over and above the amount of the annuities accruing to them during that time.

(Syllabus by the Court.)

Error from superior court, Twiggs county; C. C. Smith, Judge.

Action in ejectment by Mrs. M. E. Denson against J. H. Denson and another. There was judgment for defendants, and plaintiff brings error. Reversed.

The following is the official report:

To the petition of Mrs. M. E. Denson against J. H. and Elizabeth Denson, the defendants demurred generally, and the demurrer was sustained. The petitioner alleges that many years ago she married J. B. Denson, a son of the defendants, and he died, leaving her and two children. Some time afterwards—in 1870—defendants decided to divide their lands, and allow to each child his or her portion, it being agreed on the part of the children that each would contribute a certain sum annually for the support and maintenance of their parents. To this end certain citizens were selected to admeasure and lay off the lands into as many equal parts, according to valuation, as there were children, which being done, the several parcels were designated on slips of paper, which were placed in a receptacle, from which each should obtain his or her portion. The portion drawn by petitioner is described in the petition, and she alleges that she immediately went into possession thereof by her tenants, and used and occupied the same openly, peaceably, and continuously for the 10 years from 1880 to 1889, inclusive, and received the rents therefrom. In receiving said land, she agreed, as aforesaid, to pay defendants, during their lives, \$105 annually as a support, if they should require that much, and, if not, then such sum less as they should desire; and during each and all of the said years she did pay \$105, or just such sum as defendants demanded. For all of the said years she paid the taxes on the land, the same in most instances being returned for taxation by J. H. Denson, or one of his sons as his agent. Said land having been given to her by defendants, and she having faithfully performed all of her obligations touching the same, she bona fide claims title thereto by virtue of said gift, coupled with 10 years' possession, and in consideration of paying the annuity aforesaid. But in 1890 defendants ousted her, and took possession of the lands, and have since had possession, and refused to deliver the same to her, or to pay her the profits thereof. She prays that the lands may be decreed to be her property, and that she may have judgment against defendants for the rents and profits, less the annuity due by her to them, and that a fair and just account of the property on the one hand and annuity on the other may be had, and all the rights of the parties be determined and settled.

L. D. Moore, for plaintiff in error. F. Chambers, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 429)

**BRUMBY v. RICKOFF.**

(Supreme Court of Georgia. March 26, 1894.)

**ATTACHMENT—AMENDING AFFIDAVIT—PRACTICE.**

1. According to the act of October 25, 1889, which declares that all affidavits that are the foundation of legal proceedings shall be amendable to the same extent as ordinary declarations, an affidavit to obtain an attachment, and alleging the ground of attachment to be that the debtor is "about to remove without the limits of the state," is amendable by adding to these terms the words "and county," so as to make it read, "without the limits of the state and county." When so amended on oath, whether the amendment be sworn to orally or in writing, the affidavit should be construed as expressing what was originally intended by the affiant, and, thus construed, is sufficient. There was consequently no error in overruling the certiorari as to points made touching the affidavit.

2. The ground of the attachment having been duly traversed as provided for in section 3312 of the Code, the defendant was entitled to introduce evidence to sustain his traverse, and the presiding justice erred in holding that it was too late to do this after the defendant had replevied the property attached. With respect to this element of the case, the superior court erred in not sustaining the certiorari.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action in attachment by J. W. Rickoff against W. B. Brumby. Plaintiff had judgment, and defendant brings error. Reserved.

The following is the official report:

Attachment was sued out on the ground that the defendant was "about to remove without the limits of the state." Levy was made, and the defendant replevied the property. He also filed a traverse, alleging that he was not about to remove without the limits of the county. At the trial he moved to dismiss the attachment, for the reason that the ground therefor was not one of those laid down in the Code. The motion was overruled, and the plaintiff was allowed to amend by adding the words "and county" after the word "state." The plaintiff proved that the defendant owed him the amount for which the attachment was sued out, but made no proof of the fact stated as the ground of attachment, whereupon the defendant moved to dismiss the case as by nonsuit. The motion was overruled, and the court also refused to allow defendant to introduce evidence to sustain the traverse, holding that the ground of attachment could not be traversed after the property attached had been replevied. Judgment for the plaintiff was rendered, and by certiorari defendant assigned each of the foregoing rulings as error. The certiorari was overruled, and he excepted.

W. S. Rowell and R. T. Fouché, for plaintiff in error. Geo. A. H. Harris, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 487)

**PEED, County Treasurer, v. McCrary.**

(Supreme Court of Georgia. April 16, 1894.)

**STATUTES—SPECIAL ACT—NOTICE OF BILL—TITLE OF ACT—COUNTY INDEBTEDNESS.**

1. According to Speer v. City of Athens, 85 Ga. 49, 11 S. E. 802, the question of the preliminary advertisement of a local bill is for determination by the general assembly before passing the bill.

2. An act which does not purport to amend or repeal any particular law or section of the Code, but which by its title undertakes in general terms "to amend the county court laws as regards Taylor county, and to provide for the appointment of a county solicitor for said county, and for other purposes," is not within the inhibitory words of the constitution, declaring that "no law, or section of the Code, shall be amended or repealed by mere reference to its title, or to the number of the section of the Code, but the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made."

3. Under the title above recited, it was competent for the legislature in one and the same act to provide that the judge of the county court of Taylor county shall discharge all the duties that formerly devolved on the justices of the inferior court as to county business, and have the exclusive control and management of all public buildings and property belonging to the county; also that he might appoint one or more bailiffs to serve writs, precepts, warrants, executions, summonses, and all orders issued by the county court or the judge thereof; also that the governor, with the advice and consent of the senate, should appoint a county solicitor to represent the state in all cases in the county court, the act prescribing his duties, fixing his fees, and providing for their payment. Inasmuch as all these provisions of the act are pertinent and appropriate to a scheme or system of county court law for Taylor county, there is but one subject-matter, and the title is comprehensive enough to embrace all the provisions of the act, and none of these provisions are different from, or at variance with, anything expressed in the title.

4. Although it may be true that the constitution, of its own vigor, does not confer power to borrow money by temporary loans to supply casual deficiencies of revenue, yet where the money of a lender has actually been applied to the legitimate uses of a county,—that is, to objects to which county revenue may rightly be devoted,—it is lawful to repay the loan out of the county treasury when funds for the purpose are on hand, with 7 per cent. interest thereon. In this case no question as to the rate of interest was raised.

(Syllabus by the Court.)

Error from superior court, Taylor county; W. B. Butt, Judge.

Action by J. W. McCrary against A. B. Peed, county treasurer, for mandamus. There was judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Mandamus absolute was granted, requiring the treasurer of Taylor county to pay to the plaintiff the amount of an order in his favor, drawn on the treasurer by the county judge. To this ruling the treasurer excepted. It appears from the petition for mandamus, which was sworn to, that the grand jury at the February term, 1893, of the superior court, recommended that the treasurer (who has been succeeded in office by the defendant) borrow

\$500, with which to defray the lawful expenses of the court; and at the same time the ordinary instructed said former treasurer to do so. At the August adjourned term the grand jury recommended that the amount due the plaintiff be paid, with interest agreed upon. The \$500 was loaned by plaintiff, the county at the time not having the money with which to defray the court expenses, nor, until recently, has it had the money to repay. On January 1, 1894, the judge of the county court drew his warrant on the treasurer, directing him to pay to plaintiff \$548.65; that being the just sum of principal and interest due him. The treasurer refused to pay it. In his answer he says that his reason for so declining was that the county judge had no authority to draw the warrant; that by act of the general assembly approved December 20, 1886, the commissioners of roads and revenues were abolished, and all the powers and county matters of Taylor county were vested in and conferred upon the ordinary, who alone has authority to draw a warrant on the treasurer. He is informed that the county judge claims such power under act of the general assembly approved December 9, 1893; but respondent submits that that act is in conflict with the constitution, and is null and void, it being a local statute, and the following being all the notice of it that was given or published: "Notice is hereby given that the next general assembly of Georgia will be asked to pass the following act: 'An act to amend the county court laws as regards Taylor county, and to provide for the appointment of a county solicitor for said county, and for other purposes.'" This was published in the Butler Herald newspaper of Taylor county for the first time on October 17, 1893, and the legislature convened on October 4, 1893; and said act was not reported to the general assembly by a committee, as provided by section 7, art. 3, par. 15, of the constitution, and was not read and considered by a two-thirds vote of the general assembly. The county court of Taylor county was established in October, 1893, and the county judge commissioned on the 14th of that month. The answer further alleges that, while the ordinary may have instructed the former treasurer to borrow the \$500 to defray lawful county expenses, there is no order or judgment of the ordinary on record permitting or directing that this be done by the treasurer or any other person; and it is submitted that, had such order been made, it would have been illegal and void; for, while the constitution authorizes the general assembly to confer the right and authority of the counties to borrow money, no act of the general assembly has been passed putting said constitutional provision in force.

C. J. Thornton, for plaintiff in error. J. H. Martin, W. S. Wallace, and C. C. West, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 561.)

### FAULKNER v. VICKERS.

(Supreme Court of Georgia. April 30, 1894.)

LIS PENDENS—SPECIFIC PERFORMANCE—DECREE—EJECTMENT—EVIDENCE—HARMLESS ERROR.

1. The pendency of a bill in equity brought by the assignee of a bond for titles against both the maker and the assignor, to compel the maker to convey certain described premises pursuant to the bond, and to set aside a conveyance which he had made to the assignor subsequent to the assignment, the bill, besides praying for this specific relief, praying also for general relief, operated as notice to all the world of the plaintiff's equity; and the doctrine of lis pendens, properly understood and applied, would prevent a stranger from dealing with either of the defendants in the bill, after it was filed and before final decree, so as to acquire a title to the premises from either of them capable of withstanding the force of the decree or frustrating its full legal effect.

2. Upon the facts set forth in the bill, and upon the prayer for general relief, it was competent for the court, after verdict by a jury, to decree that the maker of the bond for titles was in default, but that the assignor to whom he had conveyed should, upon the payment of a sum of money to him by the plaintiff, execute a conveyance of the premises to the latter; and that this decree and the verdict on which the same was based were the result of consent and arrangement by the parties to the cause would make no difference, in the absence of any evidence of collusion or fraud which would affect the conscience of the plaintiff.

3. The decree, in connection with the deed made under it, although that deed did not recite the decree nor make any reference to it, was admissible in evidence in behalf of the plaintiff in an action of ejectment to recover the premises, brought against the grantee in a deed made, pending the bill, by one of the defendants in the equity suit (the one in whom the legal title was when the bill was filed), and, when admitted, was conclusive of the right to recover in that action; the decree not being attacked by any evidence of fraud or collusion on the part of the plaintiff in obtaining it. As the uncontroverted evidence clearly entitled the plaintiff to recover, and as no rightful verdict could possibly have been rendered for the defendant, the court did not err in directing a verdict for the former.

4. Even granting that it was matter of strict right for the defendant to be heard before the jury, any error of the court hampering or cutting off that right, where there was really nothing to discuss, was harmless, and is no cause for a new trial. *Early v. Oliver*, 63 Ga. 2.

In respect to matters of courtesy and decorum as between court and counsel, see *Bank v. Kent*, 57 Ga. 283, 286, par. 25.

(Syllabus by the Court.)

Error from superior court, Irwin county; J. L. Sweat, Judge.

Action in ejectment by Wiley Vickers against John A. Faulkner. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Wiley Vickers sued John A. Faulkner in ejectment for the E. ½ of lot No. 243 in the Fifth district of Irwin county. There was a verdict for plaintiff, and, defendant's motion for a new trial being overruled, he excepted.

The plaintiff introduced a bill filed by Wiley Vickers against J. W. Paulk and James R. Faulkner for specific performance.

In this bill the allegations were that Vickers bought the land from James R. Faulkner in 1885, paying part of the purchase money; that said Faulkner had purchased the land July 1, 1883, from Paulk, giving his note for the purchase money, still unpaid, due January 1, 1884; that July 1, 1883, Paulk gave bond for title to Faulkner for the land, who, in writing, transferred it to Vickers, who bought from Faulkner, paying him part of the purchase money at the time, copy of the bond with transfer being attached to the bill; that Vickers contracted with Faulkner to pay Paulk, and made arrangement with Paulk by which Paulk was to notify Vickers when he required the money, Vickers having made arrangement to get it when so called for; that Faulkner, with fraudulent intent, after transferring the bond to Vickers, went to Paulk, paid him, and got deed from him, both Paulk and Faulkner knowing at the time of Vickers' rights; that Paulk refused to make a deed to Vickers, through Vickers tendered the money and demanded a deed; that Faulkner was insolvent, and refused to make Vickers a deed, but, with intent to defraud, had procured the deed from Paulk, and was trying to set up independent and adverse title. The prayers were that Paulk should make a deed to Vickers in compliance with the bond, and that the deed by Paulk to Faulkner be decreed void and canceled. The bond for title in question was made by Paulk to James Faulkner on July 1, 1883, covered the land in question, and stated the consideration of the transaction to be \$139, payable January 1, 1884. This bond was witnessed by M. Henderson, and on the bond was the transfer: "I hereby transfer my bond to Wiley Vickers. J. R. Faulkner." This transfer was neither dated nor witnessed. The bill was filed in Irwin superior court March 1, 1886. The verdict thereon discharged Paulk from liability, and found that Faulkner, on the payment of \$159.05, should be decreed to make title to the land to Vickers, and that Faulkner have the use of the land free of rent until January 1, 1888. This verdict was rendered at the April term, 1887. The decree, rendered at the same term, conformed to the verdict. Before the above-mentioned documentary evidence was introduced, Clements testified for plaintiff that it was the original bill, verdict, and decree in the case therein mentioned, and that witness was clerk of Irwin superior court at the time said proceedings were filed and the case tried. Plaintiff introduced, also, deed to the premises in dispute from James R. Faulkner to Wiley Vickers, dated April 6, 1887, for \$159.05, no reference being made therein to any decree or verdict; also, deed from James R. Faulkner to John A. Faulkner, dated September 16, 1886, for \$300, not recorded until May 3, 1887, which last-named deed was produced by John Faulkner on notice from plaintiff. Fullwood testified that he was attorney for Vickers in the suit against Paulk

and Jim Faulkner, J. H. Martin representing the defendants; that he wrote the verdict, or dictated it; but afterwards testified that he was mistaken; that Martin wrote the verdict and witnessed the decree; that witness wrote the deed from Jim Faulkner to Vickers, and it was made under the decree; that John Faulkner was present at the trial of the same, as witness understood it; that John Faulkner was present when the deed was written, and was to get the money to be paid by Vickers to James R. Faulkner under the decree; that witness thought John Faulkner agreed to turn over to him the deeds that he held to the land, and surrender up the possession of the same; that the bill, verdict, and decree above mentioned were the original record, the verdict and decree being by the consent of all parties to the case; that the deed from James R. Faulkner to Vickers was executed in the courthouse, immediately after the verdict and decree were rendered; and that the reason it was provided in the decree that possession of the land was not to be given to Vickers until January afterwards was because John A. Faulkner had a crop on the same, and was to have until the 1st of January to gather his crop and move off. Plaintiff testified that he thought John Faulkner was present when the case against Paulk and Jim Faulkner was tried, and understood John Faulkner was consenting to the decree, though he never made any agreement with John about the matter; that John was present on one occasion, and heard witness and Jim talking about the bond for title, this being some time in 1884, and Jim being then in possession of the land; that witness paid the money as directed by the decree, and did not know at the time of the verdict and decree that John claimed any title to the land, and did not know of the fact when witness paid said money; that Paulk was in actual possession of the land when he made the bond for titles to James Faulkner, and James Faulkner held possession of the same afterwards, and was in possession when the bill was filed.

Defendant introduced the regular chain of title coming down to him through J. W. Paulk and James R. Faulkner, Paulk's deed to James R. Faulkner being dated January 25, 1886, for \$275, and James R.'s deed to defendant being as above stated. Defendant testified that he was not present when the verdict and decree or deed was made; that he had nothing to do with the case of Vickers against Paulk and Faulkner, did not consent to the verdict or decree, never received any of the money paid by Vickers, and had nothing to do with the making of the deed; that he never told Fullwood that he would give up his deeds or surrender the land, nor had any conversation with him about the matter, nor any conversation or agreement about it with Vickers; that he bought the land in good faith, giving for it a half lot of land, not knowing of the pendency of the

case of Vickers against Paulk and Faulkner, and at the time he bought it the deed was made him by James R. Faulkner, and all the back deeds then and there surrendered to him, and about a month after that he moved upon the land, and has remained upon it ever since, making permanent and valuable improvements thereon; that he would not have traded for the land unless he had thought he was getting good and perfect title; that he never knew of any outstanding bond for title, or any claim of any one upon the land, when he bought it; that he was not present at Irwin court in March, 1886, when there was a suit of some kind between Vickers and Jim Faulkner about the land, and thought Jim gained it, and thought this ended the matter, but did not know just what kind of suit it was; that while the suit was pending, and at the term of the court it was disposed of, he attended the court, and carried the title deeds; did not know whether they would be needed or not; and that he was a brother of James R. Faulkner. James R. Faulkner testified that John was not present when the verdict or decree was made, had nothing to do with either, was not to get any of the money paid by Vickers, and no such agreement or understanding was ever had about the matter; and that, after the verdict and decree, John said he had bought the land, and was going to hold, as he had bought it in good faith and paid for it. The answer of J. W. Paulk and James R. Faulkner was also introduced by defendant, denying the material allegations in the bill; also, an affidavit of the agent of Vickers made in February, 1886, to dispossess James R. Faulkner, as tenant of Vickers, of the land in question; counter affidavit of Faulkner; and dismissal of proceedings, at plaintiff's cost, March 30, 1886. The grounds of the motion for new trial approved by the court were the general grounds that the verdict was contrary to law, evidence, etc.; also, because the court erred in directing a verdict; because the court erred in allowing Fullwood to testify that the deed made by James Faulkner to Vickers was made under and in pursuance of the decree, over objection of defendant that it was illegal, and adding to and varying the terms of the written contract; error in overruling the objection of defendant to the introduction of the bill, the objections being on the grounds that it was illegal and irrelevant, defendant not being a party thereto, and that the copy of the bond for title attached thereto was not the highest and best evidence in the case, there being no effort to obtain or account for the original, which was the highest and best evidence; and the same was not admissible because the subscribing witness Henderson was not called to prove the same, and there was no evidence of the existence of the original. Other grounds of the motion are covered by the fourth headnote. They are not material here.

Tom Eason and J. H. Martin, for plaintiff in error. E. D. Graham, for defendant in error.

PER CURIAM. Judgment affirmed.

(91 Va. 161)

EASLEY v. VALLEY MUT. LIFE ASS'N.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. March 14, 1895.)

MUTUAL LIFE INSURANCE — WAIVER OF PROMPT PAYMENT OF ASSESSMENTS—HARMLESS ERROR.

1. In an action on a policy of mutual life insurance, plaintiff sought to establish a waiver of forfeiture for nonpayment of an assessment, by showing that defendant had previously accepted assessments after default, both from deceased and others. The evidence showed that deceased was on all such occasions fully aware that he had forfeited his rights, and had applied for reinstatement, with a certificate of good health, and that, as to the others, the payment of delinquent assessments had been made by an officer of defendant as a personal favor, and at his own risk. *Held*, that plaintiff could not recover.

2. Though instructions may be erroneous, a judgment will not be reversed where no prejudice is shown.

Error to circuit court, Augusta county.

Action by Minnie C. Easley against the Valley Mutual Life Association, and, to a judgment in favor of the association, error is brought. Affirmed.

John N. Ople and Martin Williams, for plaintiff in error. Elder & Elder and Geo. M. Cochran, for defendant in error.

KEITH, P. It appears from the record that George W. Easley, on the 28th of May, 1885, received a certificate of membership in the Valley Mutual Life Association of Virginia, by which that corporation, in consideration of the payment of the sum of \$24 at the date of the certificate, and the sum of \$15 annually thereafter for three years, and after the expiration of three years the annual payment of \$6 per year, together with such assessments as might be made against him on account of death of members from time to time occurring, known as "mortality assessments," undertook to pay to Minnie C. Easley, the wife of George W. Easley, at the home office of the association at Staunton, the sum of \$3,000, within 90 days after notice, and the proofs required, of the death of the said George W. Easley. This certificate of membership was issued and accepted upon certain conditions set out in the policy; among others, that if "any dues or mortality assessments on this policy shall not be paid within 30 days from date of notice in person, or from date of mailing same to his address, the consideration of this contract shall be deemed to have failed, the association shall be released from all liability, and all payments heretofore made shall be forfeited." This provision of the policy is in

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



accordance with the seventh clause of the charter of the association, and is the only provision of the charter which need be specifically mentioned. By the seventh clause of the policy, it is provided "that no person, except the president or secretary of the association, is authorized to make, alter, or discharge the contracts or to waive forfeitures"; and this provision of the policy is in accordance with article 20 of the by-laws. George W. Easley died in January, 1890, and his widow, the beneficiary under the policy, demanded of the Valley Mutual Life Association the amount of insurance upon his life, which was refused, and thereupon suit was instituted in the circuit court of Augusta county. It appears that at the time of his death there remained unpaid mortality assessment No. 72, for \$7.11, which fell due on the 31st day of October, 1889, and notice of which was mailed to the plaintiff's intestate at Pearisburg, Giles county, Va., the post office and usual place of abode of the deceased. The defendant claims that, by virtue of the provisions in the charter, the by-laws, and the policy, all benefits which would otherwise have vested in the beneficiary were forfeited, while the plaintiff on her part claims that the forfeiture was waived by the defendant company by its general course of dealing with its policy holders, and especially with the plaintiff's intestate. The acts which are relied upon to prove a waiver, or to create an estoppel, which would debar the defendant from setting up the forfeiture, are that the defendant company at various times extended credit to the plaintiff's intestate; that it had waived forfeitures which had theretofore accrued against him for the failure to pay other assessments in his lifetime, and that by this course of dealing with him, and with others, he had been lulled into false security, and had been induced to rely upon these continued acts of indulgence and forbearance; that the decedent had at all times been able to preserve his rights in this association, and that it would be a hardship and injustice to enforce the forfeiture against his widow, under such circumstances.

The first point presented in this record is as to the ruling of the circuit court excluding a question put to Asher Ayers, one of the defendant's witnesses, by counsel for plaintiff, upon cross-examination: "Did you, upon the advice of Judge Staples, settle the Pritchard and Kingren cases with me, upon which a deduction of \$500 was made, and was not \$1,250 deducted from Mrs. Warren's policy on the life of her husband, and did not the company assess for the full amount?" This was properly ruled out. The by-laws of the company expressly provide "that no question shall be raised as to the right to make or necessity of any mortality assessment made under any certificate of membership, except in the lifetime of the member, and within 6 months from the time when same was made." See,

also, *Crossman v. Association*, 143 Mass. 435, 9 N. E. 753. It was also inadmissible because it does not appear when the transaction occurred to which the question alludes, and it might, therefore, have taken place before assessment 72 became due, or it might have had relation to some subsequent assessment. In any view of it, therefore, the question was too indefinite, vague, and uncertain to be admitted, and was therefore properly excluded.

I will now consider the only evidence which I have been able to discover in the record of the dealings between the defendant and the plaintiff's intestate having the remotest bearing upon the propositions sought to be maintained, or the slightest tendency to prove any such waiver or estoppel as is here invoked. I refer, in the first place, to two assessments mentioned in the letter of Easley dated February 8, 1886, in which he says: "I have received notice of my February assessment on policy No. 9,830. On looking over my papers, I have no receipt for last assessment, nor is the check I drew for same charged to me at bank. Will it be all right to send in check for last assessment, and let the other take chances to turn up? or had I better send amount of both assessments, and, if the other check comes to light, let that then be returned? I wish to be on the safe side. Very truly, Geo. W. Easley." To that letter the company replied, advising him to send check for both assessments, and in accordance therewith, on the 27th of February, 1886, he again wrote to the company as follows: "I inclose check for \$9.48, to cover two double assessments. If the other check ever turns up, it can go to my credit. It has never been sent to bank." It appears, therefore, that on the books of the company Easley was in default for the first of the two assessments mentioned, while in point of fact he had mailed a check for the amount due. This, of course, was an accident or mistake for which he was in no wise responsible, and from the consequences of which the company was bound to hold him exonerated. I do not see that that at all tends to prove the indulgence upon which the plaintiff in this suit relies to overcome the forfeiture, or has any tendency to establish the existence of a credit system between the defendant and the plaintiff's intestate in respect to the payments of assessments due the company.

The next instance of failure to pay promptly occurred with respect to annual No. 1 for \$15, due the latter part of May, 1886. On the 14th of June, 1886, Charles Grattan, secretary of the company, wrote to Mr. Easley as follows: "Mr. Geo. W. Easley, Pearisburg, Giles Co., Va.—Dear Sir: You have failed to remit \$15.00, the amount due for annual No. 1, on your policy No. 9,830. Please remit by return mail, as the payment is past due. Yours, truly, Charles Grattan." To this Judge Easley replied by letter dated 24th July, 1886, as follows: "Mr.



Charles Grattan, Esq.—Dear Sir: I have just returned after an extended trip, and have your postal of the 10th inst. I had no idea of dropping my policy in the Valley Mutual, and, if not too late, wish it reinstated. My health is first rate, and has been. I inclose check for \$19.74, which will straighten me, I believe. I will try and not be guilty of such a piece of negligence again." The only other instance of failure to pay assessments when due occurred in June, 1889. It appears that Mr. Easley had been absent from home, and an annual, amounting to \$6, falling due May 28th of that year, was not paid. On June 14, 1889, the secretary of the defendant company addressed to George W. Easley the following notice: "You have failed to remit \$6, the amount due May 28th, for annual No. —, on your policy No. 9,830, and by the terms of your policy the same is forfeited. If the amount due is paid by the 25th inst., your policy will be reinstated. This privilege is not to be taken as a precedent or right, but as a favor to you, on the understanding that your health is unimpaired, and until the amount is received you stand uninsured. Sign and date the following certificate, and return this card, with remittance. W. B. McChesney, Secretary. I hereby certify that I am in good health and insurable condition." That certificate was signed by G. W. Easley, 24th of June, 1889. Accompanying the return of this certificate is a letter from Mr. Easley, dated Pearisburg, Va., 24th June, 1889, to W. B. McChesney, secretary: "Dear Sir: I don't know how I ever slipped up on my annual for 1889. Fortunately, my health is excellent, and I hope I have not lost anything. I wish I could have my annual made payable at the same time I have to pay an assessment. Can't you move it backward or forward so as to make it hit? I am perfectly willing to change it to 1st May. I inclose health certificate and check \$13, to cover also assessment due 1st of July. Very truly, G. W. Easley."

Now, these letters establish several propositions. They show that he knew the mortality assessment fell due on the 1st of every alternate month; that he knew his policy stood forfeited for his failure to pay his annual; and he knew that it was necessary for him to sign a health certificate in order to be reinstated. There is here no suggestion of waiver or estoppel, but it appears that he understood fully that his restoration to his relations with the company was a privilege granted as a favor to him, and granted only upon the understanding that his health was still unimpaired. Other assessments appear to have been paid promptly up to the one due October 31, 1889. There is also some evidence in the record that with respect to certain policy holders indulgence had been extended upon their annuals and assessments; but it also appears that they were members of the society who lived in

and about Staunton, who were known to the officers, who understood that while their assessments were unpaid they stood uninsured, and with respect to the greater part of them the secretary had made himself personally responsible to the company by carrying assessments for them, and had thereby lost several hundreds of dollars. It does not appear that the indulgence extended to others could have influenced the action of the plaintiff's intestate, because there is no evidence tending to prove knowledge on his part of any such acts upon the part of the company. This being all the evidence upon this point, plaintiff asked the court for nine instructions, which I do not think it necessary to consider in detail. They all present the idea that the defendant company could, expressly or by implication, waive a forfeiture occurring by reason of nonpayment of annuals or assessments on or before the appointed day, or by its acts be estopped from setting up the forfeiture; that the provisions of the charter, of the by-laws, and of the policy declaring forfeiture of policies for the reasons therein, respectively, set forth, were intended for the benefit of the company, and could be by its acts, or by the act of its officers, effectually waived; and that courts will not allow corporations, any more than individuals, to take advantage of their own wrong by accepting the benefits of a particular line of conduct, and then repudiating the obligation which that conduct entails. The defendant, on the other hand, asked the court to instruct the jury that, according to the true construction of the seventh clause of the charter, the failure to pay, or tender to pay, on or before the 31st day of October, 1889, of the assessment then due, caused a forfeiture under the terms of the seventh clause, which it was not in the power of the officers of the defendant association to prevent or waive, whatever may have been their power to have reinsured the life of George W. Easley. As abstract propositions of law, the instructions asked for by the plaintiff could, perhaps, be maintained. In some of them the law is without a doubt correctly stated, and, that being the case, it would be the duty of this court to reverse the judgment of the court below, and award a new trial, were there any evidence in the record upon which those instructions could be predicated. But it seems to us that there is no evidence whatsoever proving, or tending to prove, that there was any waiver, expressed or implied, or any conduct on the part of the defendant company from which such waiver could be inferred; and to have given any of the instructions asked for by the plaintiff would have directly tended to mislead the jury, and they were therefore properly refused. Nor can we give our assent to the law as set out in the instruction granted by the court to the defendant. We think that this provision in the charter, by-

laws, and policies was inserted for the benefit of the company, and, such being the case, we are not prepared to say that where there is evidence proving, or tending to prove, an intention to waive, it is not within the power of the company to do so. On the contrary, the general current of authority seems to be that it may. See *Insurance Co. v. Norton*, 96 U. S. 234; *Insurance Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18; *Insurance Co. v. Eggleston*, 96 U. S. 572; and *Niblack*, Vol. Soc. § 298. But, inasmuch as the plaintiff's case is entirely unsupported by testimony, it would have been within the province of the court, upon the motion of the defendant, to have excluded all that was said by witnesses upon this branch of the case from the consideration of the jury. In any event, had the jury found a verdict for the plaintiff, it would have been the duty of the court to set it aside, and grant a new trial. Conceding, therefore, that it was error to have given the instruction asked for by the defendant, the plaintiff was not prejudiced thereby, and it is not a cause for reversal, the court being of opinion that the verdict of the jury upon the facts was plainly right. The judgment must therefore be affirmed. *Moore v. City of Richmond*, 85 Va. 538, 8 S. E. 387, and cases there cited.

(91 Va. 171)

**JOHNSON'S ADM'R v. CHESAPEAKE & O. RY. CO.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. March 14, 1895.)

**DEMURRER TO EVIDENCE—EFFECT OF—PRACTICE—  
NEGLECTANCE—ACCIDENTS AT RAIL-  
ROAD CROSSINGS.**

1. Either party may demur to the evidence, unless the evidence is plainly against him, or the court doubts what facts should be inferred from the evidence demurred to.

2. Where a party has a right to demur to the evidence, it is the duty of the court to compel the other party to join in the demurrer.

3. By demurring to evidence the demurrant admits the truth of the adversary's evidence, and waives all his own evidence conflicting therewith.

4. It is not negligence to run a freight train through a village of 200 inhabitants at 20 miles per hour, where it is not shown that the train was improperly equipped with brakes and brakemen.

5. Where decedent was killed by a train while attempting, without looking or listening for a train, to cross the track at a place where people were in the known habit of crossing, and he was not seen by those in charge of the engine until it was too late to avoid the accident, the company is not liable, though no signal was given for the crossing, the whistle having been blown before for a station.

Error to circuit court, Albemarle county.

Action by Wiley B. Johnson's administrator against the Chesapeake & Ohio Railway Company for causing the death of decedent. Defendant had judgment, and plaintiff brings error. Affirmed.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Camm Patteson and S. S. P. Patteson, for plaintiff in error. Wm. J. Robertson, Thos. S. Martin, H. T. Wickham, and Henry Taylor, Jr., for defendant in error.

RIELY, J. Wiley B. Johnson was killed on the 30th day of October, 1893, while on the track of the Chesapeake & Ohio Railway Company, by one of its freight trains, and this suit was brought by his administrator to recover damages from the railway company for the death of Johnson. At the trial, after the evidence on both sides was closed, the defendant demurred to the evidence, and the court compelled the plaintiff, against his protest, to join in the demurrer. The amount of damages was thereupon inquired of by the jury, which found a verdict for the plaintiff, and assessed his damages at \$2,900, subject to the opinion of the court on the demurrer to the evidence. The court sustained the demurrer, and gave judgment in favor of the defendant. To this judgment a writ of error and supersedeas was awarded by one of the judges of this court.

The first question presented for review was the action of the court in compelling the plaintiff to join in the demurrer to the evidence. It was earnestly contended by the counsel for the plaintiff in error, both in their printed and oral arguments, that the court erred in compelling the plaintiff to join in the demurrer, and thus take away from the jury, the proper triers of facts, the question of negligence, which was the result of this proceeding. The propriety and validity of the practice of demurring to the evidence is too well settled in Virginia, and has been too often approved by this court, to be now seriously questioned. It was elaborately discussed and maturely considered in *Trout v. Railroad Co.*, 23 Grat. 619, where Judge Moncure, the president of the court, reviewed the cases in Virginia on this subject, sustained the practice, and defined the rules which govern it. It was there held that either party has the right to demur to the evidence, except where the evidence is plainly against him, or the court doubts what facts should be reasonably inferred from the evidence demurred to; and where a party has the right to demur it is the duty of the court to compel the other party to join in the demurrer. The suit of *Trout v. Railroad Co.*, supra, was brought to recover damages for the negligent killing of the stock of the plaintiff by the railroad company, and, like this case, the ground of the action was the negligence of the defendant. It was nevertheless held that this was no reason why a party should not be permitted to demur to the evidence, and that the fact of negligence constituted no exception to the general rule. That case has been repeatedly followed since, and the practice of demurring to the evidence and compelling the demurree to join in the demurrer, unless the case is within one of the two exceptions to the gen-

eral rule, is now firmly fixed in the law. *Clark's Adm'r v. Railroad Co.*, 78 Va. 709, 713. The case under review falls under the general rule and not under either of the exceptions to it, and the court did not err in compelling the plaintiff in error to join in the demurrer.

This brings us to the consideration of the demurrer to the evidence, and the review of the judgment given thereon by the court below. The rule applicable thereto is well settled and familiar. By the demurrer the party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom. 4 Minor, Inst. pt. 1, p. 921; 1 Bart. Law Pr. pp. 676-679; *Trout v. Railroad Co.*, 23 Grat. 619; and *Railroad Co. v. Anderson's Adm'r*, 31 Grat. 812. The evidence shows that Johnson was struck and killed between 9 and 10 o'clock in the morning, on the track of the Chesapeake & Ohio Railway Company, by one of its freight trains, about 15 feet from the place where the public highway crosses the track of the railroad at the depot in the village of Howardsville, in Albemarle county, and where persons on foot were in the habit of crossing the railroad without objection from the company. The track at that place runs nearly east and west, and the train was going east. It was composed, besides the engine and tender, of 45 loaded freight cars and a caboose car. Thirty-two of the cars were equipped with air brakes, which were in good order and working. Ten of the cars were without air brakes, and the four others had air brakes that were not working. The evidence shows that the employees in charge of the train were sufficient to handle it, and that the air brakes on the 32 out of the 46 cars were all that were necessary to give perfect and easy control of the train. It was running on a regular schedule, but behind time. Its speed was variously estimated by the witnesses, but claimed by counsel for plaintiff in their brief to be running from 17 to 20 miles per hour, which was less than the maximum of 24 miles per hour permitted under the rules of the company. It was proved that freight trains habitually pass Howardsville without stopping, running at as high a rate of speed as this was running, and that this train was to pass there without stopping. As was customary, the whistle for the station was blown at the whistling post, about half a mile west of the station; but neither the whistle was again heard by any of the witnesses of the plaintiff, nor was the car bell heard by them to ring as the train approached the public crossing and the station at Howardsville, before Johnson was struck; while, on the oth-

er hand, the officers and men in charge of the train testified that the whistle was not only blown for the station, as was usual, but that, after coming in sight of the signals displayed from the telegraph office, the whistle again gave two sharp blasts to indicate that the track was clear, so that the train could continue on. At the time the whistle was blown for the station, Johnson was standing at the gate of his son-in-law, S. S. Bugg, where he had been talking with Eldridge Turner, who walked to the south side of the track, and engaged in conversation with Dr. Nash and Joe P. Noel, two of the witnesses for the plaintiff. Near Johnson and Turner, where they were talking, was the buggy of a Mr. Pulling, with a young man sitting in it. Pulling was on the south side of the track, and when he heard the whistle he called to the young man to drive to where he was, that he might help him to hold the horse while the train passed. The young man drove the horse and buggy to where Pulling was, and Johnson remained standing at the gate. Bugg's gate was, according to measurement, 105 feet north of the track of the railroad where the public road crosses it, and from the gate to the crossing the view of the track and of any train moving upon it from the west was wholly unobstructed for 265 yards, so that by the use of his faculties Johnson could have clearly seen the train as it approached the crossing, and the engineer and fireman could have seen him for the same distance, after he came within 15 or 20 feet of the track, if they were at their posts, and performing their duties. After Johnson was seen standing at Bugg's gate, his movements seem not to have been observed by any one until the train was approaching the public crossing and station, when he was seen walking slowly in the direction of the track. He continued to walk on towards the track, and stepped upon it, as if to go across it. He was then in front of the train as it approached the crossing, and before he could clear the track he was struck, and instantly killed. These were the circumstances, so far as they are material, under which he met his death, and the inquiry is whether the defendant is liable therefor in damages. If the death of Johnson was caused solely by the negligence of the defendant, there can be no doubt of the right of the plaintiff to recover damages therefor. If, however, the proximate cause of his death was his own negligence, concurring with the negligence of the defendant, there can be no recovery. But, although the deceased may have been guilty of negligence, and that negligence may, in fact, have contributed to the accident, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have prevented the injury, the action may be maintained. *Railroad Co. v. Anderson's Adm'r*, 31 Grat. 812; *Railroad Co. v. Morris*, Id. 200; *Dun v. Railroad Co.*, 78 Va. 645; *Rudd's Adm'r v. Railroad Co.*, 80 Va. 546; *Farley's*

Adm'r v. Railroad Co., 81 Va. 783; and Railroad Co. v. Barksdale's Adm'r, 82 Va. 330.

It was claimed by the counsel for the plaintiff in error that the defendant was negligent in running a train as long and heavy as this one was through a village the size of Howardsville, which contained from 150 to 200 inhabitants, at a high rate of speed, without having more than two brakemen, and air brakes on all the cars. There was no evidence on the part of the plaintiff to show that the train did not have the necessary brakemen and air brakes to control it as occasion or emergency might require, or that it was not under perfect control; while it was proved by the defendant that the brakemen and the air brakes were fully sufficient to handle and control it. But the main contention of the counsel for the plaintiff was that the defendant was guilty of negligence, in that, as they claimed, the whistle was not blown and the bell rung as the train approached the crossing. While, at the time this accident happened, there was no statute in this state which required the whistle to be blown as a train approached a public crossing, as is now the case (act approved March 5, 1894), yet it was then required that a railway train should give notice of its approach to a public crossing, and, if it failed to do so, and injury resulted from such failure, it would be liable therefor. It is not shown that the approach of the train to the crossing where Johnson lost his life was not announced both by the whistle and bell. The witnesses for the plaintiff only testified that they did not hear either the whistle or bell. Whether this was from inattention, or because it was not done, does not appear from the evidence of the plaintiff; while the engineer and fireman and other witnesses of the defendant were positive that both the whistle was blown and the bell rung after the train crossed Rockfish river and came in sight of the crossing. Without deciding whether, upon a demurrer to the evidence, the negative evidence of a witness that he did not hear such sounds is in conflict with the positive evidence of another witness that such sounds were made, it may be conceded, for the purposes of this case, that the whistle was not blown, except at the whistling post for the station, and that the bell was not rung at all. If such were the fact, it did not relieve the deceased from the necessity of taking ordinary precautions for his own safety. Negligence of the employees of the defendant in this respect was no excuse for negligence on his part. The day was clear and still. And Johnson, while an old man, was in good health, and in possession of all his faculties. His sight and hearing were unimpaired. While he was standing at Bugg's gate, the whistle for the station was blown. It was distinctly heard by the persons in and about the station and crossing. The plaintiff examined eight wit-

nesses in the court below. Six out of the eight stated that they were duly advised and warned of the approaching train. One of them—Dr. Nash—stated that he did not hear either the whistle or bell, but heard the rumbling of the train, and by it and the sight of the train was amply warned. Four others—J. R. Noel, G. W. Spencer, Otho W. Carter, and John Johnson—stated that they heard the whistle west of Rockfish river, when it was blown for the station. Another of them,—Howell Lewis,—who was about 400 yards off, riding to the village on horseback, saw the train, but did not hear either the whistle or bell. S. S. Bugg was in his storehouse, about 100 yards from the track, and did not hear either bell or whistle, and the remaining witness for the plaintiff, G. W. Clay, was not examined on this point. The evidence of these witnesses for the plaintiff established clearly that the whistle was blown, and that those persons in the vicinity of the crossing and near to Johnson were fully warned of the approaching train.

While it was the duty of the defendant to give notice of the approach of the train to the crossing, and it thus appears that this was done sufficiently to warn persons who, like Johnson, were in proximity to it, there were also reciprocal duties imposed on him. He could not go upon its track, even at a public crossing, or a licensed way, without exercising ordinary care and caution. The track itself was a proclamation of danger. It was his duty, before going upon it, to use his eyes and ears. He should have both looked in either direction from which a train could come, and listened; and, if his faculties warned him of the near approach of a train, it was his duty to keep off the track. If he had done so in this instance, he could not have failed to hear and see the coming train, and be made sensible of the danger of going upon the track. It was in plain view. And if he failed to look and listen, as duty required of him, and attempted to cross the track in front of a rapidly moving train, and was caught before he could get across, and was killed, his own act—his own negligence—so contributed to the injury that a recovery therefor cannot be sustained. Railroad Co. v. Kellam's Adm'r, 83 Va. 851, 3 S. E. 703; Mark's Adm'r v. Railroad Co., 88 Va. 1, 13 S. E. 299; Railroad Co. v. Stone's Adm'r, 88 Va. 310, 13 S. E. 432; Railway Co. v. Ives, 144 U. S. 408, 431, 12 Sup. Ct. 679; 4 Am. & Eng. Enc. Law, 68-78; Ernst v. Railroad Co., 39 N. Y. 61, 68; Railroad Co. v. Houston, 95 U. S. 697; Schofield v. Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125; Wendell v. Railroad Co., 91 N. Y. 420, 428; Railroad Co. v. Neubeur, 62 Md. 391, 400; Gothard v. Railroad Co., 67 Ala. 115; Hogan's Adm'r v. Tyler (Va.) 17 S. E. 723; Beach, Contrib. Neg. §§ 63, 64; and Whitaker's Smith, Neg. p. 401, and note.

Only four witnesses testified to the movements of the deceased which immediately

preceded the accident. The witness John Johnson, who testified for the plaintiff, was standing on the platform of the depot, and saw the deceased when he approached the track and was struck by the engine. He stated in his examination in chief that when the deceased made an attempt to go across the track the train was about 100 yards from him, as near as the witness "could come at it"; and on cross-examination he admitted that the engine was so close to the deceased, when he started to go upon the track, that the witness thought that he was bound to be killed if he went on the track; and that when he got on the track he was so close to the train that he thought it was impossible to stop it in time. It was manifest from the evidence of this witness, who was the only witness for the plaintiff who saw Johnson when he was struck and killed, that the train was quite near the crossing and to Johnson when he started to go across the track. While the witness thought the train was then about 100 yards away, it appears that he was not and could not be certain of the distance, but was certain that Johnson would be killed if he went on the track, and that the train could not be stopped so as to prevent it. There were three witnesses for the defendant who saw Johnson at the time the accident occurred, and their evidence is not in conflict with that of the witness Johnson. R. S. Wilkinson, the depot agent, and T. A. Jones, the section master, were in the telegraph office when they were apprised of the approach of the train. They looked in the direction from which it was coming, and it was then in sight. While looking at it, they saw the deceased walking directly towards the track; and, without stopping or looking up or down the track, but with his head down, he kept straight on, and was struck by the engine before he could get across. The fireman, F. Foster, was on the left side of the engine,—the side on which Johnson was walking towards the track. It was proved both by himself and the engineer that they were at their posts of duty, and looking out ahead of the train. The fireman stated that when he first saw the deceased he was about 15 feet from the track, and was walking towards it; and he supposed that he, like persons were in the habit of doing at crossings and stations, would "walk up to where the train would hit him, and then stop," but, instead of stopping, he kept on, stepped on the track, and was struck by the engine; that his stepping on the track and being struck by the engine all occurred in a moment of time; and that there was no opportunity whatever to warn the deceased, or to attempt to stop the train. The engineer was at his post on the right side of the engine, while Johnson approached the track from the left side, and went upon it so near in front of the train that the engineer was unable to see him until he was struck by the engine, and

knocked across onto the platform, on the right side of the track.

Upon the face of the evidence, under the strict rule applicable to its consideration, it conclusively appears that the deceased, by his own negligence and recklessness, directly and proximately contributed to the act which caused his death, and that it was not in human power to save him after it took place. He was the author of his own misfortune. If the evidence of all the persons who were eyewitnesses to the unfortunate accident, and have testified in this case, except that of John Johnson, who testified in behalf of the plaintiff, is wholly laid out of view, his testimony establishes beyond all question such contributory negligence on the part of the deceased as to preclude all recovery of damages for his death. He proves that the deceased was not on the track until he started across it and was struck and killed. He was not walking on and along the track. He was not in the way of the moving train, or in danger, until he started to walk across the track, and when he did go upon the track it was to attempt to go right across it; and, whether the estimate of the witness Johnson is correct or not, that the train was about 100 yards distant when the deceased essayed to cross the track, certain it is that he did not stop or linger on the track, yet that he went on it in front of the engine, and when it was so close to him that, narrow as the track is, the engine struck him before he was able to cross it. This fact in itself is conclusive that when he stepped upon the track the engine was so close upon him that it was inevitable that he would be struck, and no effort or act of the engineer or fireman could prevent it. For these reasons the court below did not err in sustaining the demurrer to the evidence and in giving judgment in favor of the defendant. The plaintiff being, therefore, precluded by the contributory negligence of his intestate from recovering damages from the defendant, he was not prejudiced by the refusal of the court to allow the witness to answer the question which is the subject of the first bill of exception, nor by the refusal of the court to give to the jury the instructions asked for by the plaintiff after the joinder in the demurrer to the evidence; and consequently it is unnecessary to pass upon them. The judgment of the circuit court of Albemarle county is therefore affirmed.

#### COPELAND v. COPELAND.<sup>1</sup>

(Supreme Court of Appeals of Virginia. March 14, 1895.)

#### DIVORCE—MARRIAGE UNDER DURESS.

One is not entitled to a divorce on the ground that the marriage was contracted under

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

duress, where the only evidence of duress is the fact that, having been arrested on the charge of seduction, he married defendant to avoid the prosecution.

Appeal from circuit court, Wythe county.

Bill by Samuel C. Copeland against Josephine Copeland for a divorce. Defendant had a decree, and plaintiff appeals. Affirmed.

Blair & Blair, for appellant.

CARDWELL, J. Samuel C. Copeland (appellant) was, on the 22d day of February, 1890, arrested on a warrant from a justice of the peace in the county of Wythe, charging him with having seduced, under promise of marriage, Josephine, alias Josie, Swecker, and, upon his arrest, was bailed to appear before the justice on the 5th of March, 1890, for trial. On the 5th of March, 1890, a marriage took place between the accused and Josie Swecker, and the prosecution then terminated. After the lapse of four years, Samuel C. Copeland filed his bill of complaint at July rules, 1894, against Josephine Copeland, his wife, for a divorce on the ground that he was married to her under duress; that she, at the time of the marriage, was pregnant, without the knowledge of complainant; and that she had deserted or abandoned him for over four years. The bill was never answered by the defendant, but the depositions of several witnesses, after notice to the defendant accepted by her, were taken, and the cause was heard before the circuit court for Wythe county at the regular term September 17, 1894, when the court, by its decree, refused the relief prayed for, and dismissed the complainant's bill, with costs to the defendant. From this decree an appeal, with supersedeas, was allowed by one of the judges of this court.

This is a striking case of want of correspondence between the allegata and the probata. The bill charges "that the appellant was forced to marry appellee under and by the threats of the officers who made his arrest, as above stated, who were relatives of the appellee, and heavily armed; that the appellee was pregnant at the time of the marriage,—not by him, but by some one else,—and that he did not know this fact until five months after the marriage; that he could not safely remain at the house where he was married, and went back to his work, he being but a laborer, having no home, and his wife having none, but was living with her mother; that he resumed his work at Bertha, and never lived with her at all, as she never came to him, but refused to do so, and he never went to her mother's house, although he worked within a few miles of her, etc.; that they never did live and cohabit as man and wife, from a kind of a mutual repulsion, but she wholly neglected and refused to live with or come to him, or in any way seek the protection of said marriage, as it was well known to have been obtained by fear and force, and hence void in law." The witnesses examined

in support of these allegations were four in number, including appellant, who was examined on his own behalf, notwithstanding his incompetency as a witness against his wife. The statute (Acts Assem. 1893-94, p. 722) making husband and wife competent to testify for and against each other expressly provides that nothing contained in the act shall be deemed or construed to alter the existing rules of evidence as to proceedings for divorce. In prosecutions for seduction under promise of marriage, section 3679 of the Code of Virginia provides "that the subsequent marriage of the parties may be pleaded in bar of a conviction"; and, where the marriage takes place under these circumstances, it must be presumed that the accused is actuated in consenting thereto by the consciousness of his guilt as charged, or that he avails himself of this provision of the law to avoid further prosecution; and in this case this presumption is strongly supported by the fact that, if appellant had been forced, as alleged in his bill, to marry appellee by reasons of threats of personal violence made at the time of the marriage, he would not, as it is also reasonable to suppose, have remained silent for over four years. This marriage did not occur under any sudden or unexpected condition of things. He, by his own showing, was arrested on the 22d of February, and let to bail, and the marriage did not take place until the 5th of March,—making it perfectly plain that, if he feared violence to his person, he could and would have appealed to the officers of the law for protection; but, instead of this, according to the testimony of his own witnesses, he sought to relieve himself from the consequences of the prosecution by the payment of money to the prosecutrix. The appellant himself being incompetent to testify on his own behalf, as we have seen, the only other testimony to sustain the allegations of the bill, is as follows: James F. Brown, the justice who issued the warrant, and before whom the same was pending, was also a minister, and performed the marriage ceremony on the occasion of this marriage, and, being introduced by the appellant, testified that appellant offered Josephine Swecker and her mother certainly \$200 to release him, but nothing but marriage would suffice, and that he married them; further, that Mr. Copeland (appellant) remarked to him that he would rather die than to marry her, but would have to, or do worse. This witness further testified that, although there were quite a number of relatives and friends of Josephine Swecker present, he heard no threats, though threats might have been made. J. W. Hoskins, another witness for appellant, in answer to the question, "Please state if you were present when S. C. Copeland was forced to marry Josephine Swecker, on the 5th of March, 1890,"—answered: "Was not present. Don't know that he was forced. The law forced him to marry her." John W. Owens, the only other witness examined, was asked, "Did S. C.

Copeland marry her of his own will, or was it against his will, and by force, and under threats of violence?" (a question clearly leading),—to which he answered: "He married her against his will. He was forced to marry her." But he says nothing about the alleged threats, or about anything else that occurred to cause Copeland to fear bodily hurt. Hoskins admits that he was not at the marriage, and hence he was not testifying as to facts within his own knowledge, but giving only his understanding of the matter; and there is nothing to show that Owens was doing anything more. Hence, this evidence wholly fails to sustain the allegation that appellant was forced to enter into this marriage by reason of threats of personal violence. It is true that the evidence shows that appellee remained with her mother from the time of the marriage up to the taking of the testimony, but it nowhere shows that appellant made any effort to get her to live with him, or made any provision for her support. On the contrary, by his own showing, he left her immediately after the marriage took place, and never went where she was again, but that she applied to him for money from time to time, yet he fails to show that he furnished it. Therefore, there appears nothing in the record to show that the separation complained of is without the fault of the appellant. There appears to be quite a variance between the statement of appellant, where he represents himself as being without property or home to which to carry his wife, and the statement made at bar by his counsel on his behalf, where they represent him as being "a young man of good standing and considerable means." We deem it unnecessary to argue further to show that appellant was not entitled to a divorce from appellee on any of the grounds stated in his bill, especially as the evidence, as we have seen, signally fails to support any one of its material allegations. We are therefore of opinion that the decree complained of was clearly right, and must be affirmed.

(91 Va. 188)

**WILSON, Trustee, v. CARPENTER'S  
ADM'R.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. March 14, 1895.)

**SALE OF LAND—MISREPRESENTATIONS BY VENDOR  
—SUIT FOR RESCISSION—EVIDENCE—STATE-  
MENTS TO OTHERS—WAIVER.**

1. When a purchaser has been induced, by a material misrepresentation of the vendor, to buy, he has a right to have the contract canceled, correlative with that of the vendor to disaffirm the sale when he has been defrauded.

2. Plaintiff was induced to buy a lot in the town of G. by the false representation that \$1,500,000 had been secured to induce manufacturing enterprises to locate in said town. *Held*, that he was entitled to a rescission of the contract, and to have the money paid refunded.

3. In a suit to cancel a contract for false representations by an agent, evidence of similar

statements made by him to other people at other times, though not competent to prove what occurred when the contract in question was made, may be introduced to show the bent of the agent's mind.

4. The intent of a party making a representation to induce a contract is wholly immaterial, but the question is whether the other party has been misled and injured.

5. When the seller has made a false representation, which, from its nature, might induce a buyer to enter into the contract on the faith of it, it will be inferred that the buyer was induced thereby to contract, and it does not rest with him to show that he in fact relied upon the representation.

6. One is not bound by a waiver of his rights, unless such waiver is distinctly made with full knowledge of the rights which he intends to waive; and the fact that he knows his rights and intends to waive them must plainly appear.

7. A purchaser is not deprived of his right to relief on account of false representations from the vendor by the fact that he had the means of discovering the falsity of the representations.

Cardwell, J., dissenting.

Appeal from circuit court, Rockbridge county.

Bill by William Carpenter's administrator against Robert N. Wilson, trustee, and others, to cancel a contract for the sale of land. From a decree in favor of complainant, defendant Wilson appeals. Affirmed.

Frank Glasgow, for appellant. Strayer & Liggett, for appellee.

HARRISON, J. Robert N. Wilson held, as trustee for himself, David B. Taylor, Thomas S. White, Fitzhugh Lee, and others, with full power to sell and convey the same, lot No. 20 in block 127 on McCullough street, in the town of Glasgow. He placed the lot in the hands of Thomas S. White & Co., real-estate agents, for sale. In September, 1890, Thomas S. White sold the lot to William H. Carpenter, of Rockingham county, for the sum of \$1,500; the purchaser paying in cash \$400, and executing two bonds for \$550 each, at 6 and 12 months, with interest for the residue, receiving from R. N. Wilson, trustee, a deed of conveyance for the lot, dated September 23, 1890, and contemporaneously therewith executing a deed of trust to secure the two deferred bonds. Before the first bond became due, Carpenter paid the same. When the second bond became due, in September, 1891, it was not paid. On the 3d day of November, 1891, William H. Carpenter filed his bill in the circuit court of Rockbridge county against R. N. Wilson, Thomas S. White, and the other owners of said lot, praying for a rescission of his contract of purchase. Before the case was ready for hearing, however, the plaintiff died, and it was revived in the name of J. N. Keagy, his administrator. The bill sets forth the foregoing facts in regard to the sale and purchase of said lot, and alleges that the purchase was made on the positive assurance from Thomas S. White, agent, that the Rockbridge Company, promoters of the town, had already secured beyond a doubt \$1,500,000 from an English syndicate; that this large

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

sum of money was to be used in building up and carrying on industrial enterprises at Glasgow, which would cause real estate to advance very rapidly, start the town on a "boom" on a grand scale, and make it a manufacturing place of great importance. The complainant further alleges that he knew nothing himself of what was proposed at Glasgow, and relied solely on the representations of said White, and by reason of the representations and assurances thus made, and especially the representation that \$1,500,000 had been secured to be invested at once in manufactories, he was induced to buy the lot; and that, but for such assurances, he would never have invested a dollar in the town of Glasgow. The bill further alleges that the statements made by Thomas S. White were untrue, false, and fraudulent; that not a dollar of the English money had ever been invested in Glasgow; that the English syndicate never completed any contract with the Rockbridge Company, and that all negotiations in reference thereto have long since failed, without hope or expectation of being revived; that, so far from the lot purchased by him advancing in price, it had little or no value. The bill prays that the contract of purchase be rescinded; that defendants be required to repay the money paid on the purchase; that the lot be reconveyed to R. N. Wilson, trustee, and that he be enjoined from collecting the remaining unpaid bond. The injunction was granted as prayed for, and on the 1st day of March, 1892, the defendants filed their joint and separate answer, demurrer, and cross bill, admitting the sale of the lot by their agent, White, and its purchase by Carpenter, and alleging that none of them but Thomas S. White, through whom the sale was made, were cognizant of the facts and circumstances attending the sale; the defendant Thomas S. White denying that he made the positive assurance alleged in the bill as to \$1,500,000 having been secured by the Rockbridge Company from the English syndicate, and further denying that the alleged representations and assurances caused the plaintiff to invest at Glasgow; that many prudent and cautious business men were at that time buying lots there, believing it would grow into a large town. The respondents call for strict proof of all charges in the bill, and ask for a decree for the balance due from the purchaser. Evidence was taken by the plaintiff and defendants, and on the 20th day of March, 1893, a final decree was entered, overruling the demurrer; declaring that the sale of the lot was induced by false representations of the defendants, which were material, and to the injury of the purchaser; rescinding the contract of sale; cancelling the unpaid bond; appointing a special commissioner to reconvey the lot to R. N. Wilson, trustee; and decreeing that the defendants pay the administrator of William H. Carpenter \$1,070, with inter-

est on \$947.13 from March 1, 1893, and costs of suit,—that being the amount paid by his intestate on the lot. From this decree an appeal was granted the defendants Thomas S. White and others to this court.

The question presented by the pleading for determination is one of fact. The law applicable to a case of this sort is too well settled to be any longer doubted or called in question. No man is bound by a bargain into which he has been deceived by fraud or misrepresentation. Whenever a purchaser has been induced, by a material misrepresentation of the vendor, to buy, he has a right to repudiate the contract; a right correlative with that of the vendor to disaffirm the sale when he has been defrauded. Courts of equity are always open to afford relief in such cases, and false representation of a material fact, constituting an inducement to the contract, on which the purchaser had a right to rely, is always ground for rescission of the contract by a court of equity. *Crump v. Mining Co.*, 7 Grat. 352; *Guin v. Byrd*, 32 Grat. 293; *Linhart v. Foreman's Adm'r*, 77 Va. 540; *Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Pom. Cont. § 12*, p. 280. Further elaboration of the law on this subject would be unprofitable repetition. It is only necessary to consider the evidence, and determine whether or not it makes a case entitling the plaintiff to a rescission of the contract, as prayed for in the bill.

The depositions of L. A. Crenshaw, of Richmond, and J. G. Millinger, of Frederick county,—two intelligent and disinterested witnesses,—have been taken by the plaintiff. They were both in Glasgow in September, 1890, and present with William H. Carpenter and Thomas S. White, and heard the conversation which led to the purchase of the lot by Carpenter. L. A. Crenshaw testified that White made to Carpenter the representation and assurance that the \$1,500,000 of English money had already been secured by the Rockbridge Company; that it would be at once invested in manufacturing enterprises in Glasgow; that it would cause the town to build up rapidly, and that those who purchased lots then would realize very handsome profits in a very short time; that there was nothing in Glasgow to induce a man to invest money except this representation that \$1,500,000 had been secured for the purpose of building industrial enterprises there. J. G. Millinger testified still more clearly and strongly to this representation made by White to Carpenter. He says that White stated in the most positive and unqualified way that the English money had been already secured through William A. Anderson, the vice president of the Rockbridge Company, who was then in England; that nothing remained but for Gen. Fitzhugh Lee, the president of the company, to sign the contract. He says that: "I heard White tell Carpenter that the \$1,500,000 was secured, and the lot



would advance rapidly in value; that the money was to be all invested at once in manufacturing enterprises, which would build the town up very rapidly." The witness says that he was informed that Mr. White was a reliable man, and that he did not doubt the truth of his statements to Carpenter; that he had Mr. White's word for it, and had no doubt of its truth; that nothing was lacking, so far as that was concerned, to induce witness to buy. He did not, however, because he concluded it would be best to wait until the manufacturing enterprises were built; not because he doubted Mr. White's statement, but because he thought there would be as much room for speculation after they were built as before. This testimony proves clearly and satisfactorily that the representation of Thomas S. White that the Rockbridge Company had secured \$1,500,000 was made by him as charged in the plaintiff's bill. It is a conceded fact in the case that it never was secured, and the evidence shows that it was never at any time certain that it would be. Mr. Anderson, in his report from London to the company, dated August 27th, 1890, says: "A graver question is, will the contract be made good by the payment of the money?" In his deposition he says he cabled Gen. Fitzhugh Lee, the president of the company, to call a meeting of the board, and added these words: "Nothing certain until contract ratified and money paid." There was nothing in these communications to justify the assurance that the English money had actually been secured. The witness Crenshaw files with his deposition several letters received by him from Thomas S. White & Co. The first is without date, but the witness says it was written about the time of the sale of this lot to Carpenter. In this letter the writer says: "English money, actually in Glasgow Commercial Bank, and company registered in London last week; this being the last official act necessary to bringing out the British company." The second letter is dated November 3, 1890, in which the writer says: "The English question is settled at last. We get the first installment of \$70,000 on the 20th prox." The third letter is dated November 7, 1890, in which it is said: "We have it from General Lee, Judge Edmonson, and other Glasgow directors, that the English deal is absolutely and irretrievably closed." The representations in these letters are not evidence of the statements made by White to Carpenter at the time of the sale of the lot to him, but they are very persuasive as showing the bent of Mr. White's mind on the subject of this English money. There is no evidence in the record that weakens the force of the testimony of the witnesses Crenshaw and Millinger. Their evidence is conclusive of the question that the representations were made as charged by the purchaser in his bill. It cannot be doubted that the state-

ment was made for the purpose of procuring the contract, and it is conceded to be untrue. As to the knowledge and belief of Thomas S. White in making this statement, it is unnecessary to inquire. It should be stated, however, that counsel for appellee properly disclaim any purpose to charge willful fraud, nor does this court hold the appellant guilty of intentional fraud and misrepresentation. It is a matter of no consequence to William H. Carpenter what Mr. White thought. The intent of the party making the representation is wholly immaterial. The point is, has the other party been misled? It is sufficient that the statement is actually untrue, so as to mislead the party to whom it is made. The party making it need not know of its falsity, nor have any intent to deceive; nor does his mere belief in its truth make any difference. A party making a statement as true, for the purpose of influencing the conduct of the other party, is bound to know that it is true. Pom. Cont. § 217.

It is contended by counsel for appellant that Carpenter did not rely upon the representations of Thomas S. White, but was influenced by other considerations. There is nothing in the record to show this. On the contrary, the tendency of all the evidence is to establish the fact that he was controlled in this purchase entirely by his confidence in White, who had been highly recommended to him by D. B. Taylor, one of the owners of the lot sold; and that he was induced to buy almost exclusively by the representation about the large sum of money secured in England. When the seller has made a false representation, which, from its nature, might induce the buyer to enter into the contract on the faith of it, it will be inferred that the buyer was induced thereby to contract, and it does not rest with him to show that he, in fact, relied upon the representation. In order to displace this inference, the seller must prove either that the buyer had knowledge of facts which showed the representation to be untrue, or that he expressly stated in terms, or showed by his contract, that he did not rely upon the representation, but acted upon his own judgment. Nor is the buyer deprived of his right to relief because he had the means of discovering that the representation was false. *Redgrave v. Hurd*, 20 Ch. Div. 1, quoted in *Benj. Sales*, p. 499. The last element of a misrepresentation is its materiality. The evidence shows that Carpenter gave \$1,500 for this lot, and that it is not worth now \$50, if anything. It can hardly be doubted that, if \$1,500,000 of English capital had been invested at Glasgow in manufacturing enterprises, this lot would be worth more than it is now. The court does not inquire with any care into the extent of the prejudice. It is sufficient if the party misled has been very slightly prejudiced,—if the amount is at all appreciable. Pom. Cont. § 227.

Counsel for appellant insist that, even if Carpenter had any ground of complaint originally, he ratified fully what he had done, after the collapse at Glasgow; and in support of this contention refer to certain letters of Carpenter written to R. N. Wilson, trustee, and Thomas S. White & Co., after February 20, 1891, when all further negotiation with the English ceased. This fact, it is said, became generally known, and should have been known to Carpenter, too; and that in these letters he should have referred to White's representations, and his reliance upon them. These letters do not sustain this view. Wilson, trustee, had been writing, urging the payment of the last bond in advance of its maturity. Carpenter's letters to him were in response, telling him he was unable to pay, and could not pay the bond when due, unless the lot was sold; and urging Wilson not to put his note in bank for collection; that he would pay it as soon as possible. The letters to Thomas S. White & Co. were in reference to the value and prospect of selling the lot. And as late as April, 1891, one of these letters was asking White if he could get more than \$2,500 for the lot, and reminding him of his expressed opinion that such price could be obtained in April. It is impossible to believe that Carpenter knew, when that letter was written, that all hope of getting the English money had some time before ceased. All these letters indicate that Carpenter was ignorant of the fact. He could not have entertained the hope, expressed by him, of selling the lot, if he had known it. The record discloses no word or act of Carpenter that can fairly be regarded as a ratification of his purchase from Thomas S. White, after becoming acquainted with the misrepresentation by which he had been induced to buy. "Confirmation must be a solemn and deliberate act. When the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the courts watch it with the utmost strictness, and do not allow it to stand but on the clearest evidence." *Iron Co. v. Sherman*, 20 Md. 117. No man can be bound by a waiver of his rights, unless such waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them, must plainly appear. *Montague's Adm'r v. Massey*, 76 Va. 307. The views which have been expressed support the decree of the circuit court, and it must be affirmed.

CARDWELL, J. (dissenting). I do not disagree with my brethren as to the law of this case, but, applying the law to the evidence, I am unable to agree that appellee is entitled to the relief afforded him by the decree of the circuit court of Rockbridge county, complained of.

(91 Va. 152)

STUART et al. v. COMMONWEALTH.<sup>1</sup>

(Supreme Court of Appeals of Virginia. March 14, 1895.)

## ACTION ON TREASURER'S BOND — PLEADING — APPROVAL — DISQUALIFICATION OF BOND — ESTOPPEL.

1. Under Code 1887, § 812, the qualification of a county treasurer and the execution of his bond is a matter of record, which imports absolute verity; and in a suit upon such a bond, the only plea being that of nul tiel record, and where the record appears to be regular, it can be assailed only for fraud, to be charged and proved.

2. A judge who, under a power of attorney, attaches a name of a surety to the bond of a county treasurer, is disqualified to approve a bond as required by Code 1887, § 812.

3. One who makes a naked power of attorney to sign his name as surety to a treasurer's bond containing six sureties is not estopped to deny the validity of a subsequent exercise of the power, when the first bond proves defective, by which his name was attached to a second bond, containing only four sureties.

Error to circuit court of city of Richmond; B. R. Wellford, Judge.

The commonwealth brought suit against R. H. Stuart and others upon the official bond of the treasurer of King George county, and from a judgment against him Stuart appeals. Reversed.

R. J. Washington and J. E. Mason, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

KEITH, P. The commonwealth of Virginia, through her attorney general, served a notice in the circuit court of the city of Richmond upon F. C. S. Hunter, treasurer of King George county, and George Turner, R. H. Stuart, Henry H. Hunter, and F. W. Payne, that on June 25, 1892, judgment would be asked for against them for the sum of \$3,119.42, with interest. The parties defendant appeared by counsel, and tendered 21 special pleas, all of which the court rejected. These pleas may be grouped: (1) Varying forms of the plea non est factum; (2) pleas which may be treated as averring fraud in the transaction upon which the supposed liability of the defendants rests; and (3) a plea averring that R. H. Stuart had constituted C. H. Ashton his attorney in fact to sign his name as one of the sureties upon the treasurer's bond; that C. H. Ashton was judge of the county court of King George; that as such judge he presided in the court before which the bond was executed, and in which the treasurer qualified; and that he had acted on the occasion of the execution of the bond and the qualification of the treasurer in the dual capacity of attorney in fact for one of the parties and as judge for the court. The contention of the attorney general, representing the commonwealth, is that the qualification of the treasurer, including the execu-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

tion of his bond, is, by virtue of section 812 of the Code of 1887, made matter of record in the county court, and that this record and memorial of the judge imports "such uncontrollable credit and verity as they admit no averment, plea, or proof to the contrary"; and in support of this proposition cites a number of cases, among them *Vaughn v. Com.*, 17 Grat. 386, and *Calwell v. Com.*, Id. 391. This presents a point which was left undisposed of by this court in the recent case of *Blanton v. Com.* (decided at the January term), 20 S. E. 884, the court in that case not finding it necessary to pass upon it. We are of opinion, however, that this contention of the commonwealth is sustained by the decisions just cited and by the statute law. See section 812, Code Va. 1887. Being a record, it follows that non est factum cannot be pleaded; the only plea putting a record in issue being that of null tiel record, which is tried by the production of the record itself. Where the record appears to be regular and complete, it must be assailed, if at all, upon the ground of fraud; and the fraud relied on must be clearly and distinctly charged, and established by satisfactory proof. We are therefore of opinion that the circuit court did not err in rejecting the various pleas of non est factum offered by the several defendants.

The case arose out of the following state of facts: F. C. S. Hunter had qualified as treasurer of King George county, and one of the sureties upon his official bond, E. J. Smith, having moved for counter security, the court directed Hunter to execute a new bond, or have his power as treasurer revoked. Thereupon Hunter, with George Turner, F. W. Payne, H. H. Hunter, E. L. Hunter, W. A. Rose, and R. H. Stuart, by C. H. Ashton, his attorney in fact, acting upon a power of attorney under the hand and seal of Stuart, entered into and acknowledged a bond in the penalty of \$22,000, conditioned according to law. It seems that the bond thus executed omitted to provide that any default of which the treasurer might be guilty, or any money for which he might become responsible upon the said bond, was to be paid in lawful money of the United States, as directed by statute, and not in coupons; and, the matter having been brought to the attention of the court by its commissioner of accounts, the treasurer, and George Turner, R. H. Stuart, by C. H. Ashton, his attorney in fact, Henry Hunter and F. W. Payne appeared in court at the November term, 1888, of the county court of King George, and re-acknowledged the said bond in due form of law as their act and deed. Comparing the order entered at the November term, 1888, with that entered at the September term, 1888, it appears that the bond was not re-acknowledged by two of the obligors named therein, William A. Rose and E. L. Hunter. The power of attorney under which C. H.

Ashton acted is not in the printed record, nor does it appear in the original record brought to this court from the county of King George in obedience to the subpoena duces tecum heretofore issued. It is to be presumed that it was a naked power of attorney, authorizing C. H. Ashton to sign the name of R. H. Stuart to the bond of F. C. S. Hunter as treasurer of King George county. It may also fairly be presumed that, as is usual in such cases, the bond had been made up before the term of the court at which it was to be executed; that the sureties knew with whom their responsibility was to be shared; and that they consented to be bound as parties to a bond which contained the names of those who, when the bond came to be executed, in point of fact signed it. In other words, that R. H. Stuart, in constituting C. H. Ashton his attorney in fact, contemplated assuming a liability which was to be shared with F. W. Payne, George Turner, H. H. Hunter, W. A. Rose, and E. L. Hunter. It nowhere appears that Stuart had any knowledge of what took place at the November term of the county court, or that he knew, or had any means of knowing, that two of the names which appeared upon the bond as executed at the September term had been stricken from it, and the number of the sureties reduced from six to four. Now, these facts place Judge Ashton in a position which it was impossible for him with propriety to occupy. We do not for a moment suppose that he was guilty of any intentional wrong, or that he would, under any circumstances, purposely do anything unbecoming a judicial officer, but we conceive it to be necessary that the administration of justice shall be free from the slightest appearance or suspicion of impropriety, and we can but think that, to act as attorney in fact with respect to a transaction pending before his own court, in which he was called upon to pass judicially upon the sufficiency of his own credentials as attorney, and to execute an instrument by virtue of his position as attorney which he was then to establish as a memorial and a record importing absolute verity as to all parties concerned, in his capacity as judge, was the attempt upon his part to discharge functions absolutely antagonistic and wholly irreconcilable. It is not enough that in the particular transaction there is no suggestion, and can be none, of any improper motive or act. We cannot sanction a practice which could by possibility be drawn into a precedent, and which might or could render the judiciary of the state the objects of suspicion and of criticism, and tend to impair public confidence in their utter and complete personal dissociation from the subject-matter of their official action. Not only was he called upon as judge to pass upon his authority to act at the September term, when he accepted the original bond with six names upon it,—which is presumably the only bond his principal had ever contemplated signing,—but, continuing to act

upon the authority of that power, he appears before himself at the November term, and reacknowledges that bond, and thus increases the liability of his principal, without his knowledge or consent, interpreting as judge his power as attorney, greatly to the injury and disadvantage of his principal. The whole force and effect of this record rests upon what was done at that November term. Strike that out, and the case of the commonwealth falls with it. There is no suggestion of more than one power of attorney, and that a naked power to sign a name to a bond already agreed upon by the parties; and there is no intimation that Stuart had the slightest suspicion, or reason to suspect, that anything was to be done at the November term altering his liability, or in any way affecting his interest. It seems to be just here that the commonwealth is in a dilemma. If Judge Ashton was acting in a merely ministerial capacity, as is contended by the defendants, then the plea of non est factum could be made to the bond; if acting in a judicial capacity, his action would be obnoxious to the objection just pointed out. It is not a question as to who may be an agent or attorney in fact. Without doubt, Judge Ashton was under no disqualification to act as agent for the defendant, but, having accepted the agency, he was thereby rendered incompetent to act as judge. Having accepted that agency, was he competent to sit in judgment upon the sufficiency of his credentials as agent, and upon the extent and scope of the powers with which he had been clothed as agent? We think he could not, and we do not doubt that, though this ruling may eventuate in the loss of this debt to the commonwealth, it is far better that such a loss should be suffered than that any of the rules and principles established in order to secure absolute purity in the administration of justice should suffer any impairment.

The attorney general contends that Stuart knew that C. H. Ashton was judge of the county court of King George, and is therefore to be considered as having waived his objection to him on that account. The answers seem to be twofold:

First. There is no such express or implied waiver to be inferred from the circumstances. Stuart had, on the contrary, every reason to expect that the action of his attorney would conform to all the requirements of the law, and transcend it in no particular. The waiver or estoppel claimed by the commonwealth must rest upon the idea that Stuart selected his agent knowing that he was judge of the county court, and, as such, charged by law with the duty of presiding in the court before which the treasurer would give bond and qualify; and must, therefore, be held to have assented in advance to his acting in the dual capacity of agent and judge. Grant this to be true, for the sake of argument, can it be held to extend beyond the act of signing the bond at the September

term of the court, when a bond with six sureties was executed and received and accepted by the commonwealth? Can it be that a naked power of attorney to perform a single act could be construed as creating a continuing agency, by which the agent could assent to the most material alteration in the instrument as theretofore executed by him, reducing the number of sureties from six to four, and by his reacknowledgment bind his principal without his knowledge or consent to the instrument in its changed condition? Such a power as we are considering is to be strictly construed. The agent can do nothing which he is not expressly authorized to do by the instrument which is the exclusive source of his authority to act at all. If this be true in every case, even though the constituent who creates the agency may be the beneficial party to the transaction with respect to which he is to become bound, how much more strictness should be observed by an agent acting for one who is to be bound as surety only, and who is to reap no profit or advantage from the obligation which he assumes. As the occasion then demands the utmost strictness in the exercise of the power conferred by Stuart, and as he could not, by possibility, have contemplated, when he gave the power of attorney in August, that the bond which he authorized his agent to sign in September would be materially altered and reacknowledged in November, he cannot be deemed to have conferred the authority upon his agent to make such reacknowledgment or alteration, or be held to have waived or to be estopped from making any lawful objection thereto. Therefore, to repeat myself on this point, even though the waiver or estoppel might apply to the execution of the bond in September, on the ground that he must have contemplated what then occurred (which I by no means admit), it does not apply to what took place in November, for nothing short of prophetic vision could have enabled Stuart to foresee the situation which then existed. Without knowledge, there can in this case be no waiver or estoppel; and in this instance knowledge was impossible.

Second. We do not place our decision wholly or chiefly upon any ground of objection which the parties could have waived, but rest it broadly and firmly upon the proposition that it would be contrary to public policy to sanction what we have here condemned.

In conclusion, we are of opinion that the circuit court did not err in rejecting the several pleas of non est factum. As to the pleas in which it is averred that a fraud was practiced on the defendants, we are of opinion that, should the defendants at any future trial rely upon that defense, it can be better presented in more carefully prepared pleas. And, lastly, we are of opinion that the plea of R. H. Stuart, marked "Y," should have been admitted. The case must therefore be reversed, and remanded for a new trial,

with leave to the defendants, or any of them, to file such additional pleas as may be consistent with the views herein expressed.

(43 S. C. 381)

**SMITH v. WATKINS.**

(Supreme Court of South Carolina. March 25, 1895.)

**ABATEMENT OF ACTION—ANOTHER ACTION PENDING—JURISDICTION.**

1. Defendant interposed an oral demurrer to the jurisdiction of the court, which was sustained, and an appeal was taken, but never perfected. Before the order sustaining the demurrer was signed, plaintiff again sued defendant on the same account in another court. *Held*, that a demurrer on the ground of an action pending was properly overruled.

2. One who proceeds to trial on the merits, after his demurrer on the ground that the court has not jurisdiction of the parties has been overruled, cannot question such jurisdiction on appeal.

3. The appellate court will not consider an exception to a ruling relative to a notice of appeal, where the record fails to show that such notice was actually given.

Appeal from common pleas circuit court, York county; R. C. Watts, Judge.

Action by J. A. Smith against Kate G. Walke. From a judgment for plaintiff, defendant appeals. Affirmed.

The following are the defendant's exceptions:

"Take notice that the defendant herein, Kate G. Walke, intends to appeal, and does appeal, to the supreme court of the state of South Carolina, from the judgment herein obtained from the verdict of a jury, against this defendant and in favor of the plaintiff, on the 17th day of April, 1894, and entered in the office of the clerk of the court of common pleas for York county, on the 25th day of April, 1894, and will ask the supreme court to reverse the same, upon the following grounds and exceptions: (1) Because his honor erred in overruling the oral demurrer interposed by the defendant to the jurisdiction of the court, on the grounds that the plaintiff and defendant, at the time of the contract, and at this time, were, and are, residents of North Carolina, and the action being on a simple contract debt, made in North Carolina, the suit should have been brought in the state of North Carolina. (2) Because his honor erred in ruling that the court of common pleas for the county of York had jurisdiction of the parties to this action. (3) Because his honor erred in ruling that the court of common pleas for the county of York, state of South Carolina, had jurisdiction of the subject of this action and the cause of this action. (4) Because his honor erred in refusing to dismiss this case, there being another action pending between the same parties to this action, and for the same cause of action. (5) Because his honor erred in allowing Mrs. Kate G. Walke to testify, on cross-examination, on the objection of the defend-

ant, 'that there was about \$500 due on it. He agreed to pay \$250 then, and on the 3d of July to pay the balance, and take a mortgage on the property, and wait until October.' (6) Because his honor erred in proceeding with the trial of this cause, and failing and refusing to stay the same, after oral notice of appeal from overruling the oral demurrer interposed by the defendant to the jurisdiction of the court."

W. B. De Loach, for appellant. N. W. Hardin and G. W. S. Hart, for respondent.

GARY, J. This action was commenced on the 11th day of November, 1893, by summons and complaint personally served on the defendant in Yorkville, S. C. The action was upon a demand for \$250, alleged to have been loaned to defendant by plaintiff at Bessemer City, in the state of North Carolina, where both parties to the transaction resided on the 3d day of April, 1893, the date of the alleged loan. At the hearing the defendant's attorney moved to dismiss the action on the grounds that the plaintiff and defendant, at the time of the contract as to the loan and at the time of the trial, were residents of the state of North Carolina, and, the action being on a simple contract debt, the suit should have been brought in the state of North Carolina. The motion was overruled, and exception duly taken. The presiding judge in his charge to the jury reiterated his ruling in overruling defendant's motion, and from said ruling defendant appeals. Prior to the commencement of this action, to wit, on the — day of July, 1893, an action was commenced by the plaintiff against the defendant for the same cause of action as is herein mentioned. It seems that when the first action came on for trial before his honor, Judge Earnest Gary and a jury, on the 11th day of November, 1893, the defendant interposed an oral demurrer to the jurisdiction of the court, and that the presiding judge orally sustained the demurrer, and discharged the jury that had been impaneled to try the action. The formal order sustaining the demurrer, however, was not signed by his honor, Judge Gary, until the 14th day of November, 1893. The present action was commenced on the 11th day of November, after the jury had been discharged as aforesaid. The defendant gave plaintiff notice of appeal from the order of Judge Gary, but failed to perfect the same. The jury rendered a verdict for the plaintiff for \$250, and judgment was entered thereon. The defendant appealed on exceptions, which will be set out in the report of the case.

The first, second, and third exceptions relate to the question of the jurisdiction, and will be considered together. A copy of the summons and complaint was served on the defendant at Yorkville, in this state. The defendant answered the complaint generally, and put in issue the merits of the case; ap-

peared at the trial, offered testimony, and went before the jury upon the merits of the case. She unquestionably subjected herself to the jurisdiction of the court, and these exceptions are overruled. See the case just filed *o. Ex parte Perry Stove Co., Manufacturing Co. v. Ray*, 20 S. E. 980.

The fourth exception relates to the pendency of another action. At the time this action was commenced, Judge Gary had orally sustained the plea to the jurisdiction of the court, although the formal order was signed afterwards. Although an appeal was taken from such order, which the defendant (plaintiff) failed to perfect, it can have no effect in determining this question. See *Trimmer v. Trail*, 2 Bailey, 483. The order of Judge Gary showed that the court did not have jurisdiction. Under these circumstances, it cannot be said that there was another action pending. This exception is overruled. The testimony mentioned in exception 5 was wholly immaterial, and this exception is overruled. It does not appear in the "case" that the defendant gave the notice of appeal mentioned in the sixth exception, and it cannot be considered. It is likewise overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(43 S. C. 287)

GIBSON et al. v. HUTCHINS et al.

(Supreme Court of South Carolina. March 6, 1895.)

MORTGAGE BY MARRIED WOMAN — NOTE TAKEN AFTER MATURITY—BONA FIDE PURCHASER.

1. Under the act of 1887 providing that a mortgage by a married woman on her separate estate shall be a charge thereon whenever an intention to that effect is declared in the mortgage, such intention need not be set out in the mortgage if it was in fact executed by her for the benefit of her separate estate.

2. One who discounts a note after maturity takes it subject to the equities existing between the original parties, and his assignee is in no better position.

3. Plaintiff procured from a bank, for defendant's benefit, money with which to take up mortgages on defendant's land, on which foreclosure was impending, and defendant, in consideration, executed to plaintiff a deed absolute in form. By oral agreement plaintiff was to reconvey to defendant on repayment to him of the money so used. The bank, without notice of any condition, took a mortgage on the land from plaintiff to secure the money advanced, and also to secure certain debts due by plaintiff to the bank. *Held*, that the bank's mortgage was a valid charge on the land to the extent of the money advanced to extinguish the prior mortgages, but invalid so far as it attempted to secure payment of plaintiff's debts.

Appeal from common pleas circuit court of Oconee county.

Action by Thomas L. Gibson and others against Fannie S. Hutchins and the Seneca Bank to foreclose mortgages. The bank, in its answer, also set up a mortgage on the property. There was a judgment dismissing the complaint, but allowing defendant bank part of its claim. Both defendants appeal. Affirmed.

The decree referred to in the opinion is as follows:

"The facts of this case are as follows: On the 13th day of November, 1890, the defendant Fannie S. Hutchins, then and now a married woman, executed a promissory note for the sum of one thousand dollars, and indorsed by the plaintiff T. L. Gibson, J. A. F. Hutchins, and Asa Leathers. At the same time, the said Fannie S. Hutchins, to secure the payment of said note, executed a mortgage in favor of said Asa Leathers, T. L. Gibson, and J. A. F. Hutchins of a tract of land situate in Oconee county, and containing one hundred acres, more or less. The note and mortgage were then delivered to the husband of defendant, J. A. F. Hutchins. Shortly thereafter the said J. A. F. Hutchins negotiated with J. D. Verner, a banker in the town of Walhalla, to discount, and did in fact discount, said note with J. D. Verner, for a valuable consideration, and thereupon transferred the same to said J. D. Verner. When the note fell due it was not paid, but was renewed by the execution of another note on the 6th day of February, 1892. The renewal note was likewise indorsed by the said T. L. Gibson, J. A. F. Hutchins, and Asa Leathers. On the 6th day of December, 1890, the said Fannie S. Hutchins executed a second mortgage on a certain tract of land in the town of Westminster, in Oconee county, to the said plaintiff T. L. Gibson, conditioned for the payment of the full and just sum of twelve hundred dollars, and reciting that a bond had been given of even date. The bond recited in the mortgage is not among the papers submitted to me, but there appear attached to the mortgage two notes, each bearing date on the 28th day of November, 1891,—the one for the sum of six hundred dollars, payable to the order of T. L. Gibson, eight months after date, and signed by the defendant F. S. Hutchins; the other is for the like sum of six hundred dollars, payable to the order of J. D. Verner, and signed by T. L. Gibson. It appears from the evidence in the cause that the said T. L. Gibson had arranged to discount the note of the defendant Fannie S. Hutchins with J. D. Verner, but when the appointed time came the Hutchins note was absent, whereupon Gibson executed his note to Verner, and afterwards deposited the Hutchins note as collateral. Gibson says in his testimony: 'I also indorsed a note for Mrs. Hutchins for six hundred dollars. We went to Anderson, to get the money, but failed; and we got the money from Verner, but did not have the note; and I gave my note, and the mortgage was placed as collateral. Mr. Hutchins got the money. I don't know what he did with it.' On the 29th day of January, 1892, J. D. Verner and C. J. Strong entered suit against the defendant Fannie S. Hutchins to foreclose the two mortgages above alluded to. It appears that a summons and complaint were served on the defendant Hutchins, to

which, from some cause, she made no defense, and judgment of foreclosure was about to be entered against her by default, when the plaintiff T. L. Gibson made an arrangement with Verner, and as a result the suit was discontinued. The notes and mortgages were then assigned by Verner to J. W. Stribling. Upon one of the notes the following appears: 'I hereby assign the within to J. W. Stribling, cashier, without recourse on me in law or equity. [Signed] J. D. Verner.' On the ——— day of February, 1892, the said Fannie S. Hutchins executed and delivered to T. L. Gibson in form an absolute deed of conveyance of the tracts embraced in the two mortgages above alluded to. Although the deed appears on its face to be absolute, it was understood and agreed at the time it was executed that the grantor and defendant Hutchins was to have the land reconveyed to her upon repaying to Gibson the amount he paid out in taking up the two mortgages called for convenience the 'Verner Mortgages.' The plaintiff Gibson then undertook to negotiate a loan with which to take up the Verner mortgages, and on the 15th day of April, 1893, he executed a mortgage to J. W. Stribling, as cashier of the Seneca Bank, to secure the payment of the sum of \$5,223.67. This mortgage included the tracts deeded by Mrs. Hutchins to Gibson, and also other land belonging to Gibson. It should be stated that at this time Gibson was also indebted to the Bank of Seneca. On the 5th day of October, 1893, said Gibson made a deed of assignment for the benefit of his creditors to Jesse W. Stribling. The complaint, after alleging, in substance, as herein stated, seeks to have the deed executed by the defendant Hutchins to Gibson declared to be a mortgage, and the same foreclosed, and the proceeds applied to the claims of the different parties to this action. The complaint is not in a form to be commended. There is evidently a misjoinder of causes of action. It is therefore difficult to pass upon the different equities of the parties in such a proceeding. Counsel, however, of the respective parties, expressed a desire at the hearing to have the whole matter adjudicated in this proceeding; so there is no issue before me on the pleadings.

"Among the defenses set up by the defendant Mrs. Hutchins is a charge that she was defrauded and overreached in the execution of the Verner mortgages; and that the said mortgages and notes were executed and accepted as accommodation papers for the benefit of her husband, J. A. F. Hutchins, and the plaintiff Thomas L. Gibson, and were not made with reference to her separate estate, and are therefore not binding on her. The cause was referred to the master of Oconee county to take the testimony, decide all issues of law and fact, with leave to report any special matter. The master has made his report, in which he decides all the issues adversely to the defendant, and rec-

ommends a foreclosure of the mortgage as prayed for by plaintiffs. The cause was heard by me upon exceptions to the master's report. The master finds that 'all the transactions with the two banks, so far as the defendant Mrs. Hutchins is concerned with them, were negotiated for her by her husband, who was acting as her agent in the transactions, she having nothing to do with them, except to sign her name to the papers.' I cannot agree with the finding of the master that 'the negotiations were made for the benefit of the defendant,' nor that 'they were made by her husband while acting as her agent.' This conclusion, in so far as being supported by the evidence, seems to me to be just the reverse. Mr. J. D. Verner, who discounted the note, testifies that: 'J. A. F. Hutchins brought the \$1,000 note to me, indorsed by T. L. Gibson, Asa Leathers, and J. A. F. Hutchins, and signed by F. S. Hutchins. I discounted the papers, and turned over the money to J. A. F. Hutchins. I don't think I would have discounted the note without the indorsement of Gibson, Leathers, and Hutchins. I had no transactions with Fannie S. Hutchins about this paper. I suppose I knew she was the wife of J. A. F. Hutchins at the time I discounted the note. I have, at any rate, found it out since. I discounted a note for \$600, of Thomas L. Gibson. The F. S. Hutchins note might have been left with me as a collateral, but I can't say for certain. \* \* \* Mr. Gibson was the only one I knew in the transaction. I don't remember to have ever spoken to Fannie S. Hutchins about the mortgage. I discounted the paper looking to Mr. Gibson and the collateral for payment.' It appears to me that this testimony offered by the plaintiff conclusively negatives the idea that the husband of the defendant, while acting as her agent, negotiated this loan for her, and that it was for her benefit. It is true that Mr. Gibson testifies that J. A. F. Hutchins 'claimed to be acting as agent for his wife.' This is not sufficient to prove agency. It would be a dangerous precedent to allow agency to be proven by the declarations of the agent. Outside of this declaration, there is absolutely no evidence tending to prove the agency. The most that can be assumed is that the husband had a note and mortgage executed by his wife, and, after having the note indorsed by two approved sureties, he discounted the note at the bank for a valuable consideration. For the above reason, I cannot agree with the finding of the master. The same is therefore overruled. There appears to me, however, a more serious question than this in the case. It appears from the evidence that some time after the Verner mortgage debts became due they were not paid, whereupon Verner brought suit to foreclose against the defendant Fannie S. Hutchins. At that time it appears she did not think she had any defense, or for some cause she failed to

answer the complaint, and, in consequence, judgment of foreclosure was about to be entered against her by default, when the plaintiff T. L. Gibson again appears upon the scene; and it is then agreed that if he (Gibson) will take up the two Verner notes and mortgages, the defendant Mrs. Hutchins will execute to him an absolute deed, conveying the premises, incumbered by said mortgages, as a security to indemnify him for the amount he is to pay out in settling those debts; and it is agreed that when Gibson is reimbursed he is to convey the land to the defendant Hutchins. Just in this connection it should be remembered that Gibson was also indebted to Verner, not only as indorser on the \$1,000, but also on his individual note for \$600, which he had himself discounted. These are the circumstances under which the deed was executed. In order to get the money with which to take up this indebtedness, the said Gibson went into negotiation with the defendant bank under the following circumstances, as found by the master: 'On the 15th day of April, 1893, in settling his (Gibson's) indebtedness to the Seneca Bank for what the bank had advanced for him to J. D. Verner to pay off the amount due Verner by Fannie S. Hutchins, together with other indebtedness to the Seneca Bank, with which the said Fannie S. Hutchins had no concern, he gave to the Seneca Bank a mortgage on all the property conveyed to him by defendant Fannie S. Hutchins in the deed above referred to, to secure his note for \$5,223.67. In this transaction, after much hesitation, I have concluded that the bank is innocent of the former transactions with Verner, and only for that reason should be protected. And as to the claim of the Seneca Bank the defendant Fannie S. Hutchins is estopped by her conduct from denying her liability to said bank for the amount advanced by the Seneca Bank to take up the Verner indebtedness.' See separate opinion of chief justice in *Wallace v. Carter*, 32 S. C. 319; *Reid v. Stephens*, 38 S. C. 526; and *Howard v. Kitchen*, 31 S. C. 490. Plaintiff Thomas L. Gibson, however, stands on a very different footing. He cannot invoke this equity, for the obvious reasons that he is chargeable with notice of the fact, that the indebtedness he was seeking to take up by incumbering the defendant's property with the lien of a mortgage of her land did not relate to nor affect her separate estate, but, on the contrary, her indebtedness was only that of an accommodation indorser. One of the very mortgages he was negotiating to take up was only collateral to secure the payment of his own note for \$600. The evidence satisfies me that he was quite familiar with both the Verner transactions, and in fact a party to both. I therefore find that the deed executed by the defendant Fannie S. Hutchins to the plaintiff Thomas L. Gibson on the — day of February, 1892, was only intend-

ed by the parties, at the time the same was executed, to be a security, and not intended as an absolute deed of conveyance. It is therefore ordered and adjudged that the same is a mortgage, and a lien on the premises in favor of defendant's bond to the amount paid by said bank towards extinguishing and paying off the two Verner notes and mortgages. In view of the fact that the testimony of the bank's officer is so indefinite, it is impossible for me to determine definitely what amount has been paid by the bank; Mr. J. W. Stribling having testified before the master that he paid for the papers \$1,277, but in the amount is included a debt of Mr. Gibson's amounting to perhaps \$400. It is therefore further ordered that the cause be recommitted to the master of Oconee county to take the testimony and report to the court the amount actually advanced by the Bank of Seneca towards the extinguishing the indebtedness of the defendant Fannie S. Hutchins assigned to J. D. Verner. Upon the coming in of said report, the defendant bank will be entitled to a judgment of foreclosure for the amount ascertained by the court to have been advanced by said bank. Holding the view that none of the plaintiffs are entitled to relief under this proceeding, it is further ordered, as to them the complaint be dismissed. Ernest Gary, Presiding Judge."

C. J. Hunt & B. M. Shuman, for appellant Fannie S. Hutchins. J. W. Stribling, for appellant bank. J. W. Shelor and R. T. Jaynes, for respondents.

GARY, J. The following statement of facts appears in the "case": This action was commenced by Thomas L. Gibson against Fannie S. Hutchins on the 27th of July, 1893, to foreclose two mortgages dated on the 13th of November, 1890, respectively. The mortgage, dated the 13th of November, 1890, was made payable to Asa Leathers, T. L. Gibson, and J. A. F. Hutchins for \$1,000; the other was made payable to T. L. Gibson, for \$1,200, and in the same complaint set up a deed alleged to have been executed by Fannie S. Hutchins to T. L. Gibson, dated on the — day of February, 1892. The said complaint asked that the mortgages be foreclosed upon the land. The defendant Fannie S. Hutchins answered the complaint, alleging, among other things, that she was a married woman, and the debt complained of was a surety matter, for which she was not liable, and was made for the benefit of her husband and the said plaintiff T. L. Gibson, and that the mortgages and deed were obtained by undue influence, misrepresentation, fraud, etc. An order of reference issued in this case, referring the case to the master, a day fixed for the hearing, and the plaintiffs' attorneys appeared at said reference, and moved for a nonsuit. Thereupon the master refused to take any testimony, and recom-



mended that plaintiffs' counsel be allowed to take a nonsuit by paying the costs, and made his report to the court to that effect. Thereupon defendants' counsel excepted, and an order was taken by agreement reversing the master, and making Jesse W. Stribling, assignee of Thomas L. Gibson, and J. W. Shelor, agent for creditors, parties plaintiff, the said T. L. Gibson, on the 5th day of October, 1893, having made an assignment for the benefit of his creditors; and in the meantime the said assignee and agent advertised and undertook to sell the land in dispute under the alleged deed of F. S. Hutchins to T. L. Gibson. An action was brought against the said plaintiff Gibson and his assignee and agent, asking for a restraining order, which was granted, and it was agreed between counsel that this case should remain in statu quo, and abide the result of the case now before the court. After the assignee and agent of T. L. Gibson were made parties plaintiff, and amended complaint was filed by them, and the defendant Hutchins answered said amended complaint, a reference was had, and testimony taken; and after the close of the testimony on the part of the plaintiffs and the defendant Hutchins the Seneca Bank moved the master for leave to put in an answer and be made a party defendant, which was granted, and an order passed by the said master to that effect. Thereupon the said Seneca Bank filed an answer, and undertook to set up a mortgage executed by Thomas L. Gibson to said Seneca Bank, dated 16th April, 1893, covering the Hutchins lands in dispute in this action. The facts necessary for a better understanding of this case are set out at length in the decree of his honor, the presiding judge.

We will first consider the rights of the Seneca Bank as assignee of the \$1,000 note and mortgage executed by Mrs. F. S. Hutchins, which it bought from J. D. Verner. The notes which were discounted by J. D. Verner were executed while the act of 1887 was of force, which provides that: "All conveyances, mortgages and like formal instruments of writing affecting her separate estate, executed by a married woman shall be effectual to convey or charge her separate estate whenever the intention so to convey or charge such separate estate is declared in such conveyance, mortgage or other instruments of writing." No such intention appears in said notes or mortgages. We are, however, of the opinion that no such requirement is necessary under the act of 1887, where the contract entered into by a married woman was for the benefit of her separate estate. This view is indirectly sustained by the cases of *Reid v. Stevens*, 38 S. C. 519, 17 S. E. 358, and *Martin v. Suber* (S. C.) 18 S. E. 125. The circuit judge, in his decree, uses this language: "The master finds that: 'All the transactions with the two banks, so far as the defendant Mrs.

Hutchins is concerned with them, were negotiated for her by her husband, who was acting as her agent in the transactions, she having nothing to do with them except to sign her name to the papers.' I cannot agree with the finding of the master that 'the negotiations were made for the benefit of the defendant,' nor 'that they were made by her husband while acting as her agent.' This conclusion, in so far as being supported by the evidence, seems to me to be just the reverse." The only exceptions of the Seneca Bank are as follows: (1) "Because his honor erred in not finding that when the defendant Fannie S. Hutchins made and delivered to T. L. Gibson her deed of conveyance, absolute on its face, to the property described in the complaint, and allowed the same to be put on record, and stand thus as the property of the said T. L. Gibson, and T. L. Gibson mortgaged said lands to the Seneca Bank for valuable consideration, and the said Seneca Bank had no notice of any condition attached to said deed, but believed that the said property was the property of said T. L. Gibson, she (F. S. Hutchins) is now estopped from denying that said conveyance is absolute." (2) "That his honor erred in not finding that the Seneca Bank is entitled to judgment for the whole amount due it on its mortgage." It will thus be seen that the Seneca Bank did not except to the findings of fact by the circuit judge that the negotiations were not made for the benefit of the defendant Fannie S. Hutchins, and that they were not made by her husband while acting as her agent. These findings of fact must be regarded as conclusive in so far as the Seneca Bank is concerned. The only testimony tending to show that the execution of the note and mortgage by the defendant F. S. Hutchins was a contract as to her separate estate is that the money was received by her husband when the note was discounted by J. D. Verner. If her husband had been her agent, this money received by him would have made her separate estate liable, provided Verner did not have notice that said money was to be used for a purpose other than for the benefit of her separate estate. It is due Mr. Verner that we should say we do not think he had such notice. This note was payable one day after date, and the master finds that it was discounted by J. D. Verner a few days after its execution. The note, when discounted by Verner, was past due, and therefore subjected to the equities existing between the original parties. "The phrase 'one day after date' is generally adopted to express a due note." *Plester v. Plester*, 22 S. C. 140. The Seneca Bank, when it purchased said note and mortgage, and took an assignment thereof from J. D. Verner, took them likewise subject to such equities; and, it having been denied as matter of fact that the husband of F. S. Hutchins was her agent in negotiating the

loan with Verner, the Seneca Bank has not the right to recover thereon by reason alone of such assignment.

We will next consider the right of the Seneca Bank to recover on the mortgage executed in its favor by T. L. Gibson of the property which, upon the face of the papers, appears to be an absolute conveyance thereof by Mrs. Hutchins to said Gibson. On the 29th of January, 1892, suits were commenced to foreclose the two mortgages executed by the defendant F. S. Hutchins, hereinbefore mentioned. The summons and complaint were served on the defendant F. S. Hutchins, and she failed to make answer thereto. The plaintiffs' attorneys therein were about to take and enter up judgment of foreclosure of said mortgage by default when an arrangement was made between Mrs. Hutchins and T. L. Gibson by which he took steps and did succeed in stopping said suits. The presiding judge, in his decree, says: "On the — day of February, 1892, the said Fannie S. Hutchins executed and delivered to T. L. Gibson in form an absolute deed of conveyance of the tracts embraced in the two mortgages above alluded to. Although the deed appears on its face to be absolute, it was understood and agreed at the time it was executed that the grantor, the defendant Hutchins, was to have the land reconveyed to her upon repaying to Gibson the amount he paid out in taking up the two mortgages, called for convenience the 'Verner Mortgages.'" The master, in his report, says: "Of the \$5,223.67 secured by the mortgage, \$1,643.66 was money advanced to Gibson to pay J. D. Verner up the amount due Verner by the defendant Fannie S. Hutchins. Of this latter, \$72.93 was interest due the Seneca Bank on the \$1,590.62 advanced by it from the day of advancement to the date of Gibson's securing it by this mortgage. The Seneca Bank had no notice at any time of any condition attached to the deed from Fannie S. Hutchins to T. L. Gibson, and advanced the money to him to pay J. D. Verner on the representation that he had or would have a deed, and subsequently took a mortgage from Gibson on the land on exhibition of the deed of Fannie S. Hutchins to T. L. Gibson, with the chain of title, and supposing the conveyance to be absolute, as it reported to be, and the title perfect in all respects." The mortgage, in form a deed, which Mrs. F. S. Hutchins executed in favor of T. L. Gibson, is governed by the provision of section 2037 of the General Statutes, as amended in 1891, which is as follows: Section 2037: "A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyances therefor, and to bind herself by contract, in the same manner and to the same extent as though she were unmarried, which contract shall be legal and obligatory, and may be enforced at law or in equity by or against such mar-

ried woman in her own name apart from her husband: provided, that nothing herein shall enable such married woman to become an accommodation endorser, guarantor or surety, nor shall she be liable on any promise to pay the debt or answer for the default or liability of any other person; and, provided further, that the husband shall not be liable for the debts of his wife contracted prior or after her marriage, except for necessary support, and that of their minor children residing with her." This mortgage does not fall within any of the exceptions mentioned in the proviso to said section limiting the powers of a married woman. It was executed to prevent foreclosure proceedings of a mortgage on this property, which she had previously executed. She had failed to answer the complaint in said proceedings, and judgment of foreclosure by default was about to be taken against her, which in all probability would have necessitated a sale of said property, unless she had been able to get some one to do just what Mr. Gibson did to prevent it. The execution of this mortgage to Gibson was a valid and binding contract on the part of Mrs. Hutchins. The mortgage executed by T. L. Gibson to the Seneca Bank was valid to the extent of securing the money advanced by said bank to T. L. Gibson to extinguish the mortgage on this property, which had been previously executed by Mrs. Hutchins. The said mortgage was invalid to the extent of attempting to secure the payment of any other debts due by T. L. Gibson to said bank. It appears that all the debts outside of the money advanced by the bank to extinguish the Verner mortgage were contracted by Gibson prior to, and were subsisting obligations at the time of, the execution of the mortgage by Gibson to the Seneca Bank, and therefore the bank took subject to all equities existing between the original parties. As this mortgage was only valid to the extent of securing the payment of money advanced to extinguish the Verner mortgage, and was invalid to the extent of attempting to secure the antecedent indebtedness of the Seneca Bank, we think the reasoning applies even with greater force in so far as the rights of J. W. Stribling, as assignee of T. L. Gibson, and J. W. Shelor, as agent of the creditors, are concerned. These views render it unnecessary to decide specifically all the exceptions. It is the judgment of this court that for the reasons herein stated the judgment of the circuit court be affirmed.

(43 S. C. 306)

#### MILLER v. MILLER.

(Supreme Court of South Carolina. March 18, 1895.)

HUSBAND AND WIFE—ACTION FOR ALIMONY—EVIDENCE OF MARRIAGE.

1. A complaint to recover alimony does not contain a sufficient allegation of a consummation of the marriage contract where the only aver-

ment on the subject is that complainant has done her duty as wife and mother faithfully after her marriage to defendant, at his request, and upon his express promise that he would support her.

2. The certificate of an alleged justice of the peace by whom a marriage ceremony is claimed to have been performed, in another state, containing the letters, "J. P., C. Co., Ga.," written after his name, without any explanation of their meaning, is insufficient to prove the official character of the alleged justice.

3. A copy of the record of one state, where the law pertaining to the registry of marriage licenses applies only to residents of that state, of a marriage claimed to have been solemnized therein of parties residing in another state, is not conclusive evidence of the marriage, so as to preclude proof that the ceremony was performed while defendant was under duress.

Appeal from common pleas circuit court of Charleston county; James F. Izlar, Judge.

Action by Mary A. Miller, a minor, by her father, as guardian ad litem, against Charles D. Miller, to recover alimony. From a decree against plaintiff, and that defendant was forced into the marriage by duress, and that it was never consummated, plaintiff appeals. Affirmed.

McCrady & Bacot, for appellant. Chas. S. Bissell, for respondent.

POPE, J. The plaintiff being a minor under the age of 21 years, through her father, who was duly appointed her guardian ad litem, has instituted this action in the court of common pleas for Charleston county for alimony. In her complaint she alleges her marriage with the defendant on the 2d day of November, 1892; the birth of an infant, which is still alive; and that the defendant, since said marriage, has neglected the plaintiff, and refuses to furnish her means of support, and also neglects and refuses to furnish the said infant with the necessaries of life and medical attention; that the plaintiff has discharged faithfully and fully her duty as a wife. In his answer, the defendant, after a denial of the material facts of the complaint, alleges that any supposed contract of marriage between himself and the plaintiff is invalid and void, and that at the time the supposed contract was made it was not a contract. Whereupon the defendant prays the court to have and determine any issue herein affecting the validity of any supposed contract for marriage between the defendant and the plaintiff, and to decree any such supposed contract void. Under an order therefor, duly passed, the testimony was all taken by Master Dingle, and reported to the court. The action came on to be heard before his honor, Judge Izlar, who filed a most elaborate decree on the 15th September, 1893. He held as follows: "Under a review of the whole testimony, I find as a matter of fact: (1) That the defendant, Miller, was not consenting to this marriage voluntarily, but was forced thereunto under duress; and (2) that there was no consummation of the alleged marriage. The decree must therefore be against the

plaintiff. The defendant, under the provisions of the General Statutes, prays affirmative relief. The provision is as follows: 'Sec. 2023. The court of common pleas shall have authority to hear and determine any issue affecting the validity of marriage, and to declare same void for want of consent of contracting parties, or for any other cause going to show that at the time the supposed contract was made it was not a contract. Provided, that such contract has not been consummated by the parties thereto.' In pursuance of this provision, the defendant, in his answer, prays 'that the court will hear and determine any issue herein affecting the validity of any supposed contract of marriage between himself and the plaintiff, and will decree any such supposed contract void and for his costs,' etc. As we have concluded and adjudged that the defendant was not consenting to the alleged marriage, and that there was no consummation, and that there was not, therefore, a valid marriage contract between the plaintiff and the defendant, and that under the laws of Georgia, where the marriage was alleged to have taken place, the same is void, the defendant is entitled, under the statute, to the relief prayed for. It is therefore ordered, adjudged, and decreed that the complaint in this case be dismissed, with costs, and that the alleged contract of marriage therein set forth be, and is hereby, declared void." The plaintiff now appeals upon four grounds, to wit: "(1) Because his honor erred in holding that there was no allegation in the complaint of any consummation or cohabitation after marriage; the allegation in the complaint, 'she has done her duty as wife and mother faithfully, and, after her marriage to said defendant in the city of Savannah, left said city for Charleston, at the request of said defendant, and upon express promise from said defendant that he would support and protect her,'—showing that he recognized and held her out as his wife,—if proved, is sufficient to constitute consummation under the Georgia laws. (2) Because his honor erred in holding that the copy of record of marriage, as introduced in evidence, could not be relied upon as evidence of the marriage; the generally adopted doctrine of the law being that the record, or proper copy thereof, is direct evidence of the marriage, in criminal and civil cases alike. (3) If it is not necessary to record the marriage (the female being a nonresident), then his honor erred in holding that there was no evidence that Michael Naughton was a justice of the peace, because, according to the defendant's own testimony, the said Michael Naughton held himself out as an officer in power to perform the marriage ceremony; and, representing himself as one who was in the habit of so acting, the law presumes from this that he had the right so to act, and this presumption holds good until the contrary is shown. (4) Because his honor finds that

the defendant was not consenting to the marriage voluntarily, but was forced thereto under duress, is contrary to the weight of the evidence, and law of presumption as applicable thereto."

Although, in view of our duty under the law to these parties litigant, we have endeavored to study the case as made by their pleadings and testimony, yet we shall dispose of these several questions raised by the appeal in as brief a manner as possible. We will not even lay bare the grounds here furnished for the indignation we feel at the foul wrong which has been done to the family of the plaintiff, the cruel deception practiced upon the mother of the plaintiff in order to render possible the attack upon the plaintiff. Hard, indeed, would be the heart that would fail to respond in generous sympathy to this afflicted family. We make this last remark almost in explanation of the judgment that, under the law, we feel obliged to render. Let us, then, pass upon these grounds of appeal.

1. We agree with the circuit judge that there is no allegation of the complaint of any consummation of the marriage contract, or cohabitation after marriage. It seems from the testimony of both parties and their witnesses that, as soon as the alleged marriage ceremony was finished, the plaintiff and defendant immediately separated, and have never been together since. The marriage occurred in the state of Georgia. There is no decision of the courts of that state defining the term "consummation." The meaning accorded in 14 Am. & Eng. Enc. Law, at page 518, to that term, is approved by us, and need not be quoted.

2. It seems that the plaintiff endeavored to prove a fact of marriage and not a marriage in fact. Of course, it being true that the alleged marriage ceremony was observed in the state of Georgia, it became necessary to the establishment of its validity to show what the law of that state is on this subject, and a strict compliance with every requisite in that law to establish a valid marriage. The certificate of Michael Naughton, with the letters, "J. P., C. Co., Ga.," written after his name, that he had performed the ceremony, was introduced. No explanation was in evidence as to the meaning to be attached to these letters, "J. P., C. Co., Ga." Of course, this was fatal, in the absence of explanation.

3. The appellant assails the conclusion of the circuit judge that the copy of record of marriage, as introduced, could not be relied upon as evidence of the marriage. It is quite true that great weight—controlling weight, in fact—is accorded under the law to the records of judgment, etc., of other states by our courts. Judgments must be of record; hence the reason of the rule pertaining to them. But other instruments entered of record in Georgia, that the law does not require to be recorded, cannot have

this dignity accorded them in our courts simply because they are recorded in Georgia. Mr. Bishop on Marriage, Divorce & Separation, at sections 990, 991, says: "Sec. 990. Where, as in England, and probably in all of our states, the law requires marriages to be registered, the record kept in pursuance of law, or the certificate of it, or the copy, as just stated, is admissible in evidence to establish the fact of the marriage. But it proves nothing beyond what the law requires to be entered in the register." "Sec. 991. This sort of record is not, like judicial ones, conclusive; it is of no higher grade than the testimony of witnesses. Consequently it may be contradicted, or shown to be a forgery, or act of an unauthorized person. It is not, in contemplation of law, 'the best of evidence.'" As the circuit judge remarks, the provisions of the law of Georgia touching the registry of marriage licenses, etc., only apply to residents of that state. Section 1703, Code Ga. But, apart from all these circumstances, the circuit judge has decided as a fact that this ceremony of marriage was performed while the defendant was under duress, and that he has not ratified it since in any of the methods recognized in the law as sufficient for that purpose.

4. The appellant insists that the weight of the evidence and the presumptions are against the conclusions reached by the circuit judge. We have read very attentively the testimony in this case. We cannot hold with the appellant, as here suggested, but, as intimated previously, we prefer that no specific reference to the testimony shall appear in our decision.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(43 S. C. 345)

#### WITHERSPOON v. TWITTY.

(Supreme Court of South Carolina. March 23, 1895.)

#### REVIVAL OF JUDGMENT—QUESTIONS CONSIDERED—RES JUDICATA.

1. In a proceeding to revive a judgment, the question of whether a certain person has had possession of such character and for such time of certain land as to entitle him to claim it against the judgment cannot be considered, though such person is a party to the proceeding, by reason of being an heir of the deceased defendant.

2. An order that a judgment be revived, made in a proceeding therefor, in which all proper parties are before the court, is conclusive of the question of the right to revive, as against any objection based on a condition of facts existing prior to that time which could then have been made; and such matters are res judicata on application for a subsequent revival.

Appeal from common pleas circuit court of Lancaster county; R. C. Watts, Judge.

Proceedings against the administrator and heirs of Peter W. Twitty, deceased, to revive, in favor of D. A. Williams, as receiver of the estate of James H. Witherspoon. De-

ceased, a judgment for plaintiff in an action by J. H. Witherspoon against Peter W. Twitty. Judgment was revived, and Francis R. Twitty, one of the heirs, appeals. Affirmed.

The answer or return of said Francis R. Twitty to the summons to show cause why the judgment should not be revived was as follows:

"Francis R. Twitty, upon whom, with others, a summons to show cause in the above-entitled cause has been served, comes into court, and for cause shows: (1) That he knew nothing of the judgment referred to as rendered on the 5th day of January, 1860; that he was not a party thereto originally, nor was he a party to the alleged renewal on the 1st day of March, 1882, nor has he ever had any notice whatever that the said alleged judgment was attempted to be revived; and he denies that the same has been legally revived, and denies that the same can now or hereafter have any effect on him or his property. (2) This respondent shows that the said alleged judgment was twenty-two years old when it was attempted to be revived against the administrator, was paid at that time in point of fact and by lapse of time, and the administrator ought then to have alleged and shown payment, and it is now too late for any party interested in the said judgment to attempt to set up the same against this respondent and the other heirs at law of Peter W. Twitty, deceased; and this respondent pleads payment and lapse of time and laches against the said alleged judgment, and that said alleged judgment has never been in form or effect lawfully revived. (3) Respondent further shows that he now owns a plantation, is seised in fee and possessed of the same in his own right, which the holder of the alleged judgment is now endeavoring to take hold of as the property of the said Peter W. Twitty; but respondent has been holding the same as his own for nearly thirty years, has been paying the taxes on the same from year to year, and has never been disturbed in his possession; and he now claims the same, and has claimed the same for thirty years. And this respondent submits that if the administrator saw proper to let the said alleged judgment be revived against them after the same was paid, either in fact or by lapse of time, the same is not now, and cannot be made, binding on this respondent, and the said tract of land cannot be made liable for the said alleged judgment, and this respondent submits that the cause shown is sufficient to prevent the revival of the judgment against him, and he pleads payment, lapse of time, and defect in the alleged former revival, and asserts his title to the said tract of land, all in bar of these proceedings against him."

The following is the decree of the circuit court:

"This was a summons to show cause why a

judgment in favor of the above-named plaintiff, and against the above-named defendant, should not be revived, according to the form, force, and effect of the former recovery, and why execution should not be renewed thereon in favor of David A. Williams, as receiver of the estate of James H. Witherspoon, deceased. The summons was issued on the 19th day of January, 1892, and was directed to and served upon the surviving administrator and the heirs at law of the said Peter W. Twitty, deceased. Neither the administrator nor any of the heirs at law, save and except Francis R. Twitty, have answered the said summons; but the said Francis R. Twitty has made answer thereto, denying the recovery of the original or any previous revival thereof, and setting up various reasons why the said judgment should not be revived. It appears from the evidence before me that the judgment was originally duly rendered in this court in favor of the said James H. Witherspoon, and against the said Peter W. Twitty, on the 5th day of January, 1860, for the sum of \$810.53 debt, and for \$18.62 costs, and was duly entered up and signed in the office of the clerk of this court on that day. It was further shown by testimony as to the admissions of the surviving administrator of the defendant that on the 27th day of July, 1866, after the death of the said Peter W. Twitty, upon notice served upon the administrators of the said Peter W. Twitty, the judgment was revived, and execution renewed thereon by order of this court. The abstracts of judgments in the office of the clerk of this court contain a regular entry of this renewal, and the defendant A. Minor Caston, as administrator of Peter W. Twitty, is shown by the testimony to have admitted that this renewal was ordered after due notice to the administrator of Peter W. Twitty of application by the plaintiff therefor to the court. The execution having thus been renewed, and the judgment revived on the 27th day of July, 1866, upon notice to the administrators of Peter W. Twitty, a summons to show cause was served, prior to the March term of this court for the said county for the year 1882, upon the administrators of Peter W. Twitty, requiring them at the March term, 1882, to show cause why the said judgment should not be revived, and why execution should not be renewed thereon. No cause to the contrary having been shown, on the 1st day of March, 1882, an order was passed by this court that said judgment be revived in favor of David A. Williams, as receiver of the estate of Peter W. Twitty, deceased, according to the form, force, and effect of the former recovery, and that execution be renewed thereon in favor of the said receiver. Judgment was duly entered up accordingly, and execution issued thereon. All these facts appear by the records of this court offered in evidence herein. The summons to revive the judgment and renew the execution upon which this order and judg-

ment of revival were based was duly served upon the administrator of the said Peter W. Twitty, as appears by the said records, and the said judgment was revived for the amount of the original recovery and costs, and for \$14.40, costs of said revival. It appears from the evidence that no part of this judgment has in fact been paid; that the whole amount thereof is unpaid; and that the same has been recognized as unpaid and still outstanding by the surviving administrator and by Francis R. Twitty, the only heir at law now answering the summons to show cause why the same should not be revived. It is contended, however, by the defendant Francis R. Twitty, by his counsel, that the original judgment cannot now be revived, upon the ground that the same was more than twenty years old at the time the summons was served on him in the present proceeding. In view, however, of the facts above stated, this contention cannot prevail to defeat a revival of the judgment in this proceeding. The original judgment was recovered in 1860, but it was revived, or at least execution thereon was renewed, upon due proceedings had and notice to the administrator of Peter W. Twitty, deceased, in the year 1867. Afterwards, on summons to show cause why this judgment should not be revived, which summons was served upon the administrators of Peter W. Twitty, this judgment was again revived in 1882, by order of this court. Such revival of the judgment in 1867, and again in 1882, upon due notice to the administrators, is binding upon the heirs. The case of *Leitner v. Mets*, 32 S. C. 383, 10 S. E. 1082, and *Cowan v. Neel*, 17 S. C. 588, are authorities to show that such a renewal and revival as was here made are sufficient to keep alive the lien of the judgment as against the administrator and the heirs at law of Peter W. Twitty. See, also, *Roberts v. Smith*, 21 S. C. 455; *Wood v. Milling*, 32 S. C. 378, 10 S. E. 1081.

"The provisions of section 1831 of the General Statutes, as construed in the cases thereunder, have no application to the present case. The proviso to that section shows that the same was not intended to affect the lien of judgments kept alive by revivals within the period of twenty years, and that a judgment revived thereunder within such period is not affected thereafter so as to cease to be a lien at the expiration of twenty years from the date of the original recovery. As against the administrator and the heirs at law of Peter W. Twitty, the lien of his judgment is still of force; and, even as against subsequent judgment creditors (if there were any such intervening between the date of the original recovery and the subsequent revivals, as in *Henry v. Henry*, 31 S. C. 1, 9 S. E. 726, cited by defendant), the judgment lien in favor of the receiver would be preserved by the revival in 1867, and again, in 1882, against the administrator of Peter W. Twitty, deceased. No such question is, how-

ever, presented here, and it is not necessary to pass upon the question as to the rights of intervening lien holders.

"The simple question here is whether a judgment originally recovered in 1860, revived or renewed in 1866, upon due notice to the administrator of the judgment debtor, and revived upon summons to show cause in 1882 served upon such administrator, can now be revived upon summons in 1892 to the surviving administrator and the heirs at law of the said judgment debtor, and upon proof that it has not been paid. This question is decided in the affirmative, the court holding that the revivals upon notices to the administrators have the same force and effect as if made upon notice to the heirs. Such revivals, having been ordered within the several periods of twenty years, while the lien of the judgment existed, made a new starting point for the presumption of payment, and kept alive the lien of the judgment from the date of the last revival, in 1882. See *Cowan v. Neel*, 17 S. C. 588.

"It is therefore ordered, adjudged, and decreed that the judgment aforementioned be revived in favor of David A. Williams, as receiver of the estate of James H. Witherspoon, deceased, against the said defendant, according to the form, force, and effect of the former recovery, and that execution be renewed thereon for the amount of the said judgment, interest, and costs, and for the costs of revival, in favor of the said receiver. This cause heard before me at Lancaster, at the March term, 1894, and decree made to relate back to the said term."

R. E. & R. B. Allison, for appellant. Ernest Moore, for respondent.

McIVER, C. J. The facts of the case are so fully and clearly stated in the decree of the circuit court, rendered by his honor, Judge Watts (a copy of which should be incorporated in the report of the case), that it will be unnecessary to do more than make a very general statement here. It seems that the plaintiff in the case above stated recovered a judgment against the defendant, which was duly entered on the 5th day of January, 1860. This judgment, it is claimed, was duly revived by proper proceedings on the 27th of July, 1866; but this claim is stoutly contested, and several of the questions presented by this appeal raise questions of the competency of the evidence adduced to establish such claim, and as to the validity of that proceeding, if any such there was. It does appear, however, that on the 6th and 8th days of February, 1882, a summons was duly served upon the two administrators of the original judgment debtor, Peter W. Twitty, who had in the meantime departed this life, intestate, calling upon them to show cause why "the original judgment" should not be revived in favor of David A. Williams, as receiver of the estate

of said James H. Witherspoon, deceased, according to the form, force, and effect of the former recovery, and why execution thereon should not be renewed. In pursuance of this summons, on the 1st day of March, 1882, an order was granted by his honor, Judge Cothran, in the following words: "It appearing that the summons in this action has been duly served, and that no answer, demurrer, or notice of appearance has been put in, on motion of Moore & Moore, ordered that the judgment within mentioned and described be revived in favor of David A. Williams, as receiver of the estate of James H. Witherspoon, deceased, according to the form, force, and effect of the former recovery, and that said receiver have leave to issue execution thereon." In conformity with this order, it appears from the book of "Pleadings and Judgments" that on the 8th of March, 1882, a formal judgment of revival was duly entered as authorized by said order. On the 19th of January, 1892, the receiver of the estate of the original judgment creditor instituted the present proceeding, again to revive said judgment by the service of a summons upon the surviving administrator of the estate of Peter W. Twitty and all of his heirs at law, to which no answer or return was made except by one of said heirs, viz. Francis R. Twitty, the appellant herein, who, by his answer or return (a copy of which should be incorporated in the report of the case), sets up sundry objections to the revival of the original judgment. Many of these objections, as it seems to us, relate more to the effect of the judgment, if it should be revived, as a lien upon certain lands of the appellant, of which he claimed to have been in undisputed possession for a great number of years, than to the right to revive the judgment. Whether the appellant's possession of such lands has been of such a character, and continued for such a length of time, as would entitle him to successfully claim the same against such judgment, is not a question which can be considered in the present case.

The only question here is as to whether the circuit court erred in adjudging that the judgment should be revived. That question turns upon the effect of the order to revive passed in March, 1882. That order was made in a proceeding in which all proper parties were before the court (*Leitner v. Metz*, 32 S. C. 383, 10 S. E. 1082; *Railroad Co. v. Marshall*, 40 S. C. 59, 18 S. E. 247), and hence was conclusive of all questions which were then made, as well as upon all question which were necessarily involved in the issue then determined, whether such questions were then raised or not (*Sullivan v. Shell*, 36 S. C. 578, 15 S. E. 722, and the several cases therein cited and followed). The very issue then before the court was as to the right to revive the judgment, and this, of course, involved many of the ques-

tions which are now urged upon the court. Then was the proper time to raise any objections based upon any condition of facts existing prior to that time, and, if not raised then, it is now too late to do so, as all such matters must be regarded as *res adjudicata*. The right to revive being then solemnly adjudicated, and the present proceeding having been instituted within 20 years from the date of such adjudication, we see no error in the judgment appealed from. The view which we have taken renders it unnecessary to consider any of the other questions raised by this appeal, as under that view they become immaterial. The judgment of this court is that the judgment of the circuit court be affirmed.

(43 S. C. 355)

## WILLIAMS v. WASHINGTON et al.

(Supreme Court of South Carolina. March 23, 1895.)

## TAXATION OF COSTS — PARTITION AND FORECLOSURE PROCEEDINGS—COSTS ON APPEAL.

1. A decree in which it was adjudged that defendant B. do recover his costs from defendant W., in conclusion recited that "this decree is without prejudice to the rights of any party as to costs." *Held*, that the decree left open for adjustment the costs of all the parties except as to defendant B.

2. Land was mortgaged by cotenants, with power of sale, and the land sold under the power. One of the cotenants, who was induced by fraud to acquiesce in a sale by the purchaser at the mortgage sale of the portion of the land which had been set apart to him, sued, the mortgage sale being void, to determine his title to the land, making his cotenant, as well as the mortgagee and his grantee, parties. The complaint contained a prayer for partition. There was no controversy as to the right to a partition, and no obstacle in the way of making one. *Held*, that the action was not one for partition, so as to entitle the parties to only half costs, under Rev. St. 1893, § 2548.

3. Where a mortgagor sues to determine his title to the mortgaged land after a void sale under the mortgage, offering to pay the mortgage, and a defendant claims under a mortgage made by the purchasers at such void sale, and asks foreclosure thereof, the action is not one to foreclose a mortgage, in which, under Rev. St. 1893, § 2548, only half costs can be allowed.

4. Where a decree, which was not appealed from, adjudges that defendant B. recover his costs against defendant W. alone, and leaves open for future adjustment the costs between the other parties, it is error to subsequently charge another defendant with "all" the costs in the case.

5. A person brought in as a party after the commencement of an action cannot be charged with costs which had previously accrued.

6. Plaintiff sued to recover land sold under a mortgage executed by him, the sale being void. Defendant P., who was the assignee of the mortgage, claimed no interest under that mortgage, but set up a claim under a mortgage executed to him by the grantee under the mortgage sale. The trial court decreed that plaintiff was estopped to deny the validity of the mortgage sale, and also refused to foreclose the mortgage set up by defendant P. On appeals by plaintiff and defendant P. the decree was reversed, and one ordered to be entered for the land in favor of plaintiff, and ordering the mortgage under which P. claimed to be delivered up for cancellation; but also adjudged that P. should have

a lien on the land to the extent of the first mortgage, payment of which he had refused. *Held*, that it was not error to tax all the costs of the appeal against defendant P.

Appeal from common pleas circuit court of Alken county; D. A. Townsend, Judge.

Action by Sanders Williams against George Washington and others. From the judgment taxing the costs, defendant James Powell appeals. Modified.

Defendant Powell's exceptions were as follows: "The defendant James Powell excepts to the decree of his honor, Judge D. A. Townsend, in which he directs that the costs in this case should be paid by this defendant and the defendant George Washington, upon the following grounds: (a) Because it is submitted his honor erred in not ordering the costs to be taxed at one-half of the true costs, for the reason that he should have held that the case was either a suit for partition or for the foreclosure of mortgages set up by the defendants, and not an action to recover possession of land. (b) Because it is submitted that James Powell, not being an original defendant in the case, and coming into action simply to foreclose his mortgage, ought not to be charged with all of the costs of the action under the facts and circumstances and equities of the case, and, if charged with any cost at all, he should simply be required to pay a proportion of the costs accrued by the appeal to the supreme court."

Henderson Bros. and M. B. Woodward, for appellant. Croft & Chafee and O. C. Jordan, for respondents.

McIVER, O. J. This being the second appeal in this case, reference must be had to the former decision, in 40 S. C. 457, 19 S. E. 1, for a detailed statement of the facts. After that decision was rendered, and the remittitur sent down to the circuit court, his honor, Judge Norton, rendered a judgment in conformity to the views announced in the opinion of the supreme court, which concludes with these words: "This decree is without prejudice to the rights of any party as to costs,"—which must be construed as meaning except with regard to the costs of the defendant J. H. Beckman, as it had been expressly adjudged in a previous part of the decree "that the defendant J. H. Beckman do recover his costs and disbursements herein from the defendant George Washington." The question of costs having been thus left open, with the exception above mentioned, it became necessary to adjust the same, and, the costs having been taxed by the clerk as set forth in the "case," to which no exception was taken, so far as the items therein were concerned, two questions were submitted, by agreement, to his honor, Judge Townsend, for decision: (1) Whether the costs should be taxed at half rates, under the provisions of section 2548 of the Revised Statutes of 1893; (2) against whom the costs should be taxed. Judge Townsend held that

the case did not fall within either of the classes of cases in which, by the terms of that section, only half costs should be allowed, as the case was not an action for partition or for foreclosure of a mortgage; and that James Powell and George Washington should pay all the costs of this action, and accordingly he so ordered and adjudged. From this judgment the defendant James Powell alone appeals, and by his appeal presents the same questions for the determination of this court as were presented to Judge Townsend, as may be seen by his exceptions, which should appear in the report of this case.

The first question turns upon the inquiry as to what was the nature and object of the action. If it should be regarded as an action either for partition or for the foreclosure of a mortgage, then, as it is conceded that the amounts involved are less than the amounts named in the section above referred to, only half costs can be allowed. But, if the action does not fall within either of those classes of actions, then it is clear that there was no error in adjudging that full costs should be charged. We agree with the circuit judge that this action cannot properly be regarded as either an action for partition or an action for the foreclosure of a mortgage, and, on the contrary, we think the real object of the action was to determine the title to the land described in the complaint. It was not an action for partition, as the pleadings show that there was no necessity for such an action, for there was no controversy upon that point, and, so far as appears, there was not only no objection to a division of the land, but no obstacle in the way of making a partition by the act of the parties. The two defendants, Adaline Williams and Lewis Williams, as tenants in common with the plaintiff, having an interest in the lands in controversy, were proper parties to the action, the real object of which was to determine the title to said lands, and it is manifest that the prayer for the partition was merely incidental to the main object of the action. Nor can the action be properly regarded as an action for the foreclosure of a mortgage, for, in the first place, the plaintiff did not hold, and did not pretend to hold, any mortgage on the premises in controversy. On the contrary, the complaint shows that the plaintiff admitted that his interest in the land was subject to the lien of a mortgage which he had given, and which he was willing to pay. The mortgages of which foreclosure was asked were set up by the defendants, in their answers, first by the original defendant, George Washington, and by the other defendants, who were made parties after the commencement of the action; and it may be mentioned in passing that neither the mortgage set up by said Washington nor that set up by the appellant, Powell, was sustained as a valid claim in their behalf. We cannot, however, fully agree with the circuit judge



that the defendants "James Powell and George Washington should pay all the costs of the action." As the defendant George Washington has not appealed, his rights and interests, even if he could establish any, are not before us for consideration. But the defendant Powell has appealed, and although we must say that his conduct, as disclosed by the proceedings in this case, has not been such as to commend him to the favor of the court, yet he is entitled to his legal rights, which must be accorded to him. We do not think that Powell, along with his codefendant, Washington, can be properly charged with all of the costs of the action, for two reasons. In the first place, by the decree of Judge Norton, which was not appealed from, it has been adjudged, as we have seen, that the defendant Beckman is entitled to recover his costs and disbursements from defendant Washington alone, and hence no part of such costs can now be charged against the appellant, Powell. In the second place, it must be remembered that Powell was not originally made a party to the action, but was subsequently made a party defendant by the order of the court, and we do not see how he can be charged with any costs which had accrued prior to his being made a party. It seems to us, therefore, that the judgment appealed from should be so modified as to relieve the appellant, Powell, from the payment of any of the costs of the defendant Beckman, as well as any of the costs accruing before he was made a party to the action. The position taken by counsel for appellant in his argument here, that Powell should not be charged with any of the costs incurred by the former appeal, inasmuch as he was not the "losing party," having gained "at least half of what he asked for in the supreme court against nothing in the court below," seems to be somewhat inconsistent with the terms of his second exception, where it is, at least impliedly, admitted that he is liable to pay a proportion of the costs incurred by the former appeal. But, waiving this, and not resting our judgment upon any such ground, inasmuch as such implied admission may, possibly, be regarded as merely conditional, we do not think that any such position can be sustained. As we understand it, the claim set up by Powell in his answer was for the foreclosure of the mortgage given him by Washington, and that claim was entirely repudiated, and that mortgage was ordered to be delivered up and canceled. He did not and could not have set up any claim for the \$150 from the plaintiff, for that was utterly inconsistent with his whole defense, and directly contrary to the claim which he did set up, as well as to his conduct in refusing to accept the \$150 when offered by plaintiff's counsel. The judgment of the supreme court simply was that the plaintiff should pay to him the amount which the plaintiff had all the time expressed his willingness and readiness to pay, but without interest, because

Powell had refused to accept the tender when made to him by the plaintiff. It cannot, therefore, with any propriety be said that Powell gained anything by the former appeal, but, on the contrary, he lost everything for which he had contended throughout the whole case. The judgment of this court is that the judgment appealed from, except as modified herein, be affirmed.

(48 S. C. 342)

# TABB & JENKINS HARDWARE CO. v. GELZER.

(Supreme Court of South Carolina. March 23, 1895.)

## AFFIDAVIT ON ATTACHMENT—FRAUDULENT CONVEYANCE OF PROPERTY.

1. An affidavit for an attachment sufficiently avers an intent to defraud creditors, where it alleges that the debtor has disposed of a large proportion of his property with such intent, by mortgages on his entire stock of goods for more than their actual value, and stating that the debtor admitted that two of the mortgages secured an amount much greater than was actually due, and that he declined to give any information concerning the other mortgages.

2. A mortgage by the debtor on his stock of goods, having effect, after condition broken, to divest him of the title, and vest it in the mortgagees, is such an assignment of his property as authorizes an attachment for disposing of property with the intent to defraud creditors.

Appeal from common pleas circuit court of York county; R. C. Watts, Judge.

Action by Tabb & Jenkins Hardware Company against John Gelzer on certain promissory notes, and also by service of summons and attachment of the defendant's property. From the refusal of a motion to dissolve the attachment, defendant appeals. Affirmed.

The following is the affidavit in attachment:

"Personally appeared Charles T. Jenkins, and made oath that he is the secretary and treasurer of the Tabb & Jenkins Hardware Company, a corporation duly incorporated under the laws of Maryland, with its principal business office in the city of Baltimore, in the state of Maryland, and with power, among other things, to make contracts and to sue and be sued. Second. That four separate causes of action exist in favor of the plaintiff and against the defendant, arising as follows: (1) On account of the certain promissory note made by the defendant to the plaintiff on the — day of —, in the sum of two hundred dollars, due and payable on the 27th day of December, 1893, besides interest thereon from maturity, and protest fees in the sum of \$2.25. (2) On account of the certain promissory note made and delivered by the defendant to the plaintiff on the 26th day of October, 1893, due and payable on the 15th day of January, 1894, in the sum of one hundred and thirty-six and  $\frac{85}{100}$  dollars, besides interest thereon after maturity, and protest fees in the sum of \$2.25. (3) On account of the certain promissory note made and delivered by the defend-

ant to the plaintiff on the 8th day of November, 1893, in the sum of one hundred and one  $\frac{40}{100}$  dollars, due and payable on the 15th day of January, 1894, besides interest thereon after maturity, and protest fees in the sum of \$2.75. (4) On account of the certain promissory note made and delivered by the defendant to the plaintiff on the 4th day of December, 1893, in the sum of one hundred and fifty-three and  $\frac{1}{100}$  dollars, due and payable on the 25th day of January, 1894, besides interest thereon after maturity; that no part of the said notes above mentioned, either of principal or interest, has been paid, except \$1.68 credited January 22, 1894, but otherwise remains wholly due and unpaid. Third. That the defendant, John Gelzer, has already disposed of a very large portion of his property, to wit, more than three thousand dollars, with intent to defeat, delay, hinder, and defraud his creditors, and particularly the plaintiff, in the collection of the debts to it justly due and owing by the defendant, having already mortgaged his entire stock of goods for far more than their actual value, as follows, viz.: By chattel mortgage to the Savings Bank of Rock Hill, S. C., dated December 2, 1893, in the sum of \$3,100, due and payable December 15, 1893, recorded in the office of the register of mesne conveyance for York county on the 5th day of January, 1894. (2) A certain other chattel mortgage to the Savings Bank of Rock Hill, S. C., dated January 21, 1893, in the sum of \$2,000, to secure an alleged note in the sum of \$2,000, due and payable one day after date, recorded in the office of the register of mesne conveyance for York county on the 5th day of January, 1894. (3) A certain other chattel mortgage to J. J. Wescoat, trustee, dated August 17, 1892, to secure alleged note, due forty days after date, in the sum of seven hundred dollars, but said mortgage was not recorded until the 10th day of January, 1894. (4) A certain other chattel mortgage to John L. Ancrum, dated the 1st day of September, 1892, to secure an alleged indebtedness of \$1,500, due and payable —, but said mortgage was not recorded until the 31st day of January, 1894. Affiant, after discovering that the aforesaid mortgages were on record, which he did for the first time on the 3d day of February, 1894, called upon the aforesaid John Gelzer at his place of business in Rock Hill, York county, South Carolina, on the 5th day of February, 1894, and requested the said John Gelzer to make an explanation of the aforesaid mortgages. In response to a direct inquiry on the part of the affiant, as to the nature and amount of the said Gelzer's alleged indebtedness to the Savings Bank of Rock Hill, the said John Gelzer made evasive answer, but, upon being pressed for a direct answer by affiant, he (Gelzer) answered, 'Oh, I never did owe the bank anything like \$5,100; I, in fact, did not owe the bank more than \$3,100,'—or words to that effect. Affiant then for a little while

left the store of the said John Gelzer, who up to that time had remained mum and noncommunicative as to the mortgages to J. J. Wescoat and John L. Ancrum, in the sum of \$700 and \$1,500, respectively; but after affiant's return, from fifteen to twenty minutes from the time of his retirement from said store, he asked the said John Gelzer for a direct explanation of the mortgages to those parties. Gelzer replied that he did not owe J. J. Wescoat anything like seven hundred dollars, and not more than three hundred dollars, and would not offer any explanation whatever of the mortgage indebtedness to J. L. Ancrum. And affiant, upon the strength of the information furnished by the admission of the aforesaid John Gelzer that he never did owe the Savings Bank of Rock Hill, S. C., more than \$3,100, nor J. J. Wescoat, trustee, more than \$300, and from the record of the above-mentioned mortgages in the office of the register of mesne conveyance for York county, in the state of South Carolina, firmly believes and charges that the said mortgages to the Savings Bank of Rock Hill, and to J. J. Wescoat, trustee, each being in the sum of \$2,000 and \$400, respectively, in excess of the amount alleged by the said John Gelzer to have been actually due at the date said mortgages were executed, were really executed for no other purpose than to defeat, delay, hinder, and defraud the creditors of the said John Gelzer, and particularly this plaintiff. Affiant avers further, upon information furnished by the said John Gelzer, that he is continuing his business, and is barely making enough to pay expenses, and is thereby depleting and exhausting the only source from which the plaintiff can possibly realize upon their debt, and, if he is suffered to continue, he will completely delay and defeat the plaintiff in the collection of his debts, now past due and owing. Fourth. That the plaintiff has commenced an action against the defendant, by delivering to the sheriff of York county, the summons and complaint in the foregoing action, to be forthwith served. Sworn to and subscribed before me this 5th day of February, 1894. Charles T. Jenkins. [L. S.] W. Brown Wylie, C. C. C. Pleas."

C. E. Spencer, for appellant. Finley & Brice and W. B. McCaw, for respondent.

McIVER, C. J. This is an appeal from an order of Judge Watts refusing a motion to dissolve an attachment. The motion was based upon two grounds: (1) That the attachment was irregularly issued; (2) that it was improvidently issued; and the same grounds are urged in support of this appeal.

The first question turns upon the inquiry whether the facts stated in the affidavit upon which the application was based were, if true, sufficient to warrant the clerk in issuing the attachment. The statute provides that a warrant of attachment may be issued "when-ever it shall appear by affidavit that a cause

of action exists against such defendants \* \* \* and that the defendant \* \* \* has assigned, disposed of, secreted, or is about to assign, dispose of or secrete any of his or its property" with intent to defraud his creditors. So that the practical inquiry here is whether it appears by the affidavit of Charles T. Jenkins, upon which the clerk issued the warrant of attachment, that a cause of action against the defendant exists, and that such defendant has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his property with intent to defraud his creditors. Without setting forth here a copy of this affidavit, which, however, should be incorporated in the report of this case, it is sufficient to say that, if the statements contained in such affidavit are true,—and, for the purposes of this inquiry, they must be so taken,—there can be no doubt, and indeed it is not questioned, that it does appear from such affidavit that a cause of action against the defendant does exist; but the contention on the part of the appellant is that the further essential fact that defendant has assigned or disposed of his property with intent to defraud his creditors does not appear from said affidavit. It is stated in the affidavit that the defendant has already disposed of a very large portion of his property with intent to defraud his creditors, particularly the plaintiffs, by giving mortgages, four in number, on his entire stock of goods, for far more than their actual value, the particulars of which—dates, amounts, maturity, and when recorded—are particularly set forth, none of which, except the last, were recorded in due time, which was executed on the 15th of December, 1893, and recorded on the 5th of January, 1894; that as soon as affiant, as one of the officers of the plaintiff company, learned that these mortgages had been executed, to wit, on the 5th of February, 1894, he called upon defendant for an explanation of these large mortgages covering the great bulk of his property, and was at first met with evasive answers, but finally defendant admitted that two of these mortgages purported to secure the payment of amounts much greater than were really due, and as to another of the mortgages, purporting to secure the payment of the amount of \$1,500, defendant declined to give any information or explanation; and affiant further avers, upon information derived from the defendant himself, "that he is continuing his business, and is barely making enough to pay expenses," and that he "is thereby depleting and exhausting the only source from which the plaintiffs can possibly realize upon their debt, and, if he is suffered to continue, will completely delay and defeat the plaintiffs in the collection of their debts now past due and owing." These facts, thus briefly outlined, seem to us sufficient to make it appear to the officer issuing the warrant of attachment that there was a fraudulent intent on the part of the defendant in

making these mortgages. But in the argument here counsel for appellant intimates a doubt whether a mortgage is such an assignment or disposition of property as is contemplated by the attachment, and, though not pressing the argument upon that point, cites the case of *Ivy v. Caston*, 21 S. C. 533. It will be seen, however, by reference to page 589, that the court expressly declined to consider the question, because unnecessary to the decision of that case. We must say that we see no reason why a mortgage of personal property, after condition broken, may not be regarded as an assignment or disposition of such property, within the purview of the attachment law, as the title to the property then passes to and is vested in the mortgagee, and is thereby effectually placed beyond the reach of other creditors, for the manifest object of the attachment law was to reach any case in which a debtor undertakes, fraudulently, to place his property beyond the reach of his creditors. We do not think there was any error on the part of the circuit judge in refusing the motion to dissolve the attachment upon the ground of irregularity.

The only remaining inquiry is whether the attachment was improvidently issued, and, this being a question of fact, it is very doubtful, to say the least of it, whether this court can take jurisdiction of such a question, since the case of *Sharp v. Palmer*, 31 S. C. 444, 10 S. E. 98, notwithstanding what has been intimated, though not decided, in the previous case of *Claussen v. Easterling*, 19 S. C. 515. But, even if we had the power to review the findings of fact made by the circuit judge, we think his findings are sustained by a review of all the testimony in the case. The judgment of this court is that the judgment of the circuit court be affirmed.

(43 S. C. 359)

GREEN et al. v. NIVER et al.

(Supreme Court of South Carolina. March 25, 1895.)

#### QUIETING TITLE—PARTIES.

The United States is a necessary party to an action to remove a cloud from the title to lands, the right of recovery in which depends upon the validity of a government grant of the lands to a negro, pursuant to Act Cong. July 16, 1866, for the relief of freedmen, etc., where two of the questions involved and necessary to a complete determination are as to whether the manner in which the certificate of sale was obtained did not render it void, and whether such conveyance did not work a forfeiture of the grantee's rights to the United States as his grantor.

Appeal from common pleas circuit court of Beaufort county; James F. Izlar, Judge.

Action by Laura Green and others against Christian W. Niver and others to remove an alleged cloud from the title to certain lands. From a judgment for defendants, plaintiffs appeal. Reversed, and complaint dismissed for want of jurisdiction.

The following are the decree and exceptions:

## Decree.

"The plaintiffs, as heirs at law of one Adam Green, Sr., bring this action against the defendants to remove an alleged cloud from their title to the piece or parcel of land mentioned and described in the complaint. The cause of action, as set out in the complaint, is that on the 29th day of March, 1872, in pursuance of an act of congress entitled 'An act to continue in force and to amend "An act to establish a bureau for the relief of freedmen and refugees," and for other purposes,' approved July 16, 1866, and acts amendatory thereto, the piece or parcel of land described in the complaint was sold and conveyed to Adam Green, Sr., the head of a family of the African race, for the sum of fifty dollars, and that a certificate of the sale was delivered to said Adam Green, Sr., who became seised and possessed of said premises as owner in fee simple, subject to the provisions of said act; that said Adam Green, Sr., died intestate in the year 1881, leaving, surviving him, as his heirs at law, his children, Perry Green, and the plaintiffs Adam Green, Jr., William Green, Elsie Green, and Bacchus Green; that Perry Green died intestate, in the year 1882, leaving, surviving him, as his heirs at law, his children, the infant plaintiffs, Laura Green and Lydia Green; that Bacchus Green, on the 18th of April, 1892, conveyed to Adam Green, in fee simple, all his undivided interest in the premises; that the plaintiffs are now seised and are in possession of said premises as owners in fee simple; that on the 30th day of March, 1872, the said Adam Green, Sr., was an illiterate negro, unaccustomed to holding property, and incapable of properly attending to business and of alienating said premises; and that on or about that day the defendants Christian W. Niver and W. H. Niver, as plaintiffs are informed and believe, fraudulently took advantage of the incapacity of said Adam Green, Sr., and without paying him any consideration therefor, procured him to sign, seal, and deliver a certain writing, which appears upon its face to be a deed, and to convey said premises to Christian W. Niver and W. H. Niver, in consideration of one dollar; and that said deed was on the — day of April, 1872, recorded in the office of the register of mesne conveyance for Beaufort county, and the defendant Agnes Niver claims some interest under said deed, which is a cloud upon the title of the plaintiffs to said premises. It may be well to state here that, since the commencement of this action, the said Adam Green, Jr., has died, intestate, leaving, surviving him, as his heirs at law, his widow, Julia Green, and three children, to wit, Margaret Green, Joseph Green, and Abram Green, infants, all of whom are infants under the age of fourteen years; and that, by an order of this court made in this cause, William Green was appointed the guardian ad litem of Laura and Lydia Green, in the place and stead of Adam Green, de-

ceased; and that Julia Green and her infant children were substituted as plaintiffs in the action in the place and stead of Adam Green, Jr., deceased, and authorized to prosecute the same, without prejudice to any of the proceedings already had in the cause. The testimony was taken and reported to the court by S. J. Bamfield, the clerk of this court, under and by virtue of an order made for that purpose.

"A complaint of this nature must set forth the plaintiff's title, and must show in some way that the defendant is setting up a cloud upon it. 'A cloud upon a title is a title or incumbrance apparently valid, but in fact invalid.' In *Lick v. Ray*, 43 Cal. 83, it was held that a title which, if asserted by action and put in evidence, would compel the production of defendant's title as a defense, is a cloud which the latter may call upon equity to remove. To the same effect is our own case of *Ketchin v. McCarley*, 26 S. C. 7, 11 S. E. 1099. In order to maintain the action, the plaintiff must have possession, unless the title is an equitable one, incapable of effectual assertion at law, or, as is held in some of the states, unless the land is vacant. In order that the plaintiff may recover, he must not only establish his title, but the proof must clearly show the hostility of the deed of the defendant which he seeks to set aside as a cloud upon his title. The plaintiffs in the present action have set forth the title under which they claim to be the owners in fee of the premises described in the complaint, and upon which they contend a cloud is cast by the deed made by Adam Green, Sr., to Christian W. Niver and W. H. Niver. They have also alleged possession of the premises in themselves at the commencement of the action; and that the title which constitutes a cloud, while apparently valid on its face, is really invalid. These facts, upon which the controversy mainly depends, are denied, and the issues thus raised constitute the important questions to be considered and determined.

"The question of possession in the plaintiffs at the commencement of the action, I think, has been fully established. While there may be some circumstances connected with the manner in which the possession was obtained calculated to raise a suspicion as to its fairness, yet the testimony satisfies me that there was no fraud or deception practiced by the plaintiffs in gaining possession of said premises. Now, as to the title of the plaintiffs to the premises. Have they established any title to these premises? This fact is put in issue, and, before they can obtain the relief demanded, they must show title in themselves. To do this, they have attempted to show the invalidity of the deed executed by their ancestor to Christian W. Niver and W. H. Niver. This deed is attacked on two grounds: First, that it was fraudulently obtained; secondly, that it is void by reason of the fact that it was made

in violation of the provisions of the act of congress entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' approved June 7, 1862, and of the acts amendatory of the same, approved February 6, 1863, and March 3, 1865, and of the act entitled 'An act to continue in force and to amend "An act to establish a bureau for the relief of freedmen and refugees," and for other purposes,' attested July 16, 1866, among which it is provided that the lands sold in compliance with the provisions thereof 'shall not be alienated by their purchasers within six years' from and after the passage of the last-mentioned act.

"The first ground may be dismissed with very few words. The testimony, in my opinion, fails to establish the allegations of fraud and undue advantage charged against the defendants Christian W. Niver and W. H. Niver in the complaint. It seems to me, from the testimony, that the transaction between the Nivers and Adam Green, Sr., was nothing more than an attempt on the part of the parties to evade the provisions of the acts of congress in regard to the sale of the lands in question. The Nivers were anxious to obtain the title to these lands. They knew that under the provisions of said acts, these lands could only be sold to 'heads of families of the African race.' They therefore furnished Adam Green, Sr., with the money to purchase said lands (he being the head of a family of the African race, and entitled under said acts to purchase), with the understanding that he would, upon obtaining the certificate of sale, convey the same to them. This the said Adam Green, Sr., in pursuance of the understanding between himself and the Nivers, did. Admit that this was in fraud of the government regulations as to the sale of these lands, and that no resulting trust could be raised out of such transaction in favor of the Nivers. How does this help the plaintiffs? If a contest had arisen between the Nivers and Adam Green, Sr., before his conveyance to them, growing out of the purchase, there might have been some force in the position. But Adam Green, Sr., saw proper, after obtaining the certificate of sale, to convey these lands, in pursuance of his agreement and understanding, to the Nivers; and this, it seems to me, disposes of the question of resulting trust. The present action is not one of the Nivers against Adam Green, Sr., to enforce a resulting trust in relation to these lands by reason of their having furnished the money to Adam Green, Sr., to purchase the same, and he having taken title thereto in his own name. I am fully aware that equity will not enforce a trust created for an illegal and fraudulent purpose, and that a resulting trust will not be raised or enforced in contravention of public policy or the provisions of a statute. But, as I consider it, the case now under consideration does not fall within these well known and es-

tablished principles. If the transaction between Adam Green, Sr., and the Nivers was a fraud on the government, from the fact that it was in violation of the spirit of the acts of congress above mentioned and of the government regulations in regard to the sale and disposition of these lands, and rendered the whole transaction null and void, it must follow that Adam Green, Sr., obtained no title by the certificate of sale, which, even by a valid conveyance, could be transferred to the Nivers, or which, in case he made no valid sale to the Nivers, could descend to his heirs. If the transaction between Adam Green, Sr., and the Nivers was void by reason of the fraud perpetrated on the government, then the certificate of sale conferred no title on Adam Green, Sr., and the plaintiff can claim no title to the premises thereunder. If the foregoing conclusions are correct, it follows that the plaintiffs have failed to establish title to the premises, or an interest in the same which would warrant the court of equity in granting the relief demanded.

"I might well stop here. But it may not be amiss to consider the other ground on which the plaintiffs mainly rely. For the sake of the discussion, let it be admitted that there was no fraud practiced on the government in obtaining the certificate of sale, and that the transaction up to this point was not only regular, but bona fide. Can this better the condition of the plaintiffs, and invest them with sufficient title to maintain this action? The sale to Adam Green, Sr., by the government of the United States, was made at private sale for cash. The certificate of sale bears date the 27th day of March, 1872. The habendum clause of the certificate reads as follows: "To have and to hold the same to him, his heirs and assigns, subject to all the provisions of the aforesaid acts, among which it is provided that the said Adam Green, Sr., or his heirs, shall not alienate the aforesaid tract or parcel of land within six years from and after the 16th day of July, 1866." On the 30th of March, 1872, the day following the date of the certificate, and within six years from the 16th of July, 1866, Adam Green, Sr., conveyed the said tract or parcel of land to Christian W. Niver and W. H. Niver in fee simple. The question presented by this state of facts is: Was the restraint on alienation contained in the certificate of sale to Adam Green, Sr., of such validity as to render the conveyance made by him to Christian W. Niver and W. H. Niver invalid, and at the same time not affect in any degree the conveyance to Adam Green, Sr., from the government of the United States?

"In considering this question, it is necessary to recall the status of the freedmen in the South at the time the act of congress of the 16th of July, 1866, was passed, and their status at the time the land in question was purchased by Adam Green, Sr. The certifi-

cate of purchase issued to Adam Green, Sr., by the United States for this tract or parcel of land, has been treated throughout the argument by the attorneys as being as binding and valid as a patent, and for the purpose of this discussion I shall so treat it. At the time the act of congress of July 16, 1866, was passed, the freedmen of the South were the 'wards of the nation.' Relying upon the kindness and power of the United States government, the freedmen looked to it for care and protection; and, as such wards, they were entitled to receive from the government that care and protection which is due from a guardian to a ward. With the view of protecting these wards of the nation from the superior capacity of their more intelligent neighbors, and of preventing them from being wronged in contracts for sale of the lands acquired by them from the government, a restraint on alienation for a limited period was imposed by the government. At this time the provision was doubtless valid. It was certainly wise and proper. The fourteenth amendment to the constitution of the United States became a part of the constitution in July, 1868. By this amendment the freedmen became citizens of the United States and of the states in which they resided. The relation which had theretofore existed between the United States government and the freedmen was, by the adoption of the fourteenth amendment to the constitution, broken up, and a newer and higher relation was formed. The freedmen after July, 1868, were no longer the wards of the nation. Their status had changed from that of a ward of the nation to that of a citizen of the United States and of the state in which they resided. As citizens, the freedmen were entitled to all the privileges and immunities of other citizens. Every civil and political right belonging to other citizens of the United States and of the state in which the freedmen resided was by this amendment to be enjoyed by them. Like other citizens, they were invested with the power to acquire, hold, and enjoy property, and to devise, convey, and dispose of the same.

"Now, when Adam Green, Sr., purchased the land in question, and received the certificate of purchase, he was not a ward of the nation, but a citizen of the United States and this state. The title which he acquired was a title in fee. It is true that there was in the certificate of purchase a restraint against alienation by him within six years from the 16th day of July, 1866; but the reason for the condition had ceased long before he became the purchaser. If the view for which I contend be correct, then wherein does this case differ from a case where the fee is conveyed to any other citizen clogged with a restraint on alienation within a limited period? It is against the policy of the law to allow restraints to be imposed on the alienation of an estate in fee. One cannot, I apprehend, create an estate in fee, and deprive the ten-

ant of those essential rights which the law annexes to such an estate. The law is against such restraints, however limited as to time. Gray, *Restr. Alien. Prop.* §§ 8, 13, 23, 54. The mere fact that the grantor here was the United States ought not to change the rule. The sale was for cash, to a citizen, and in fee simple. Under the circumstances, I fail to see how the conveyance by Adam Green, Sr., to the Nivers, can be held invalid, being otherwise free from attack. The fee being in him, the restraint imposed against alienation was void. Again, it does seem to me that even if the condition against alienation was valid, the United States, as grantor, alone had the right, upon breach of the condition, to take advantage of it, and enter and take possession. Certainly these plaintiffs cannot take advantage of the breach of the condition if any has been committed by their ancestor in making the conveyance to the Nivers. The plaintiffs have failed to establish a title in themselves, and are therefore not entitled to obtain from the court the relief demanded in the complaint. It is therefore ordered, adjudged, and decreed that the complaint be, and the same is hereby, dismissed, with costs."

#### Exceptions.

"That his honor, the presiding judge, erred (1) in holding and concluding that the plaintiffs failed to establish title in themselves; (2) in holding and concluding that Adam Green, Sr., obtained no title by the certificate of sale, which, even by a valid conveyance, could be transferred to the Nivers, or which, in case he made no valid sale to the Nivers, could descend to his heirs; (3) in holding that the fact that the Nivers furnished the purchase money to Adam Green, Sr., to purchase the land, and then convey to them, in order to defeat the intention of the acts of congress, and in violation of the spirit of said acts to evade the provisions of the acts of congress in regard to the sale of the lands in question, rendered the sale from the government to said Adam Green null, void, and inoperative to convey or vest title in said Adam Green, Sr.; (4) in holding that the restraint on alienation contained in the act of congress entitled 'An act to continue in force and to amend "An act to establish a bureau for the relief of freedmen and refugees," and for other purposes,' approved July 16, 1866, was abrogated and repealed by the adoption of the fourteenth amendment to the constitution of the United States; (5) in holding that the restraint on alienation contained in said act of congress, as recited in the certificate of sale issued to Adam Green, Sr., was not of such validity as to render the deed of conveyance executed by Adam Green, Sr., to C. W. and W. H. Niver invalid; (6) in holding that the restraint on alienation, recited in the certificate, constituted a condition subsequent, for the breach of which by the plaintiffs' ancestor they could not take

advantage, enter and take possession: (7) in not holding and concluding that the said deed from Adam Green, Sr., to the said Nivers was absolutely void in fact, while upon its face it is valid, and constitutes a cloud upon plaintiffs' title."

W. H. Townsend, for appellants. Thos. Talbird, for respondents.

GARY, J. This is an action commenced May 2, 1892, by the plaintiffs, who are the heirs at law of Adam Green, Sr., who died intestate, in the year 1881, to remove an alleged cloud upon their title to a piece of land described in the complaint, and situate in Beaufort county. The action was tried before his honor, J. F. Izlar, presiding judge, at the September, 1893, term of the court of common pleas for Beaufort county. It is stated in the case that the only facts, other than those found in the decree of the circuit judge, necessary to have before the court on the hearing of this appeal are: That on March 29, 1872, in pursuance of the act of congress entitled "An act to continue in force and to amend 'An act to establish a bureau for the relief of freedmen and refugees,' and for other purposes," approved July 16, 1866, and the acts amendatory thereto, the land described in the complaint, which was the property of the United States, purchased by them under the direct-tax acts of congress, was sold and conveyed to Adam Green, Sr., the head of a family of the African race, for the sum of \$50, and a certificate of sale was delivered to said Adam Green, Sr. This certificate is dated 29th of March, 1872, and the habendum clause is recited in the decree. On the 30th of March, 1872, said Adam Green, Sr., executed his deed, in due and regular form, purporting to convey, for valuable consideration, the said land to the defendants C. W. Niver and W. H. Niver, which deed was recorded in R. M. C. office for said county in April, 1872, and under which the defendants claim, and which the plaintiffs are seeking to set aside in this action. The other facts are stated in the decree of the presiding judge, which, together with the exceptions, will accompany the report of the case.

Section 143 of the Code provides that the court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but, when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. It appears in the proceedings herein that the United States is an indispensable party, in order to have a complete determination of two questions arising out of this controversy: (1) Whether or not the manner in which the certificate of sale was obtained did not render it null and void; (2) whether the conveyance of the property by Adam Green, Sr., did not work a forfeiture of his rights, which inured to the benefit of

his grantor, the United States. This objection may be raised at any time, and is jurisdictional in its nature. In the case of *Lowry v. Thompson*, 25 S. C. 416, 1 S. E. 141, such objection was interposed by the supreme court during the argument of the case in that court, and was sustained. The case of *Columbia Water-Power Co. v. Columbia Electric Street Railway, Light & Power Co.*, 20 S. E. 1002, which has just been decided by this court, discusses this question at length, and is authority for the conclusions at which we have arrived in this case.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the complaint be dismissed, for want of jurisdiction, without prejudice as to the merits of the action.

McIVER, C. J. I concur in what I understand to be the practical result of this judgment, to wit, the dismissal of the complaint. I prefer, however, to rest my conclusion upon the grounds taken in the circuit decree, rather than upon the question of jurisdiction, inasmuch as I have some doubts on that point, and the question of jurisdiction was not argued at the hearing; for, although that question may be raised at any time, even in this court, I think it would be better that the parties should be first heard upon the question before it is made the basis of the decision. In addition to the views presented by the circuit judge, it seems to me that the position taken by counsel for respondents—that the plaintiffs, as heirs at law of Adam Green, Sr., are now estopped from questioning his right to convey—is well taken; for even conceding, what I am not to be understood as admitting, that the restraint upon his right to convey for a limited time, contained in his certificate of purchase, did have the effect of preventing him from exercising such right at the time he made the deed to the defendants, yet, upon the expiration of the time so limited, his right to convey could not be disputed, and both he and his heirs would be estopped from now disputing the validity of the conveyance previously made, upon the principle that one who conveys land to which he has no title at the time, and no right to convey, but subsequently acquires a good title, is estopped from disputing his previous conveyance. This position is sustained by the cases cited by counsel for respondent, *Van Rensselaer v. Kearney*, 11 How. 297, and *Jenkins v. Col-lard*, 145 U. S. 546, 12 Sup. Ct. 868, to which may be added the cases of *Lessee of French v. Spencer*, 21 How. 228; *Irvine v. Irvine*, 9 Wall. 617; *Myers v. Croft*, 13 Wall. 291; and *U. S. v. California & O. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458; as well as our own cases of *Craig v. Reeder*, 3 McCord, 411; *Harvin v. Hodge*, Dud. (S. C.) 25, recognized in *Starke v. Harrison*, 5 Rich. Law, 7 (though in the case last cited the doctrine was not applied because there was no warranty in the sheriff's deed); *Lamar v. Simpson*, 1 Rich. Eq. 71; and *Wingo v. Parker*, 19 S. C. 16.



(43 S. C. 318)

**MILHOUS et al. v. SALLY et al.<sup>1</sup>**

(Supreme Court of South Carolina. March 21, 1895.)

**FRAUDULENT CONTRACT—ENFORCEMENT IN EQUITY  
—SPECIFIC PERFORMANCE—AMENDMENT  
OF COMPLAINT.**

1. The heirs of an insolvent intestate agreed with his widow, who held a judgment against him, that the land composing the estate should be sold to satisfy the judgment, and that one of the heirs should buy it in for the others (without, however, paying any of the price bid), in trust to support the widow, and upon her death to distribute it among the heirs. In pursuance thereof, an heir bought the land, and, by representing that he was acting for the intestate's family, secured it at much less than its market value, and took possession. *Held* that, upon the widow's death, the heir in possession could not be compelled to perform the agreement to convey, it being in fraud of the intestate's creditors.

2. Where heirs make an illegal contract regarding the estate, and one of them afterward dies, the fact that a child of the deceased heir, claiming by representation, is a minor, gives him no greater rights as to the enforcement of the contract than the heir himself would have were he living.

3. The complaint set up a contract between the heirs of an insolvent intestate which was in fraud of his creditors, whereby defendant heirs obtained certain of the estate which they agreed to convey to the plaintiff heirs, and alleged that plaintiffs and defendants were tenants in common of said estate, and prayed an enforcement of the contract and a partition. *Held* that, such tenancy being under a void agreement, the allegation of it did not entitle plaintiffs to relief.

4. A motion to amend a complaint first made upon the hearing of exceptions to the master's report sustaining a demurrer to the complaint, cannot be considered.

Appeal from common pleas circuit court of Orangeburg county; Ernest Gary, Judge.

Action by Caroline A. Milhous and others against J. Martin Sally and others to enforce a contract, and for a partition of land. Judgment for defendants, and plaintiffs appeal. Affirmed.

Glaze & Herbert, for appellants. Henderson Bros., for respondents. P. T. Hilderbrand, for infant respondents.

McIVER, C. J. The controversy presented for the determination of the court in this case, arises upon a demurrer to the complaint, upon the ground that the facts therein stated are not sufficient to constitute a cause of action. The case was referred to the master to hear and determine all of the issues therein; and at the first reference, before any testimony was offered, the defendants interposed a demurrer, based upon the several grounds stated in the master's report, all of which were overruled, except the fourth, to wit, that the contract was an illegal one, and in fraud of the rights of others, and therefore will not be enforced "in a court of equity," which was sustained; and the master reported accordingly. To this report plaintiffs excepted, and the case came before the Honorable Ernest Gary, judge of the Fifth circuit, who overruled all of the exceptions, and rendered judgment

confirming the report of the master. In his order rendering this judgment his honor says: "At the hearing of the case, the plaintiffs asked leave to amend the complaint by striking from the fourth paragraph thereof the words 'numerous creditors,' and inserting in lieu thereof the words 'Ann C. Sally,' and by adding to paragraph seven of the said complaint the words: 'And said representations were made without any authority, and solely upon their own responsibility.' This motion is refused, for the reason that there is nothing to amend, and, even if allowed, the amendment would not cure the defects in the complaint." From this judgment plaintiffs appealed, upon the several grounds set out in the record; and defendants, according to the proper practice, gave notice that, at the hearing, they would contend that the judgment of Judge Gary should be sustained upon other grounds likewise set out in the record.

Our first inquiry obviously is, what are the allegations of the complaint? That paper is too long for insertion here. We will, however, proceed to state substantially what we understand to be the facts therein stated and the relief demanded: First. That one John A. Sally departed this life some time in the year 1870, intestate, being seised and possessed, at the time of his death, of certain real estate described in the complaint. Second. That, prior to his death, said John A. Sally confessed a judgment in favor of certain persons named, for the sum of \$10,000, and that thereafter said judgment was duly assigned, for value, to Mrs. Ann C. Sally, the wife of the said John A. Sally; but whether this assignment was made before or after his death does not distinctly appear, though we infer from the order in which the statements appear in the complaint that it was before his death; but we may say that we do not see that this is material. Third. The complaint sets forth the names of the heirs whom the said John A. Sally left surviving him, and goes on to state the names of those who succeeded to the estates of such of the heirs as have since died. Fourth. In the fourth paragraph of the complaint the allegations of the complaint are as follows: "That the said John A. Sally, at the time of his death, was largely indebted to numerous creditors, and was totally insolvent, and his said heirs at law found that it was necessary after his death that all of his property, both real and personal, should be sold, and applied to the payment and satisfaction of his debts and liabilities." Fifth. That on the — day of —, A. D. 1871, the heirs at law of said John A. Sally held a meeting "for the purpose of coming to an agreement in reference to the sale of the estates of the said John A. Sally, deceased; that it was then and there agreed by and between the said heirs at law, including the widow, Ann C. Sally, and J. George H. Sally and J. Martin

<sup>1</sup> Motion to recall remittitur denied. See 21 S. E. 385.



Sally being present and parties to the said agreement, that all of the real estate of which the said John A. Sally died seised and possessed, and hereinbefore mentioned and described, should be sold under the judgment in favor of John F. and Henry Hartzog, executors, then held by the said Ann C. Sally, and that the real estate should be bid in by one or more of the said heirs at law as the agent for all of said heirs, and that the said lands should be held by them in trust for the support of their mother, the said Ann C. Sally, for and during the term of her natural life, and at her death to be divided amongst all the heirs at law of the said John A. Sally and Ann C. Sally, share and share alike, according to law and the statute of distributions, the child or children of deceased children to take, by representation, the parent's share." Sixth. That, in accordance with the said agreement, the said lands were sold, under said judgment, some time in the year 1871, and tracts Nos. 1, 4, and 5 were bid in by the said J. George H. Sally, tract No. 2 by the plaintiff R. Adeline Price, and tract No. 3 by J. Martin Sally, one of the defendants. Seventh. The seventh paragraph of the complaint reads as follows: "That the said lands were bought in by the said parties as the agents and representatives of all of said heirs at law, acting under said agreement with them; that by reason thereof, and by holding themselves out as representing and bidding for the widow and family under said agreement, they were enabled to bid off the property at a very low price, and very much less than its actual market value; that, under said agreement, the said parties were not required to pay any portion of the purchase money bid for the said lands, and they did not pay any portion thereof, but took possession of said lands and continued to hold the same under the trusts imposed thereon, for the benefit and support of the said Ann C. Sally during her lifetime, rendering to her the rents, issues, and profits arising therefrom." Eighth. That the said Ann C. Sally departed this life, intestate, prior to the commencement of this action, leaving, as her heirs at law and distributees, the persons named in the complaint. Ninth. That, since the death of the said Ann C. Sally, the said J. George H. Sally, up to the time of his death, and his heirs since, and the said J. Martin Sally, have continued in the possession and enjoyment of the lands bid in by them, and have refused to recognize the existence of the agreement hereinbefore set forth, and have repudiated the trust created by said agreement, and have claimed said lands as their own, and have attempted to dispose of portions thereof to third parties. Tenth. That the defendant J. Martin Sally and the heirs at law of the said J. George H. Sally are in possession of said real estate, and wrongfully withhold the same from plaintiffs. Eleventh. That

certain of the defendants named in the complaint are in possession of portions of said real estate, with full notice of the agreement hereinbefore set forth, and are supposed to claim interest in said portions. Twelfth. "That the plaintiffs and defendants, the heirs at law of the said John A. Sally and Ann C. Sally, are tenants in common of the said real estate hereinbefore mentioned and described, and that they own no other lands as tenants in common in this state." Thirteenth. That certain of the defendants named in the complaint are minors.

Judgment is demanded as follows: (1) That the said agreement between the said heirs at law of the said John A. and Ann C. Sally be specifically performed; (2) that the purchasers of the said land under said judgment be declared trustees of the same for the benefit of the said heirs at law; (3) that said J. Martin Sally and the heirs of J. George H. Sally be required to account for the rents and profits of said land; (4) that the said real estate be partitioned among the several parties in interest according to their respective interests therein, but, if that be impracticable, then that the same be sold, and the proceeds divided among the several parties according to their respective interests.

Upon these facts, all of which, under the demurrer, must be assumed to be true, the plaintiffs rest their claim for relief in the court of equity, and the question is whether such facts are sufficient to justify that court in lending its aid in affording the relief demanded. It must be kept in mind throughout this discussion that these plaintiffs never had any legal right to, nor even any interest in, the land which is the subject of this action, for one of the facts stated in the complaint, which really constituted the moving cause of the agreement upon which plaintiffs based their claim, is that the estate of their ancestors, whose property the land was, "was totally insolvent," and hence these heirs could have no lawful claim on said property until the debts of the ancestor were paid, for which purpose the said property was confessedly insufficient. Indeed, even the widow, Mrs. Ann C. Sally, had no legal interest in the estate of her deceased husband, for, at most, she only had a lien thereon, as the holder of the Hartzog judgment. The manifest object of the agreement was to so arrange matters as that the rights of creditors should be entirely disregarded, and the property of the insolvent ancestor of these plaintiffs and the other heirs should be preserved for their own use. It seems to us that the bare statement of such an agreement is quite sufficient, even without citing any authority, to show that a court of equity would never lend its aid to the carrying out such a scheme, even among the parties to such agreement, for it would be subversive of every principle of equity and good conscience. But we are not left without au-

thority upon the subject, as we shall presently show. The real purpose and actual effect of the agreement which the plaintiffs are seeking to enforce was to have the lands which constitute the subject-matter of this controversy sold under the Hartzog judgment, and bought in for the benefit of those who, as we have said, had no legal interest therein; and this purpose was intended to be, and was in fact, effected by that feature of the scheme allowing some of the heirs to bid in the property, under representations that they were bidding for the benefit of the family, whereby they obtained the property "at a very low price, and very much less than its market value," and, what is more, were not to be required to pay, and did not in fact pay, even such "very low price." No other construction can be placed upon the allegations contained in the seventh paragraph of the complaint, hereinabove distinctly set out. This was practically nothing more nor less than a combination among the heirs to obtain the property of their insolvent ancestor for their own benefit, at the expense of creditors, by chilling the biddings when it was offered for sale under legal process by the sheriff. It is well settled that such an arrangement will never receive the sanction of a court of equity, but, on the contrary, that court, when appealed to by third persons whose legal rights have thus been disregarded and defeated, will unhesitatingly set aside the whole transaction. Ever since the case of *Hamilton v. Hamilton*, 2 Rich. Eq. 355, the doctrine above stated has been regarded as firmly established in this state, and that case has been recognized and followed in a number of other cases, the last being *Herndon v. Gibson*, 38 S. C. 257, 17 S. E. 145.

It is urged, however, that it would be inequitable to allow those who had bid off the land to retain the same at the expense of the other heirs. That consideration is entitled to no favor, and has never received any at the hands of a court of equity, when urged by those who participated in the fraudulent arrangement by which such an advantage was acquired by the defendants. It does not approve the conduct of any of the parties to the fraudulent arrangement, but simply leaves them in the situation in which they have placed themselves, and will not lend its aid to relieve any of them. As is said by *Dunkin, C. J.*, in *Hamilton v. Hamilton*, supra, such transaction "can be enforced by none of the parties to it, *even against each other.*" (Italics ours.) See, to same effect, *Baggott v. Sawyer*, 25 S. C. 405, where it was held that parties to the conspiracy cannot obtain the aid of the court in specifically enforcing their illegal agreement with their co-conspirators. As is said by *Lord Mansfield* in *Holman v. Johnson*, 1 Cowp. 341: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds, at all times, very ill in

the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in a general principle of policy, which the defendant has the advantage of, contrary to real justice as between him and the plaintiff; by accident, if I may so say. The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." And as is said by *Dixon, C. J.*, in *Clemens v. Clemens*, 28 Wis. 637, at page 654, after making the above quotation from *Lord Mansfield*: "The principle or policy of the law, therefore, is to reject the suit of and reprove the plaintiff for his wrong, not to reward the defendant. The plaintiff must be punished, even though it be at the expense of allowing the defendant, an equally guilty party, to obtain most unjust and unfair advantage for himself. \* \* \* The suit of the party compelled to seek the aid of the courts, in order to obtain the fruits of his own fraud or wrong, must be dismissed, although it may result in unjustly giving to the other equally culpable party the entire benefit of them." See, to same effect, 1 Pom. Eq. Jur. § 401, where, among other things, that author says: "Where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves." And he cites two cases, *Johns v. Norris*, 22 N. J. Eq. 102, and *Walker v. Hill*, Id. 513, in support of his text, which are not distinguishable in principle from the case now under consideration.

It is earnestly contended on the part of the appellants that the maxim "In pari delicto," etc., is not of universal application, but is subject to certain limitations, and 1 Pom. Eq. Jur. § 403, is cited to sustain such contention. It is true that certain limitations to that maxim are there laid down by that distinguished author, but we are unable to see that this case falls under either of the limitations there laid down. In the first place, we do not see how it can be said that any of the parties to the illegal arrangement upon which the plaintiffs' whole case rests were not in equal fault; for, while it is true that the said *J. Martin Sally* and *J. George H. Sally* were the parties who actually bid the land, yet it is distinctly alleged that in doing so they were merely acting as the agent of the heirs, under the terms of the agreement to which they were all parties. Their act, therefore, was the act of all. Nor does it appear that any of the heirs were minors or under any other disability at the time the agreement was entered into; and the fact that some of the heirs—those who have become so by reason of the death of

some of the original heirs—are now minors cannot affect the question, for such heirs must stand in the shoes of those under whom they claim, and can have no higher rights than their ancestors. Nor does it appear that any of the heirs were induced by any false representations made to them by either Martin or George Sally to enter into the agreement, or that they advanced any money or parted with any property of their own in pursuance of said agreement. In fact, nothing appears to place the other heirs in a better or more favorable light before the court than that in which Martin and George Sally stood. They all equally participated in the common design to obtain property to which they never had any claim, either legal or equitable, at the expense of the creditors of their insolvent ancestor, by combining together to buy the property at a sacrifice when offered for sale under legal process. We think it will be found that in the cases cited by appellants other elements entered which are absent in this. For example, in *Clemens v. Clemens*, *supra*, the plaintiff and defendant entered into an arrangement, instigated by defendant, whereby plaintiff, for the purpose of protecting his property against a suit then pending against him, was to convey to defendant, who was his son, a certain tract of land; but, by the fraud of the defendant, the conveyance was made so as to include another tract of land, which was protected by the homestead law; and it was held that the conveyance should be set aside as to the tract included in the conveyance by the defendant's fraud, which was altogether outside of, and not in any way dependent upon, the agreement to defraud plaintiff's creditors. So, in *Harper v. Harper*, 85 Ky. 160, 3 S. W. 5, the plaintiff, who was an aged lady, was induced by the false representations of her son, in whom she had implicit confidence, to convey her property to the son, with a view to avoid the effect of a threatened suit for slander, which, however, was never brought; and it was held that the plaintiff was entitled to relief on account of the fraud practiced upon her by her son, notwithstanding the fact of her intention to evade the alleged suit for slander; the court resting its decision upon the ground that the parties did not stand upon an equal footing, and that defendant had obtained the consent of his mother to execute the deed by undue influence and false representations. In others of the cases it will be found that the defendant had, by reason of the fraudulent agreement, obtained from the plaintiff money or property to which the plaintiff was lawfully entitled, and for which defendant was held accountable. We do not think that the plaintiffs' case, as stated in their complaint, brings it within any of the limitations insisted upon by appellants; and hence we agree with the circuit judge that the facts stated in the complaint are not sufficient to constitute a cause of action.

The attempt to sustain the complaint under the allegation in the twelfth paragraph that plaintiffs and defendants, as heirs at law of John A. Sally and Ann C. Sally, are tenants in common of the lands, must fail; for those allegations, read in connection with the other allegations in the complaint, must be construed that they were tenants in common under the terms of the agreement relied on, as such other allegations show clearly that they could not be tenants in common qua heirs, as John A. Sally died insolvent, leaving nothing for them to inherit, and Ann C. Sally never had any right or title to the said lands which could descend to her heirs, having, at most, only a lien thereon.

Under this view, it becomes unnecessary to consider the additional grounds relied upon by respondents to sustain the circuit decree. It only remains to consider whether there was any error in refusing plaintiffs' motion to amend the complaint. Here, too, we agree with the circuit judge. This motion seems to have been made "at the hearing of the case," and, so far as appears, without notice to the other side. In the first place, it is, at least, doubtful whether the motion to amend did not come too late. It will be remembered that the case was referred to the master to hear and determine all the issues therein. At the first reference the demurrer was interposed, no motion to amend the complaint being then made. The master made his report, sustaining the demurrer, and the case came before the circuit judge upon the report and exceptions, among which there was none presenting the question of amendment. We are inclined to think that the only question before the circuit judge was whether any of the exceptions should be sustained, and, if not, then the confirmation of the report followed as a matter of course, and the case was at an end. Besides, we think, as intimated by the circuit judge, that, even if the amendments moved for had been allowed, the complaint would still have failed to state a cause of action. It would still have appeared to be a case in which the heirs at law of an insolvent ancestor were seeking to obtain the property of such ancestor as the fruits of an agreement fraudulent in law, and it would make no difference whether the creditors were one hundred or only one in number. The other amendment, by adding certain words at the end of paragraph 7 of the complaint, besides making the allegations of that paragraph utterly inconsistent, would add nothing to the plaintiffs' cause of action. They were not creditors of the intestate, and this additional allegation would afford them no ground for setting aside a sale which they themselves brought about. Even if Mrs. Sally were still living, she, though a creditor, could not with any propriety have asked a court of equity to set aside a sale which she had brought

about, and the fruits of which she enjoyed, as alleged in the seventh paragraph; and certainly the plaintiffs, as her heirs, could claim no higher rights than she could have done.

The judgment of this court is that the judgment of the circuit court be affirmed.

(43 S. C. 329)

GROLLMAN et al. v. LIPSITZ.

(Supreme Court of South Carolina. March 21, 1895.)

ATTACHMENT—AFFIDAVIT—DISSOLUTION—BOND—  
SIGNATURE OF FIRM.

1. An affidavit, in attachment, was sufficient upon its face which alleged that the defendant had committed certain acts from which a fraudulent intent might be inferred, and stated admissions on the part of the defendant tending to prove such fraudulent intent.

2. It is for the circuit court, but not the supreme court, to decide upon the credibility of those making affidavits upon issuing attachment.

3. Where defendant, upon affidavits, moved to vacate an attachment, and the plaintiffs offered affidavits in reply, the plaintiffs had the right to know which affidavits were allowed in reply, and the failure to accord this right was reversible error.

4. An attachment made under Code, §§ 253, 257, cannot be set aside because the affidavit and warrant were not served upon the defendant.

5. An undertaking on attachment need not be under seal.

6. One member of a firm can sign the firm name to an undertaking on attachment without special authority so to do.

7. The judge, before issuing a warrant of attachment, may demand the authority by which an agent acts for the plaintiff, and, where there is a power of attorney in writing, may have it filed with the undertaking, but the failure to do so is not fatal to the attachment.

8. Rule 66 of the circuit court, providing that there must be a subscribing witness to an undertaking in attachment, is inconsistent with the statutes.

9. Under Code, § 250, which provides that a warrant in attachment may be issued "whenever it shall appear by affidavit that a cause of action exists," one made upon information and belief by an attorney or traveling salesman of an attaching firm is sufficient.

10. An affidavit that property, which the defendant is alleged to have fraudulently disposed of, was not a part of defendant's homestead, was not necessary for the issuing of an attachment.

11. A partnership may bind itself by its signature to an undertaking in attachment, either by the name of the firm simply, or by the signatures of the individual members of the firm, provided it appears in the instrument that the intention is to bind the partnership.

Appeal from common pleas circuit court of Beaufort county; D. A. Townsend, Judge.

Attachments against A. J. Lipsitz by L. Grollman, M. Ferst's Sons & Co., D. O'Neill & Son, George W. Steffens & Son, Savannah Grocery Company, Savannah Steam Bakery Company, M. Hornik & Co., and Waterhouse & Danner and others. From orders vacating the attachments, plaintiffs appeal. Reversed.

The order in the case of John F. Werner & Co. v. A. J. Lipsitz was as follows:

"The plaintiffs in this action attached the property of the defendant, and this is a mo-

tion to vacate the attachment. The motion is based on several grounds. The first relates to the insufficiency of the undertaking; the second, to the exemption of the property under the homestead law; the third, to the failure to show that a cause of action existed; the fourth, to the failure to show fraud; the fifth, to the omission to serve the defendant with copies of the affidavits and warrant; and the sixth, to the falsity of the matters stated in the affidavit which was relied on to show fraud on the part of defendant. The plaintiffs must rest the validity of the attachment on the status of the attachment proceedings at the time the warrant was issued. They cannot afterwards add anything to those proceedings by way of reply to motion papers or otherwise. *Myers v. Whiteheart*, 24 S. C. 203. I shall therefore consider the case as it was when presented to the officer who issued the warrant. An inspection of the undertaking discloses the fact that the plaintiffs did not sign it. This is fatal, and it is null and void. *Bank v. Stelling*, 31 S. C. 369, 9 S. E. 1023; *Wagener v. Booker*, 31 S. C. 375, 9 S. E. 1055. In addition to this, the blanks in said undertaking render it of no binding force. *Clawson v. Mining Co.*, 3 S. C. 420. There was therefore no jurisdiction, and the attachment was without authority, and must be vacated. I will notice briefly the other grounds relied on by the defendant. The next ground, the second one, is that there was no affidavit to show that the property which, it is alleged, the defendant disposed of was subject to attachment, or, in other words, was not a part of defendant's homestead. The omission was not fatal to issuing the warrant. The warrant might issue without such affidavit, but no part of the homestead could be legally attached. It does not appear directly and definitely whether any part of the homestead was attached or not. Defendant's third ground for this motion is the plaintiffs' failure to show, at the time the warrant was issued, that there existed a cause of action against the defendant in favor of the plaintiffs. I sustain this position. The affidavit was made by Mr. White, who does not swear to any personal knowledge of the cause of action, nor to any information received from the defendant himself, but only to hearsay from the plaintiffs and the clerk of defendant, without stating what they said, and to having seen a verified itemized copy of an account of plaintiffs against defendant. This is too general and indefinite, and is insufficient. Hence the attachment is invalid on that ground also. Code, § 250. The defendants' fourth and sixth grounds relate to the affidavit which was relied on by the plaintiffs to show fraud on the part of the defendant, and was made the basis of the warrant. This affidavit was made by L. Grollman. The first objection to it is that the matters therein alleged, even if true, do not show fraud on the part of the defendant; and the

second is that those matters are not true. I sustain the first objection, for the reason that the said affidavit, standing alone, discloses nothing on the part of the defendant inconsistent with what he might find it reasonably necessary and proper to do at any time in the usual course of his business, and nothing to create suspicion in any unbiased mind. I sustain the second objection for the reason that the affidavit introduced by the defendant disproves many of the facts sworn to in the affidavit of L. Grollman, explains many others, and altogether shows clearly that there was no fraudulent intent on the part of the defendant in what he did. The fifth ground of the defendant is that no copy, either of the affidavit or warrant, was ever served on the defendant. This I think sufficient of itself to vacate the attachment. So far as I know, our supreme court has not decided this question, but they strongly intimate in *Sharp v. Plamer*, 31 S. C. 453, 10 S. E. 98, that copies should be served; and such seems to be the practice in New York. In *re Flandrow*, 92 N. Y. 256; *Id.*, 84 N. Y. 1. Affidavits were offered in reply to defendant's affidavits. Objection was made to their introduction. I overruled the objection, but stated at the time that I would consider only so much thereof as was strictly in reply to the statements made in defendant's affidavits, and nothing that tended to supplement plaintiffs' case as first made, and I have done so. It is therefore ordered, adjudged, and decreed that the attachment herein be, and it is hereby, set aside and vacated. It is further ordered that the defendant have leave to apply at chambers for any orders that may be necessary to carry out this order. August 14, 1894. D. A. Townsend, Presiding Judge."

The orders made in other cases are as follows:

"*M. Hornik & Co. v. A. J. Lipsitz*. The plaintiffs in this case attached the property of the defendant, and this is a motion to vacate the attachment. This case was heard with several other cases at the same time. Among them was the case of *Werner & Co. v. A. J. Lipsitz*, to which I refer now for my opinion, and the reasons therefor, upon all the points raised in this case except the first, and my opinion in this case upon all these points except the first. The first point relates to the insufficiency of the undertaking. So did the first point in *Werner & Co. v. A. J. Lipsitz*. My opinion in that case was that the undertaking was defective; and my opinion is the same in this case as to that point, but it is based on a different reason. In this case it appears that S. Rittenburg signed the firm name to the undertaking. This he could not do without proper authority, which nowhere appears. For this reason I consider the undertaking void. It is therefore ordered, adjudged, and decreed that the attachment in this case be vacated. It is further ordered that the defendant have

leave to apply at chambers for such orders as may be necessary to carry out this order. D. A. Townsend, Presiding Judge."

"*D. O'Neill & Son v. A. J. Lipsitz*. In this case the plaintiffs attached the property of the defendant, and this is a motion to vacate the attachment. An examination of the undertaking shows that it was not signed by the plaintiffs. This is fatal to the validity of the attachment, and it must be vacated. Other grounds have been urged for vacating the attachment, but the same have been taken in other cases which were heard at the same time with this case, and in these other cases I have decided against the validity of the attachment on all these points, and will not repeat here my reasons for so deciding, but will adopt what is said in *Werner & Co. v. A. J. Lipsitz*, *Hornik & Co. v. A. J. Lipsitz*, and *M. Ferst's Sons & Co. v. A. J. Lipsitz* on all these points as my decision in this case. It is therefore ordered that the attachment in this case be vacated. It is further ordered that the defendant have leave to apply at chambers for any orders necessary to carry out this order. D. A. Townsend, Presiding Judge."

"*Waterhouse & Danner v. A. J. Lipsitz*. This is a motion to set aside an attachment. The attachment in this case is assailed on the same grounds as the attachments in several other cases which were heard with this case, viz.: *Werner & Co. v. A. J. Lipsitz*, *M. Ferst's Sons & Co. v. A. J. Lipsitz*, *Hornik & Co. v. A. J. Lipsitz*, *D. O'Neill & Son v. A. J. Lipsitz*, and still other cases. In these last-named cases I have decided all the points raised in this case, and I refer to them for my opinion and my reasons therefor, and I adopt for this case what was said in those cases on the point now raised in this case. It is therefore ordered that the attachment in this case be vacated. It is further ordered the defendant have leave to apply at chambers for any further order that may be necessary to carry out this order. D. A. Townsend, Presiding Judge."

"*L. Grollman v. A. J. Lipsitz*. This is a motion to vacate an attachment. The plaintiff attached the defendant's property. In this case the undertaking was not under seal, nor was there a subscribing witness thereto, nor did the plaintiff serve copies of the warrant and of the affidavit on the defendant; and the affidavit on which the warrant was issued was insufficient, and hence the attachment is null and void, and must be vacated, and it is so ordered. In other cases heard with this one, these points have been made, and I refer to those cases for my opinion on all these points and my reasons therefor. It is therefore ordered that the attachment in this case be vacated. It is further ordered that the defendant have leave to apply at chambers for any order necessary to carry out this order. D. A. Townsend, Presiding Judge."

"*Savannah Grocery Company v. A. J. Lipsitz* and *Savannah Steam Bakery Company*

**v. A. J. Lipsitz** Both the above cases were heard together, and with several others. In both the motion is to vacate an attachment of the defendant's property by the plaintiffs. The grounds of the motion are the same in both, and have been decided in the cases of *Werner & Co. v. A. J. Lipsitz*, *M. Ferst's Sons & Co. v. A. J. Lipsitz*, *Hornik & Co. v. A. J. Lipsitz*, *L. Grollman v. A. J. Lipsitz*, *D. O'Neill & Son v. A. J. Lipsitz*, and I refer to those cases, which were heard with these two cases, for my opinion on the different points made, and my reasons therefor. The points made in these two cases against the validity of the attachment are—First, that the undertakings are not under seal, which I find to be true; second, that there is no affidavit showing that the property which it is alleged that the defendant removed or disposed of was subject to attachment, which I find to be so, but do not consider it necessary; third, that the affidavit is not sufficient to show a cause of action, which I find to be true, because the agent who makes the affidavit in each case swears to no personal knowledge in relation to the cause of action; fourth, that the affidavit on which the warrant in each case is based does not show fraud on the part of the defendant, which I find to be true, and that the charges therein are not true; and, fifth, that copies of the affidavit and warrant were not served. On all these points I have rendered my opinion in one or another of the cases above mentioned, and I adopt for these cases what I have said on these points in those cases. It is therefore ordered that the attachment in the above-entitled cases be vacated. It is further ordered that the defendant in these cases have leave to apply at chambers for such orders as may be necessary to carry out this order. D. A. Townsend, Presiding Judge."

"**Geo. W. Steffens & Son v. A. J. Lipsitz.** The plaintiffs in this case attached the defendant's property, and this is a motion to vacate the attachment. The motion is based on several grounds. The first relates to the insufficiency of the undertaking; the second, to the exemption of defendant's property under the homestead law; the third, to the failure to serve copies of the affidavit and warrant, respectively; the fourth, to the insufficiency of the affidavit on which the attachment warrant was issued to show fraud; and the fifth, to the falsity of the charges made in said affidavit. In regard to the first ground, I find that the undertaking is without seal, and in my opinion that is fatal to the validity of the attachment, and my reasons for this opinion will be found under this same objection, in the case of *M. Ferst's Sons & Co. v. A. J. Lipsitz*, which was heard with this case. Another objection to the undertaking is that the firm name was signed thereto by Geo. W. Steffens, Jr., a member of the firm, and no authority appears for his so doing. If the bond or undertaking had

been otherwise valid, and therefore under seal, such signing would be a nullity, for the reason that a member of a copartnership cannot sign the firm name to a sealed instrument without proper authority. No such authority is shown in this case; hence for this reason, also, the attachment in this case cannot stand. All the other grounds in this case were taken in the case of *Werner & Co. v. A. J. Lipsitz*, which was heard with this case, and I adopt the opinion in that case as my opinion on the same grounds in this case. It is therefore ordered that the attachment in this case be vacated. It is further ordered that the defendant have leave to apply at chambers for any such order as may be necessary to carry out this order. D. A. Townsend, Presiding Judge."

"**M. Ferst's Sons & Co. v. A. J. Lipsitz.** The plaintiffs in this case attached the property of the defendant, and this is a motion to vacate the attachment. The motion is based on several grounds. The first relates to the insufficiency of the undertaking; the second, to the omission of a witness to the undertaking; the third, to the exemption of the property under the homestead law; the fourth, to failure to show that a cause of action existed; the fifth, to the insufficiency of the affidavit on which the warrant was based; the sixth, to failure to serve copy of warrant and affidavit; and seventh, to the falsity of the affidavit on which warrant was based. This case was heard at the same time that the case of *John F. Werner & Co. v. A. J. Lipsitz* was heard, and the grounds of this motion are the same as the grounds in the motion in the case of *Werner & Co. v. A. J. Lipsitz* except that the objection urged in the first ground of this case, to wit, the objection to the undertaking, is not exactly the same, and there is one new objection added in this case, to wit, the omission to have a subscribing witness to the undertaking. All the other grounds of objection are precisely the same in this case as in the *Werner & Co. Case*, and I hereby adopt my decision in that case on these other grounds as my decision on the same grounds in this case, and it is so ordered, adjudged, and decreed. The objections to the undertaking in this case raise four questions: (1) Whether the firm name of the plaintiffs was properly signed thereto; (2) whether the power of attorney authorizing W. J. Verdier to sign said firm name should have been filed with the undertaking or other attachment proceedings; (3) whether there should have been a subscribing witness thereto; (4) whether there should have been a seal opposite each name in said undertaking. These questions did not arise in the case of *Werner & Co. v. A. J. Lipsitz*. I find that the firm name of the plaintiffs was signed to said undertaking by W. J. Verdier, Esq., as attorney in fact. I find also that W. J. Verdier, Esq., had a power of attorney in proper form, authorizing him to sign said name to

said bond. Yet from the affidavit of Thomas Talbird, Esq., it appears that said power of attorney was not in the record a few days after the attachment, and hence I infer that it was not filed until after the attachment. This I consider an irregularity sufficient to vacate the attachment. The supreme court intimates very strongly in *Bank v. Stelling*, 31 S. C. 371, 9 S. E. 1028, that a power of attorney to sign the undertaking should be filed with the proceedings, and, if it should be filed at all, I see no reason why it should not be filed at the same time as the bond or undertaking. The next question in regard to the undertaking is, should there have been a subscribing witness? A witness is not essential. The bond or undertaking could not be recorded without the affidavit of a witness, but it is not such a writing as the law provides for recording or requires to be recorded; hence a witness is unnecessary to the creation of the paper. But since no paper of that kind can, under rule 66 of the circuit court, be filed unless there is a subscribing witness, it is plain that a subscribing witness was necessary in this case, and the omission is, in my opinion, fatal. I do not think that Mr. Verdier would fill the requirement as a subscribing witness, he having merely witnessed his own writing. The next question is, should there have been a seal opposite each name? or, in other words, should those who signed the undertaking have used seals? I think that the 'undertaking' mentioned in the Code, in connection with the provisions for attachments, is synonymous with and means the same thing as 'bond.' In sections 260 and 261, and also in other sections of the Code, the word 'undertaking' and the word 'bond' are used synonymously. A seal was always necessary to a bond in this state. Without a seal, a bond of this kind would be of no binding force. *Cantey v. Duren*, Harp. 434. However, I conclude that a seal was necessary, and its omission is fatal to the validity of the attachment. It is therefore ordered that the attachment in this case be vacated. It is further ordered that the defendant have leave to apply at chambers for any further orders that may be necessary to enforce this order. D. A. Townsend, Presiding Judge."

W. J. Verdier and Elliott & Elliott, for appellants. Thomas Talbird and Howell & Gruber, for respondent.

GARY, J. The above-entitled causes, with one other, in which no appeal has been taken, were brought in the court of common pleas for Beaufort county, and attachments against defendant's property were issued. The attachments were all issued upon an affidavit in each case, made by L. Grollman, which will be set forth in the report of the cases. There was also in each case the affidavit as to cause of action. Thereafter the defendant, upon affidavits, moved to vacate the attachments upon various grounds, hereinafter

mentioned. The plaintiffs offered in reply quite a number of affidavits. The affidavits being objected to as not in reply, his honor, Judge Townsend, who heard the motions, said he would hear the affidavits and pass upon the question of their admissibility when considering the motions. The presiding judge made orders setting aside the attachments in all the cases. There was one case, that of John F. Werner & Co., represented by other counsel, in which the motion to vacate was not resisted, it being admitted that the undertaking was fatally defective. This case, however, the presiding judge used for writing his principal decision, and in all the other cases referred to his decision in this case, deciding also upon special points in the other cases. The orders of the presiding judge will accompany the report of the cases.

The first exception is as follows: "Because his honor erred in holding, and so deciding, that the affidavits on which the attachments issued were insufficient to show grounds for attachment." The affidavit is very long, and we will not set out at length the different facts therein alleged to sustain the attachments. It not only appears upon the face of the affidavit that the defendant committed certain acts from which a fraudulent intention might be inferred, but there are also admissions on the part of the defendant stated in the affidavit tending to prove such fraudulent intention. We say, "upon the face of the affidavit," because it is not within the power of the supreme court to decide upon the credibility of the affiant in such cases, nor whether the facts are true or untrue. These are matters for the circuit court. If, however, the facts alleged in the affidavit are true, then they were sufficient to sustain the attachments. The first exception is therefore sustained.

The second and third exceptions are as follows: (2) "Because his honor erred in ruling out plaintiffs' affidavits in reply, the defendant having moved upon affidavits." (3) "Because his honor erred in holding that the affidavits upon which the attachments were issued were disposed of and explained away by defendant's affidavits, and that defendant's moving affidavits showed that there was no ground for attachment, without having taken into consideration plaintiffs' affidavits in reply." This court has not the power, as just stated, to consider the question as to the credibility of those making the affidavits. As hereinbefore stated, objection was made, when plaintiffs offered their affidavits in reply, that such affidavits were not in reply, and therefore inadmissible. His honor allowed them to be read, and said he would pass upon the question of their admissibility when he came to consider the motions on their merits. In the case of John F. Werner & Co. v. Lipsitz, in which his honor made his principal decision, he says: "Affidavits were offered in reply to defendant's affidavits. Objection was made to their introduction. I overruled the objection, but

stated at the time that I would consider only so much thereof as was strictly in reply to the statements made in defendant's affidavits, and nothing that tended to supplement plaintiffs' case as first made, and I have done so." It does not appear which affidavits were ruled by his honor to be in reply, and which were excluded. The plaintiffs had the right to know which affidavits were allowed in reply, and the failure of the presiding judge to accord them such right is reversible error. These exceptions, in so far as they complain of error on the part of his honor in the particulars just mentioned, are sustained.

The fourth exception is as follows: "Because his honor erred in deciding that the nonservice of the affidavit and warrant of attachment upon the defendant was fatal, and sufficient ground for setting aside the attachment." The statute does not require such service, and this court certainly has no right to interpolate such provision into the statute. It is entirely a matter for the legislative department of the government. Section 253 of the Code provides that a true and attested copy of the attachment shall be delivered to the party whose real estate is attached, by the officer serving the same; and section 257 also provides for leaving a certified copy of the warrant of attachment with certain parties, where the property is incapable of manual delivery. These circumstances rather tend to sustain the doctrine found in the maxim, "*Expressio unius, exclusio alterius*." We think the presiding judge committed error as complained of in this exception, and the exception is therefore sustained.

The fifth exception is as follows: "Because his honor erred in deciding that an undertaking or attachment must be under seal." The statute uses the word "undertaking," and not the word "bond." An "undertaking" is good without a seal, and this exception is therefore sustained.

The sixth exception is as follows: "That his honor erred in holding that one member of a firm has no power to sign the firm name to an undertaking on attachment without special authority so to do, and that such authority must be shown." The undertaking does not require a seal, as we have just stated, and therefore his honor was in error. This exception is therefore sustained.

The seventh exception is as follows: "Because his honor erred in holding that where plaintiff's name is signed to the undertaking by an attorney in fact, under a proper power so to do, such power must be filed with the undertaking at the time of the issuing of the attachment, and it is not sufficient that it be filed after the attachment has been issued." Again, we find that there is no statutory requirement to this effect, and the presiding judge was in error. The judge, clerk of the court, or trial justice, before issuing the warrant, should have such facts before him showing that the undertaking is that of the

plaintiff. Such officer may demand the authority by which the agent acts for the plaintiff, and, where there is a power of attorney in writing, may have it filed with the undertaking; but the failure to do so is not fatal to the attachment. This exception is therefore sustained.

The eighth exception is as follows: "Because his honor erred in holding that there must be a subscribing witness to an undertaking on attachment." Although there is no statutory requirement to this effect, it is contended that there is a requirement of rule 66 of the circuit court. Rule 66 is as follows: "Whenever a justice or other officer approves of the security to be given in any case or reports upon its sufficiency, it shall be his duty to require personal sureties to justify. And all bonds and undertakings shall be duly proved by a subscribing witness, or acknowledged in like manner as deeds of real estate, before the same shall be received or filed." The limitation upon the power of the judges to make rules is that such alterations or additions be not inconsistent with any of the statutes of the state. The question, then, is whether or not said rule (66) is inconsistent with any of the statutes of the state. This rule is not simply a regulation of practice, but imposes a condition upon those suing out attachment proceedings. It is therefore inconsistent with the statutes of the state, and this exception is sustained.

The ninth exception is as follows: "Because his honor erred in holding that the affidavit as to cause of action was insufficient in the cases of *M. Ferst & Co.*, *Savannah Grocery Co.*, and *Savannah Steam Bakery Co.*, in that same was made not by any member of firm, but upon information and belief, by the attorney and traveling salesman, respectively." The provision of section 250 of the Code is that the warrant may be issued "whenever it shall appear by affidavit that a cause of action exists" against such defendant, "specifying the amount of the claim and the grounds thereof," etc. There is no requirement that the affidavit must be made by a particular person, and therefore this exception is sustained.

The defendant's counsel gave notice that, if the decision of the circuit judge could not be sustained upon any of the grounds upon which he placed it, they would insist that it should be sustained on the ground "that there was no affidavit to show that the property that the defendant is alleged to have fraudulently disposed of was not a part of defendant's homestead, and that such affidavit was necessary for the issuing of an attachment; and in the case of *Waterhouse & Danner*, the circuit judge not having passed on the point made that the name of the firm was not signed to the undertaking, they would insist on this point in the supreme court." As to the first ground upon which the defendant relies, we do not think it can be sustained. The cases of *Martin v. Bowles*, 37 S. C. 102, 15 S.



E. 736, and *Bradford v. Buchanan*, 39 S. C. 237, 17 S. E. 501, show that the right to a homestead in the property does not prevent proceedings to sell the property, but the homestead will be protected when it is made to appear that it exists. Of course, the party entitled to a homestead cannot be deprived of such right. In regard to the point as to the manner in which a partnership can sign an undertaking, we are of the opinion that in this case the undertaking was properly signed. There are two ways in which a partnership may bind itself by its signature to a contract not requiring a seal: (1) By simply the name of the partnership, as "Waterhouse & Danner"; and (2) by the signatures of the individual members composing the partnership, provided it appears in the instrument of writing that the intention is to bind the partnership. A copy of the undertaking is not set out in full, but we must presume that this intention sufficiently appears in the undertaking, in the absence of testimony to the contrary. It is the judgment of this court that the several orders appealed from be reversed.

(48 S. C. 436)

BABB, Clerk, v. SULLIVAN.

(Supreme Court of South Carolina. April 1, 1895.)

RES JUDICATA—AMENDMENT OF JUDGMENT—  
LACHES.

1. Where a judgment debtor, duly summoned to show cause why the judgment should not be revived, fails to set up a defense of part payment, the question is *res judicata*.

2. The order reviving a judgment failed to state any amount, and the judgment debtor, though duly summoned, failed to appear and set up his defense of part payment, and, with knowledge of the amount for which execution was revived, delayed for nearly 10 years to seek to amend the revived execution. *Held*, that he was precluded by laches.

3. Laches is the neglect to do what, in law, should have been done for an unreasonable and unexplained length of time and under circumstances permitting diligence.

4. Acquiescence is an intentional failure to resist the assertion of an adverse right.

Appeal from common pleas circuit court of Laurens county; T. B. Fraser, Judge.

Motion by Joseph P. Latimer and another to amend an execution. From an order granting the motion, plaintiff appeals. Reversed.

Featherstone & Son and Haskell & Dial, for appellant. J. A. McCullough, for respondent.

BENET, A. A. J.<sup>1</sup> This was a motion to amend an execution made *ex parte* Joseph P. Latimer and John H. Latimer, as executors of the last will and testament of Hewlett Sullivan, deceased, in re M. E. Babb, as Clerk, Successor, etc., v. Hewlett Sullivan. The same moving parties made at the same time two other motions,—one in re Rice, as Clerk, Successor, etc., v. Sullivan, to vacate a judgment, and one in re Shell, as Clerk, Successor, etc., v. Sullivan, to quash an exe-

cution. All the three cases in which the several motions were made were closely connected, and interdependent. The circuit judge, in the decretal order appealed from, refused the first two motions, but granted the third, namely, the motion to amend the execution, remarking that "this motion is made in the event that both of the preceding motions were refused." To make plain the grounds upon which this third motion was granted, as well as the grounds upon which the order granting it was appealed from, it is necessary to set forth the following statement of facts: In 1877, Ira Rice, as clerk of court and successor of Homer L. McGowan, commissioner in equity for Laurens county, in a suit for foreclosure against Hewlett Sullivan and his sureties, John Hellams and C. P. Sullivan, Jr., recovered judgment against Hewlett Sullivan and John Hellams for \$4,368.98. On this judgment, Hewlett Sullivan, from time to time, made various payments. In 1883 a copy summons to renew execution in the main cause was served on Hewlett Sullivan. It appears that both the original summons and the copy have been lost, and that there was some dispute whether the summons, in its terms, stated the amount for which it was proposed to renew the execution. But the attorneys who issued the summons made affidavit that, to the best of their recollection, the amount was stated therein as being for \$1,000, and for \$368.53 costs. To this summons to renew, the defendant Hewlett Sullivan failed to file either answer or demurrer, or to give notice of appearance. On the 2d of December, 1884, therefore, Judge Pressley granted his order that "the judgment and execution of Ira Rice, Clerk, Plaintiff, against Hewlett Sullivan, be renewed, to have the force, form, and effect of the former recovery, with leave to G. W. Shell to issue execution therefor." And on 12th December, 1884, counsel representing sundry creditors of M. A. Sullivan, deceased, to whose estate the debt was owing, procured the issuing of an execution in said cause against Hewlett Sullivan for \$1,000, and for \$368.53 costs. When this renewed execution was levied upon the land of Hewlett Sullivan, on the 12th of March, 1885, an action was commenced by him on 23d March, 1885, for the purpose of enjoining its enforcement, and to have the judgment canceled and marked "Satisfied." In that action (*Sullivan v. Shell*) the plea of full payment was set up. The case was heard by Judge Hudson, who granted the order of injunction prayed for. On appeal to this court the judgment of the circuit court was reversed, and the complaint dismissed. *Sullivan v. Shell*, 36 S. C. 578, 15 S. E. 722. In that case, Mr. Chief Justice McIver, delivering the opinion of the court, said that the plaintiff, Sullivan, was not entitled to maintain the action, adding: "If he ever had any remedy, it should have been sought by a motion in the cause in which the judgment complained of was rendered. But, even if he had resorted to that mode of relief, we do not see how he could have successfully met the plea of *res adjudicata*."

<sup>1</sup> Sitting in place of Mr. Justice Pope, disqualified.

When he was served with summons to show cause why the judgment should not be revived, and execution issued to enforce the same, he was afforded the opportunity to raise the very same question which he now seeks to raise by this action, and this court has repeatedly decided that one who fails to do so when afforded such opportunity is forever afterwards estopped from doing so." Id., 36 S. C. 580, 15 S. E. 722. This opinion was handed down on 3d September, 1892. Thereafter, as we gather from the statement of facts in the brief, the renewed execution was again levied, when, Hewlett Sullivan having died, his executors brought another action, claiming that the consideration of the judgment had failed, and asking relief on that ground. That action also was dismissed. Again was the renewed execution levied, whereupon the executors instituted this proceeding, making a motion in the original cause in which the judgment was rendered for an order to amend the renewed execution by reducing the amount from \$1,000 to \$76. It is not unlikely that this mode of relief was resorted to in consequence of the suggestion made in *Sullivan v. Shell*, supra, and quoted above. This motion was heard on its merits in the circuit court by Judge Fraser, who rendered his decree in favor of the executors, and granted the order moved for, holding as follows: "The plaintiff contends that, as the amount of the balance due upon the judgment was stated in the summons to renew, the defendant was estopped from disputing it. Assuming for the purpose of this motion that the summons did state that there was a balance of \$1,000 and costs, \$368.53, due upon the judgment, the order of Judge Pressley did but renew the judgment, with the form, force, and effect of the former recovery. The executors, therefore, have the right to show, if they can, that the execution has been renewed for too large a sum. The balance due upon the judgment at the date of the order of renewal being in dispute, it is ordered that it be referred to J. K. Jennings, Esq., as special referee to take testimony and report to this court the balance ascertained to be due upon said judgment at the time said execution was renewed, and that the execution be amended, if the same be necessary, for the amount due upon said judgment at the time said execution was renewed." From this decretal order the plaintiff appeals upon several grounds.

The view we have taken of the case renders it unnecessary to pass upon more than the first and the fifth exceptions, which raise the questions of *res adjudicata* and laches. It seems to us that the mere statement of the facts, as above set forth, with the various proceedings had both in the circuit court and in this court, and with the dates showing the time which has elapsed, clearly call for a reversal of Judge Fraser's decretal order on the two grounds of *res adjudicata* and laches.

It is admitted for the defendant that in *Sullivan v. Shell*, supra, the issue of full payment has been adjudicated. But it is argued, interrogatively, that the plea of part payment might not constitute a defense to the application to renew an execution. We cannot so hold. We see no reason for holding that the defense of part payment could not have been set up at the time the application to renew was made. On the contrary, we hold that there was then offered to the defendant Sullivan an opportunity in law to set up the plea on which his privies now insist. He failed to take advantage of it, and suffered judgment to be taken for the amount stated in the summons to renew. Following in the line of the doctrine laid down by this court in *Hart v. Bates*, 17 S. C. 40, and in *Ex parte Roberts*, 19 S. C. 156-158, where Mr. Justice McGowan clearly defines the requisites of the plea of *res adjudicata*, we are able to say of the case at bar, and the proceedings had before Judge Pressley to renew the execution, that the parties or their privies are the same, that the subject-matter is the same, and that the precise point,—part payment,—if not expressly ruled upon, was necessarily determined by the judgment of this court, upon the plea of full payment, in *Sullivan v. Shell*. This court has repeatedly declared that when a party served with summons to show cause why a judgment should not be revived, and execution renewed, fails to make a defense which he has the opportunity of making, he must be held to have formally made such defense, and to have been unsuccessful, and he is forever afterwards estopped from setting up that defense. *Davis v. Murphy*, 2 Rich. Law, 560; *Jackson v. Patrick*, 10 S. C. 197; *McNair v. Ingraham*, 21 S. C. 70; *Crenshaw v. Juliau*, 26 S. C. 283, 2 S. E. 133; *Sullivan v. Shell*, 36 S. C. 578, 15 S. E. 722. We therefore sustain the appellant's first exception, which charges error in the circuit judge in not holding the defendant estopped from making the defense of part payment, such a defense being *res adjudicata*.

We sustain also the appellant's fifth exception, which charges error in the circuit judge in not holding the defendant's motion barred by his own laches. The summons to renew was served in October, 1883. The order of Judge Pressley, granting leave to renew the judgment and execution, was passed in December, 1884. And now, in 1894, it is sought for the first time to amend the renewed execution. No reason or excuse is given for this long delay, nor is the court informed when the discovery was made that the renewed execution was for too large an amount, nor is there any allegation of fraud. It cannot be said that the defendant has acted with reasonable diligence. He knew that the judgment had been revived against him; he knew the amount for which the execution had been renewed; and we hold that his unreasonable and unexplained delay, and his

failure to set up this defense when in law it should have been set up, the opportunity offering, amount to such laches as effectually precludes him from obtaining the relief which he or his privies now seek. It was urged, however, by defendant's counsel, that, since the time which elapsed between the order of renewal and the defendant's notice of motion to amend was a few months—from July to December—less than 10 years, the delay was not long enough to amount to laches. It is confessedly impossible to adopt a general rule, and fix a definite length of delay which shall justify a court of equity in refusing relief on the ground of laches. Each case must be governed by its own facts, and courts of equity must be trusted to exercise a salutary discretion. As we understand the doctrine of estoppel by laches, the facts in this case would justify us in holding that even a shorter delay than nine years and six months, inexcusable or unexplained, would have furnished the circuit court with sufficient grounds for refusing the order moved for. Delay is not the sole factor that constitutes laches. If it were so, some period fixed by statute or by the common law of the courts would afford a safe and unvarying rule. Laches connotes not only undue lapse of time, but also negligence, and opportunity to have acted sooner, and all three factors must be satisfactorily shown before the bar in equity is complete. Other factors of lesser importance sometimes demand consideration, such as the nature of the property involved, or the subject-matter of the suit, or the like. As a definition of "laches," however, it is sufficiently correct to say that it is the neglecting or the omitting to do what in law should have been done, and this for an unreasonable and unexplained length of time, and in circumstances which afforded opportunity for diligence. This definition will be found adequate as a test to be applied to the vast majority of cases. The doctrine embraced in it is in accordance with the principles and the practice of courts of equity, which have from the beginning held themselves ready to aid suitors who come in good conscience, good faith, and with diligence; and from the beginning they have discountenanced stale demands, and refused relief from the effect of negligence and inexcusable delay. We have seen, from the very nature of equity jurisdiction, and the principles that guide and control its exercise, that it is impracticable, if not impossible, to fix a definite period of time as a bar or limitation to suits in equity; that lapse of time is not the only test of staleness; that it needs to be conjoined with negligence or inattention, and with opportunity for diligence and for acting sooner. For it is of the essence of laches that the party charged with it should have either actual knowledge, or such notice as would have put him on inquiry. It is manifest, therefore, that the period of time which shall be a bar in equity must needs vary with

the varying circumstances in the different cases. Thus, to constitute laches in a case showing gross negligence, a lesser lapse of time would suffice than in a case of ordinary carelessness and inattention. So, too, would the length of time deemed sufficient be greater or less according as the evidence in the case might show whether the party to whom laches is imputed actually knew of the opportunity he neglected, or was simply presumed to have known. Laches being the resultant of a combination of negligence, lapse of time, and loss of opportunity, by as much, therefore, as negligence and knowledge of opportunity may vary in degree, by so much will the period of time vary in length. Speaking generally, it may be said that, the greater the negligence and the knowledge, the less will be the time. Hence the great differences in the length of the delay which the courts have held to work laches, varying from a few months to any number of years less than 20. In the matter of application to vacate or open judgments, we have already said that the length of time may be affected by the nature of the property involved, or by the subject-matter of the suit in which the judgment was rendered. Thus equity would bar an application to set aside a decree of divorce in much shorter time than it would an application to set aside an ordinary judgment. Recurring to the case before us, we are clearly of the opinion that the delay of nine and a half years, joined with Hewlett Sullivan's knowledge of the plaintiff's application to renew, and his failure to use the opportunity afforded, was such laches as completely bars him or his privies from obtaining the relief sought. It might be held, also, that under the equitable doctrine of acquiescence the defendant is barred. If laches is the negligent failure to assert a positive right when opportunity is afforded, acquiescence is the intentional failure to resist the assertion of an adverse right. In 1883, Hewlett Sullivan was served with a copy summons to renew the execution. He not only failed to assert any positive right of his own, but he knowingly failed to resist the assertion of the plaintiff's right, and he should be held barred by acquiescence. The judgment of this court is that the judgment of the circuit court be reversed, and the motion of the defendant or his privies dismissed.

(91 Va. 134)

EXCHANGE BLDG. & INV. CO. v. BAYLESS et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Feb. 14, 1895.)

SUBROGATION OF SURETY — PAYMENT OF DEBT — RELEASE OF SURETY — EXTENSION OF TIME.

1. B. sold a lot to the E. Co. for part cash, and balance secured by deed of trust. Subse-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

quently the E. Co. sold the same lot to the V. Co. for part cash, the assumption of the former deferred payments due B., and a balance secured by deed of trust. Upon maturity of the first notes due B., the V. Co. was unable to pay them, and, to secure further time, two of its officers gave B. their personal notes as additional security, which were paid at maturity. *Held*, that said officers were not entitled to be subrogated to the security of the deed of trust held by B. as against the E. Co.

2. An agreement to give time to the debtor, which reserves a right to sue at the request of the sureties, does not release the latter.

Appeal from circuit court of city of Roanoke.

Action by the Exchange Building & Investment Company against the Virginia Finance Company, William H. Bayless, and others. Judgment for defendants, and plaintiff appeals. Reversed.

Watts, Robertson & Robertson and C. B. Moomaw, for appellant. Penn & Cocke and Smith & King, for appellees.

HARRISON, J. This is an appeal from a decree of the circuit court of the city of Roanoke in a cause wherein the Exchange Building & Investment Company was plaintiff and the Virginia Finance Company, William H. Bayless, William M. Yager, and others were defendants. The object of the suit was to ascertain the liens on a certain lot in the city of Roanoke, determine the priorities, and sell the lot for the satisfaction of the plaintiff's debt. The court, on the 18th day of November, 1893, entered a decree declaring that after the payment of costs, etc., the defendant W. H. Bayless held the first lien, the defendant W. M. Yager held the second lien, the plaintiff the Exchange Building & Investment Company held the third lien, and that the property should be sold, and the proceeds applied to the payment of the liens in the order named. From this decree, the Exchange Building & Investment Company was granted an appeal to this court.

The record discloses the following facts: On July 2, 1890, W. H. Bayless and others sold and conveyed to the Exchange Building & Investment Company a parcel of land fronting on Campbell street, in the city of Roanoke. A part of the purchase price was paid in cash, and four notes executed by the purchaser for the residue,—two notes for \$1,666.66, each payable in one year, and two for \$1,666.66, each payable in two years,—all executed to William H. Bayless and his associates, said Bayless subsequently becoming the owner of all four of said notes. Contemporaneously with the conveyance, a deed of trust was given on the lot to secure the four purchase-money notes already described. Subsequently to this transaction, the Exchange Building & Investment Company sold and conveyed this same lot to the Virginia Finance Company, upon the following terms: The purchaser, making a cash payment, undertaking and agreeing to assume

and pay off the four notes, of \$1,666.66 each, executed by the Exchange Building & Investment Company to W. M. Bayless and others, and for the residue executing two notes to said Exchange Building & Investment Company, each for the sum of \$2,500, and securing the same on said lot by deed of trust. So that, after this latter transaction was consummated, the Virginia Finance Company was the owner of the lot in question, subject to two mortgages, the first, the four notes of the Exchange Building & Investment Company to W. H. Bayless, each for \$1,666.66, assumed by it; and, second, two notes of its own, each for \$2,500, due to the Exchange Building & Investment Company. The Virginia Finance Company, under its purchase, having assumed payment thereof, became the principal debtor as to the four notes secured in the first mortgage; and the Exchange Building & Investment Company became surety for those notes; and this relation was recognized and accepted by William H. Bayless, the creditor, in his dealing with the parties. When the two one-year notes of the Exchange Building & Investment Company to Bayless, for \$1,666.66 each, became due, the Virginia Finance Company was unable to pay them; and, not wishing the property to be sold, William M. Yager, one of the principal stockholders in said company, and also one of the directors and its general manager, sought W. H. Bayless, the creditor, and procured from him an extension of time, evidenced by a contract in writing, executed by the Virginia Finance Company, recognizing its primary liability to pay the Bayless notes, and, in consideration of the extension of time, giving as additional security three negotiable notes, aggregating \$3,466.64. These notes were each indorsed by W. M. Yager & Co. and J. B. Levy; W. M. Yager & Co. being W. M. Yager and J. B. Levy, and, as before stated, W. M. Yager being stockholder, director, and general manager of the Virginia Finance Company, and J. B. Levy being stockholder, director, and president of said company. When these three negotiable notes, thus indorsed, became due, they were paid by W. M. Yager, one of the indorsers. The Exchange Building & Investment Company consented to the extension of time thus given the Virginia Finance Company by Bayless, the creditor.

The first error assigned is that the circuit court of Roanoke, by the decree complained of, subrogated William M. Yager to the rights of the original creditor, W. H. Bayless, under the deed of trust given on the lot to secure Bayless. In considering this question, it must be borne in mind that the Exchange Building & Investment Company bore two relations to the Virginia Finance Company. The first was that of surety for the first mortgage debt of Bayless, assumed by the Virginia Finance Company; and the second was that of creditor in the second

mortgage debt of \$5,000; the aggregate of these two debts representing the balance due from the Virginia Finance Company for the lot, as purchaser from the Exchange Building & Investment Company. As a means of paying part of this purchase money, the debtor executed three negotiable notes, aggregating \$3,466.64, indorsed by Yager, and delivered them to Bayless, to be applied, when paid, to the discharge of that portion of said purchase money held by him. The effect of the decree of the circuit court is to put Yager, when he paid these notes, in a better position than his principal's creditor, the Exchange Building & Investment Company. In other words, it gives him a lien on the lot, ahead of the remaining purchase money still unpaid and due to the vendor of his principal, the Virginia Finance Company.

A surety who was not originally bound for the debt, but who comes in during the prosecution of a remedy for the debt against the principal, cannot, by subrogation, obtain a preference over creditors of the principal whose liens attached before the surety became bound. As to any such prior interest in the property, he must occupy the place of debtor. 2 Brandt, Sur. § 308. The doctrine of subrogation being a doctrine of purely equitable origin and nature, its operation is always controlled by equitable principles. It is therefore never enforced so as to defeat or interfere with a superior or equal equity of third persons, or with the legal right of third persons growing out of an express contract. Pom. Eq. Jur. § 1419, and note. To give Yager, the voluntary indorser of the Virginia Finance Company, a lien on this lot prior in dignity to the Exchange Building & Investment Company, the purchase-money creditor of said finance company, would be to violate the contract rights between the parties; and subrogation is never enforced when it would be in the nature of a breach of contract to do so.

The circumstances of the transaction and the preponderance of evidence show that these notes, gotten up at Yager's instance, were intended, when paid, to be a discharge of the two one-year notes held by Bayless, and that it was not proposed or intended that the deed of trust should be kept alive in favor of Yager, even were that permissible in view of the rights of the Exchange Building & Investment Company. Yager himself, in his deposition, says the notes were turned over to Bayless, "for the purpose of the payment of those two notes of the Exchange Building and Investment Company of \$1,666.66 each." Yager was the representative and general manager of the debtor company, and this mode of paying the debt of his company was adopted by him in consideration of further time extended his company by Bayless, the creditor. As an innocent accommodation indorser for the Vir-

ginia Finance Company, Yager could not, under the circumstances, be subrogated as a lien creditor upon this lot, prior in dignity to the lien already resting upon it in favor of the Exchange Building & Investment Company. In view of his relations to this transaction and to the Virginia Finance Company, as the manager of its affairs, the reasons for his not being thus subrogated are greatly strengthened. The court is therefore of opinion that the circuit court erred in subrogating W. M. Yager to the rights of Bayless under the deed of trust securing the latter's debt on the lot mentioned in these proceedings.

It further appears from the record that when the two notes, each for \$1,666.66, due in two years, and secured to W. H. Bayless by deed of trust on this lot, became due, the Virginia Finance Company was again unable to meet them; and through its general manager, W. M. Yager, a contract bearing date August 22, 1892, was secured, reduced to writing, and signed by W. H. Bayless, the Virginia Finance Company, J. B. Levy, president, and W. M. Yager, whereby, in consideration of certain negotiable notes given by the Virginia Finance Company, indorsed by W. M. Yager, and delivered to W. H. Bayless as collateral security for his debt, the time for the payment of said debt was postponed. This contract was made without the knowledge or consent of the Exchange Building & Investment Company, which stood in the relation of surety for the debt, the payment of which was postponed by the contract aforesaid. The circuit court held that this contract of August 22, 1892, released the Exchange Building & Investment Company from all personal liability on the said two-year notes of \$1,666.66 each, but that the said contract did not release the lien held by Bayless for their security on the lot. This decree is objected to by the appellant, who contends that the contract for time released the lien of Bayless, which was prior in time on the lot, as well as the personal liability of the appellant for said debt. The decree is objected to by the appellee Bayless, because it released the Exchange Building & Investment Company from personal liability to him for said debt.

There is no principle of law better settled than the one contended for by the appellant, viz. that any change of the contract by the principal, however slight, without the consent of the surety, releases the latter from all further liability. Extension of time for payment is the most frequent form in which the creditor so deals with the principal as to discharge the surety; and, whenever such indulgence is granted in pursuance of a binding legal contract, the surety is at once released from his obligations. 2 Daniel, Neg. Inst. § 1312. The same author says: "But this principle on which sureties are released is not a mere shadow without sub-

stance. It is founded on the restriction of the rights of the sureties by which they are supposed to be injured. Therefore, when there is a legal impossibility of injury, the principle does not apply." Hence it is equally well settled that if, in a contract between the creditor and the principal debtor for an extension of time, all the rights and remedies of the surety are reserved unimpaired, the surety is not discharged. 2 Brandt, Sur. § 376. Daniel, in his work on Negotiable Instruments, in giving the elements or circumstances that must unite in order to constitute an indulgence which will discharge the surety, states the fifth to be as follows: "The indulgence must be without reservation of remedy, against the surety, for that would reserve the surety's recourse on the principal." See, also, 2 Hare & W. Lead. Cas. 425, where it is said in *Harris v. Brooks*: "It follows from this reasoning that an agreement to give time to the debtor, which reserves a right to sue at the request of the surety, will not be effectual as a defense in an action brought against the latter." Applying these principles to the contract of August 22, 1892, it is clear that no right or remedy of the Exchange Building & Investment Company, as surety for the Virginia Finance Company, has been impaired thereby. On the contrary, the creditor W. H. Bayless has with great care and particularity reserved to the surety all his rights and remedies by inserting in the contract a clause in these words: "This contract and agreement is made subject to this provision: that the Exchange Building & Investment Company may at any time require the property to be sold under the deed of trust aforesaid, or the collection of the said two notes enforced; and nothing herein contained shall operate to impair any right the Exchange Building & Investment Company may have to require the enforcement of the deed of trust aforesaid, or of the collection of the said notes." The rights and remedies of a surety could hardly be reserved in a contract in plainer and more unambiguous terms. There was not a right possessed by the Exchange Building & Investment Company before this contract was made that it did not have with equal force afterwards. It reserves the right to proceed immediately, at the request of the surety, and therefore cannot be effectual as a defense against the liability of said surety. It follows, therefore, that the circuit court erred in releasing the Exchange Building & Investment Company from its personal liability to W. H. Bayless on the two notes held by him, and for which said company was bound as surety.

For the foregoing reasons, the court is of opinion that the decree complained of is erroneous, and must be set aside; and this court will enter such decree as the circuit court of the city of Roanoke ought to have entered.

(94 Ga. 126)

## FAIRCLOTH v. STUBBS et al.

(Supreme Court of Georgia. July 16, 1894.)

## EXCEPTIONS TO AUDITOR'S REPORT—TRIAL BY JURY—REVIEW.

1. There is no provision of law for ascertaining by jury trial whether an auditor's report of the evidence before him is deficient or incomplete by reason of alleged omissions of some of the evidence actually submitted and heard. Therefore the presiding judge, in cases not governed by the practice in equity, is left to the exercise of his own discretion as to what means he will adopt in solving and settling such a question, where it is raised by exceptions to the auditor's report.

2. Under the evidence submitted to the judge in this case, his finding against the exceptions was not so manifestly unwarranted as to justify a reversal of the same by a reviewing court.

(Syllabus by the Court.)

Error from superior court, Emanuel county; R. L. Gamble, Judge.

Action by Stubbs & Tison against Chesley Faircloth. There was judgment for plaintiffs, and defendant brings error. Affirmed.

H. R. Daniel, F. H. Saffold, Hines & Felder, and Evans & Evans, for plaintiff in error. Williams & Smith, for defendants in error.

SIMMONS, J. 1. A mortgage given by Faircloth to Stubbs & Tison was sought to be foreclosed for an alleged balance due. Faircloth defended on the ground that the notes secured by the mortgage were not given for an actual indebtedness, but as collateral to an account for present indebtedness and further advances, and that overcharges were made in the account for which the notes were given, etc. The case was referred to an auditor, who made a report thereon, and to this report the defendant filed exceptions. One of the exceptions was that the auditor had omitted to report certain portions of the testimony, which were set out in the exceptions; and the defendant moved to re-refer the case, that the auditor might inquire into the evidence alleged to have been omitted, and report the same; or, if the court should refuse to do this, that the question be submitted to the jury as to whether such testimony was introduced before the auditor or not. The court refused to re-refer the case to the auditor, or to submit this question to the jury, but heard evidence himself as to whether the testimony alleged to have been omitted had been introduced before the auditor; and, after hearing the evidence on this point, ordered that the exception relating to the alleged omission of testimony be dismissed, upon the ground that it had not been made to appear satisfactorily that the testimony alleged to have been omitted had really been submitted to the auditor. The defendant assigns error upon these rulings. There is no provision of law for ascertaining by jury trial whether an auditor's report of the evidence before him is deficient or incomplete by reason of alleged

omissions of some of the evidence submitted and heard. In equity cases, where exception is taken to the report of a master as deficient in this respect, the law contemplates that the presiding judge shall pass upon the question himself. Code, § 3097c. This, however, is a case at law, and the law is silent as to the means to be adopted in such cases for solving and settling a question of this kind. The judge is therefore left to his own discretion in the matter, and in this case did not err in the mode of procedure adopted.

2. Under the evidence submitted to the judge, his finding against the exceptions was not so manifestly unwarranted as to justify a reversal of the same by this court. Judgment affirmed.

(94 Ga. 128)

**PAUL v. RONEY et al.**

(Supreme Court of Georgia. July 16, 1894.)

**GARNISHMENT OF MORTGAGOR—RIGHTS OF MORTGAGEE TO FORECLOSE.**

Judgment against the mortgagor of personal property upon a garnishment sued out at the instance of a creditor of the mortgagee, and the pendency of another like garnishment, not yet answered, will not, without respect to the amount of the claims covered by the garnishments, as compared with the amount due on the mortgage debt, necessarily negative the right of the mortgagee, or his assignee, to foreclose the mortgage and cause a seizure of the incumbered property. If the mortgage debt be payable by installments, some of which are overdue and others not due, the foreclosure may, under section 1965 of the Code, embrace the whole, and execution may issue and be levied for the aggregate amount, the facts as to maturity of a part and nonmaturity of the residue being stated in the affidavit of foreclosure.

(Syllabus by the Court.)

Error from superior court, Richmond county; William F. Eve, Judge.

Action by E. P. Paul against E. Roney and another. From a judgment for defendants, plaintiff brings error. Affirmed.

Salem Dutcher, for plaintiff in error. Fleming & Alexander and P. J. Sullivan, for defendants in error.

SIMMONS, J. Roney, as transferee of Smith, held several promissory notes of Paul, and a mortgage given by Paul on his stock in trade to secure the same. The notes were dated November 2, 1892, and were payable respectively in one, two, three, four, five, and six months after date. On January 24, 1893, two of the notes being then past due, Roney made an affidavit to foreclose the mortgage, and petitioned the court to control the surplus arising from the sale of the mortgaged property so as to protect the lien of the mortgage as to that portion of the debt which was not yet due. The clerk of the superior court issued execution for the whole amount of the indebtedness, and placed it in the hands of the sheriff, who executed the same by levying upon the property described therein. Paul seeks in this action to recover

against Roney and Smith for damages sustained by reason of the levy, on the ground that the same was an abuse of legal process. It appears that subsequently to the giving of the notes and mortgage, and before the foreclosure and levy, certain creditors of Smith, who had filed suits against him, obtained process of garnishment against Paul, and judgment was taken against him as a garnishee in one of these suits. All these claims, however, were bought by Roney, and the garnishments dismissed, before he proceeded to foreclose the mortgage, but no notice of this was given Paul until after the levy. It was contended in the present case that Paul was entitled to have notice of the dismissal of the garnishments, and of who owned the notes, before he could be legally proceeded against as for a default in payment; also, that the mortgage could only be foreclosed for the amount due at the time of foreclosure; and that for Roney to proceed as he did was an abuse of legal process. It does not appear from the record that the claims of Smith's creditors covered by the garnishments against Paul were equal in amount to Paul's indebtedness upon the notes secured by the mortgage. For aught that appears, even if Paul had been required to pay the claims of these creditors in full, he might still have remained indebted upon the mortgage. If this was so, the judgment against him in favor of one of the creditors and the pendency of such garnishments would not preclude a foreclosure of the mortgage and the seizure of the mortgaged property. The mortgagee is not compelled to postpone the enforcement of his lien for the amount due him upon the mortgage indebtedness simply because some portion of the indebtedness has been subjected to the claims of his creditors by process of garnishment against the mortgagor. Nor is he precluded from foreclosing the mortgage because the debt is payable in installments, some of which are not yet due. Under section 1965 of the Code, the foreclosure may embrace installments not due, as well as those which are overdue, and execution may issue and be levied for the aggregate amount, the facts as to maturity of a part and nonmaturity of the residue being stated in the affidavit of foreclosure. Upon the state of facts disclosed by the record, we hold that the court below did not err in a granting a nonsuit. Judgment affirmed.

(94 Ga. 140)

**PATTERSON v. AUGUSTA & S. R. CO.**

(Supreme Court of Georgia. July 16, 1894.)

**CONTRACT OF CARRIAGE—LIMITATION OF ACTION.**

Where the action against a common carrier is upon the contract to safely carry, although the breach alleged resulted in injuries to the person, for which damages are sought to be recovered, the action is one *ex contractu*, and is not barred until four years after the breach, notwithstanding the statute applicable to actions *ex delicto* bars actions for injuries to the person

unless the suit be brought within two years after the right of action accrues.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by George Patterson against the Augusta & Savannah Railroad Company for personal injuries. Defendant had judgment, and plaintiff brings error. Reversed.

Colley & Sims and J. R. Lamar, for plaintiff in error. Lawton & Cunningham and J. O. C. Black, for defendant in error.

**SIMMONS, J.** Patterson brought his action against the Augusta & Savannah Railroad Company, alleging that he had made a contract with it, whereby it agreed for a certain consideration to transport him safely from the city of Augusta to the city of Waynesboro, on the line of its railroad, and that there was a breach of the contract, in that it did not transport him safely, but that he was injured and damaged by the loss of his arm. Where a person makes a contract of this kind with a common carrier, and he is injured by the negligence of the carrier, he has two remedies,—one an action for the breach of contract, the other an action on the case for the wrong,—and he may elect which remedy he will pursue. If he elects to bring an action for the breach of contract, he has, under the Code, four years within which to bring it; if he elects to sue upon the tort, he has two years. Code, §§ 2923, 3060. If he sues upon the breach of contract, and there is a final adjudication of this suit upon the merits, he cannot afterwards sue the same defendant on the tort. The plaintiff in this case having brought his action for a breach of the contract, and four years not having elapsed before the filing of the suit, he was in time; and, if he proves the contract alleged with this particular defendant, or one of its agents, who was authorized to make it, and the alleged breach and injury resulting therefrom, we see no reason why he cannot recover. See Code, § 2955; Hutch. Carr. § 790. Judgment reversed.

(94 Ga. 193)

**BRAY et al. v. MCGINTY et al.**

(Supreme Court of Georgia. July 23, 1894.)

DEED OF GIFT—CONSTRUCTION.

Although most of the phraseology in the premises of a deed of gift conveying land, and all of that used in the habendum, be such as a person skilled in conveyancing would rightly use to pass an estate in fee simple, and the same, if standing alone, would be wholly inconsistent with an intention to convey a less estate to the donee, yet where the concluding words of the premises were, "Then, if the said [donee] should die, the same to go to his children," the effect of the deed as a whole, construing all its language together, was to create an estate in the donee for his life only, with remainder in fee to his children. The same construction is applicable to a like deed in which the concluding words of the premises were, "Reserving the use myself

during my life, and, if the said [donee] should die, to go to the children,"—the donee in each instance having living children at the date of the gift, and it being admitted that these children were the persons referred to by the donor. As it is evident that each of the deeds was drawn by an unskilled person, there is no probability that the comprehensive technical language employed was used in its technical sense; and although, if interpreted in that sense, the words of the deed would be repugnant, it is manifest that there was no repugnancy in the intention, the purpose being that the donee's children should succeed to his estate, and not that his heirs at law should take it by inheritance. If this was not the intention, there could be no rational object in mentioning the children, or providing for them to take at all.

(Syllabus by the Court.)

Error from superior court, Warren county; George F. Gober, Judge.

Action by J. M. Bray and others against Myrtle McGinty and others to recover land. There was judgment for defendants, and plaintiffs bring error. Reversed.

Glenn & Slaton and H. M. Holden, for plaintiffs in error. Jos. Whitehead, for defendants in error.

**LUMPKIN, J.** W. A. Bray, J. M. Bray, and Mrs. Tuck, the children of Richard L. Bray, deceased, brought an action against Myrtle McGinty and her guardian for the recovery of a tract of land. At the trial it appeared that on the 15th day of February, 1847, Lucy Bray, in consideration of natural love and affection for Richard L. Bray, executed and delivered to him a deed conveying to him, his heirs and assigns, a tract of land therein described, and certain slaves, the premises concluding with these words: "Reserving the use myself during my life, and, if the said Bray should die, to go to the children." In the habendum clause it was recited that Richard L. Bray, his heirs and assigns, were to have and to hold the property conveyed "to his and their own proper use, benefit, and behoof, forever, in fee simple." Afterwards, on the 26th day of January, 1849, Lucy Bray, in consideration of natural love and affection for Richard L. Bray, executed and delivered to him another deed conveying to him, his heirs and assigns, the same tract of land and the same slaves, in the premises of which deed the following words occur: "Then, if the said Richard L. Bray should die, the same to go to his children." The habendum clause of this deed was, in substance, the same as that contained in the first deed. The plaintiffs were the only children of Richard L. Bray at the time either of the deeds were executed, and were his only children at the time of his death. They are "the children" referred to in the deeds executed by Mrs. Bray. The latter, before making either of the deeds in question, had a perfect title to the land, and the plaintiffs and the defendants both claim under her. Richard L. Bray was in possession of the land described in the deeds of



Mrs. Bray after their date and after her death. On the 1st day of December, 1852, he conveyed the land now in controversy, it being a part of the land described in the deeds of Mrs. Bray, to one Wynn, under whom the defendants claim. The plaintiffs offered legal evidence to show that the intention of Lucy Bray, at the time of executing each of said deeds, was to convey only a life estate in the land to Richard L. Bray, with remainder to his children. The court rejected this evidence on the ground that it tended to vary and contradict the terms of the deeds, which, in the opinion of the court, were plain and unambiguous, and conveyed a fee-simple title to Richard L. Bray. Entertaining this view, a motion to nonsuit made by the defendants was sustained.

We think the court was right in rejecting the evidence above mentioned, but we differ with his honor in the construction placed by him on the deeds of Mrs. Bray. The case turns upon a proper construction of these instruments, and we think there is no real difficulty in arriving at the intention of the maker without the aid of extrinsic evidence. It cannot be denied that most of the phraseology used in both of these deeds is just such as a person skilled in conveyancing would rightly use to pass an estate in fee; and it is also quite certain that such phraseology, if it stood alone, would be wholly inconsistent with an intention to convey a less estate to the donee. It is also true that each deed contains language clearly indicating a contrary intention; and this intention, we think, manifestly was that the donee should take a life estate only, and that after his death his children should have the land as purchasers, and not as heirs at law taking by inheritance. If this was not the intention of Mrs. Bray, there could have been no rational object at all in mentioning the children, or providing for them to take at all. If no reference had been made to them in the deeds, there would undoubtedly have been an estate in fee in Richard L. Bray, to which his children would have succeeded as heirs at law, and it was totally unnecessary to mention them in the deeds in order to give them an estate by inheritance. It is evident that both deeds were drawn by an unskillful person, and, in view of all the language contained in them, it is not at all probable that the comprehensive words creating an estate in fee were used in their usual and technical sense. So interpreted, there would be a repugnancy. It is manifest, however, that there was no repugnancy in the donor's intention, and the mere repugnancy in the words is of no real consequence. Section 2697 of the Code declares: "If two clauses in a deed be utterly inconsistent, the former must prevail; but the intention of the parties, from the whole instrument, should, if possible, be ascertained and carried into effect." In *Max-*

*well v. Hopple*, 70 Ga. 161, Justice Hall said: "So hard does the law strive to carry out the lawful intention of parties to contracts that it will never resort to the doctrine of repugnant clauses in a deed, and declare the latter void, except in cases of absolute necessity." According to the principle laid down in the concurring opinion of Chief Justice Bleckley in *West v. Randle*, 79 Ga. 28, 3 S. E. 454, if a deed can be read and applied to its subject-matter without necessarily giving inconsistent or irreconcilable meanings to different portions of it, it ought to be done. On page 86, 79 Ga., and page 454, 3 S. E., the chief justice remarks: "With regard to ambiguities, the rule is, as I understand it, that an ambiguity is merely apparent unless it persists,—unless it holds out until you have exhausted the whole context, and resorted in vain to all the provisions of the instrument. If it persists, and you cannot resolve it by the terms of the instrument, then it is a real ambiguity, and you are at liberty to resort to extrinsic evidence." It follows from the doctrine here announced that a mere repugnancy in words will not authorize a court to hold that there is a real repugnancy in a deed, and consequently to annul the latter of two inconsistent clauses, when the actual intention of the maker, viewing the instrument as a whole, can be arrived at without serious difficulty. We feel quite sure we have ascertained and correctly stated the intention of Mrs. Bray in each and in both of the deeds above referred to; and, if we have done this, the conclusion is inevitable that the court erred in granting a nonsuit. The plaintiffs, under the evidence, made out a prima facie case, and were entitled to a verdict. We do not, of course, know what the defendants may be able to allege or prove as a defense against this action. We simply rule now that the plaintiffs have shown a sufficient title to put upon the defendants the burden of proving that they have a better one, or showing in some way that the plaintiffs are not entitled to recover. Judgment reversed.

(94 Ga. 143)

## SAVANNAH, T. &amp; I. OF H. RY. v. BEASLEY.

(Supreme Court of Georgia. July 16, 1894.)

INSTRUCTIONS—CLERICAL ERROR—MODIFICATION ON ORAL REQUEST—STREET RAILROADS—DUTIES AT CROSSINGS.

1. Where the court read to the jury a request to charge in the exact language in which it was written, and the counsel who had presented the request stated "that, if he had so requested in writing, it was a clerical error, and proceeded to state the alleged error in the charge," and "the court, not comprehending or being able to understand the explanation, requested counsel, if he desired his written request modified, to reduce the modification to writing for the purpose of understanding it," which was not done, the failure of the court to comply with the oral request to modify the written charge was not error.

2. In charging the jury upon negligence, the court should not enumerate acts or omissions which are wholly outside of any degree of diligence which the law requires. An electric railway company is under no duty to stop its cars before reaching the crossings of public highways for the purpose of looking and listening by the motormen, or to enable them to look and listen, when there is no apparent reason for so doing. Under the facts of the present case, however, the erroneous charge on this subject, giving the jury credit for ordinary intelligence, could not have prejudiced the company.

3. The evidence warranted the verdict, and there was no error in denying a new trial. (Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by J. Beasley against the Savannah, Thunderbolt & Isle of Hope Railway for personal injuries. Plaintiff had judgment, and defendant brings error. Affirmed.

Saussy & Saussy, for plaintiff in error. McAlpin & La Roche, for defendant in error.

SIMMONS, J. 1. Counsel for the defendant requested the court to charge as follows: "If both the plaintiff and defendant are at fault, damages are to be diminished in proportion to the fault attributable to the plaintiff." When the judge reached the subject of contributory negligence in his charge, he read this request to the jury as a part of his charge. Counsel for the defendant thereupon interrupted the judge, and stated that, if the request was written as read by the court, it was a clerical error, and that he desired the court to state the proviso in the law that no recovery could be had provided the plaintiff, in the exercise of ordinary care, could not have avoided the consequences of defendant's negligence. The judge, in his certificate to the motion for a new trial, states that, not comprehending or being able to understand the explanation, he requested counsel, if he (counsel) desired his written request modified, to reduce the modification to writing, so that it could be understood. Some volume of Georgia Reports was referred to, but no decision was read. The written modification of the request was never tendered, and the jury were permitted to retire. The failure of the judge to comply with the oral request to modify the written charge was not error. When the court requested counsel to reduce the modification to writing, so that it could be understood, counsel should have complied with the request. The court is not bound to give in charge a request not made in writing, and clearly is not bound to give in charge oral modifications of a written request, especially where he has asked counsel to reduce the modification to writing, and counsel has failed to do so. A request of this kind is sometimes calculated to confuse the judge, and it would not always be safe to change or modify the written charge upon such a request, as the judge might misunderstand counsel, or not fully comprehend the modification desired.

2, 3. A car upon the defendant's electric

railway line, while crossing a public highway between Savannah and the town of Warsaw or Thunderbolt, came in collision with the plaintiff, who was driving his wagon across the highway, and this action was brought to recover damages for the injury thereby sustained. The judge, in charging the jury, instructed them that: "The precise thing which every prudent man is bound to do before driving upon a railroad track is that which every prudent man would do under like circumstances. If a prudent man would stop and look and listen, so must every one else, or take the consequences, so far as the consequences may have been avoided by that reason or by that measure. In the same way, the precise thing which every motorman was bound to do before driving upon a crossing where vehicles are likely to be found crossing, if you believe this was such a crossing, is that which every prudent man would do under such circumstances. If a prudent man, under such circumstances, would stop his car, and would look and see and listen, or if he would go at a very low rate of speed, then the motorman would be bound to do whatever a prudent man would do under such circumstances, or else take the consequences so far as the consequences could have been avoided by that means." We think the latter part of this charge was erroneous, under the facts of this case. It puts a stricter rule of diligence upon street-railway companies than the law imposes. Such a company is under no duty to stop its cars before reaching a public crossing, for the purpose of looking and listening, when there is no apparent reason for so doing. These companies are chartered for the benefit of the public. The public require rapid transit, and, if a motorman driving one of these cars were compelled to stop and look and listen for the approach of every wagon or buggy likely to cross the railway line, the public would be greatly inconvenienced, and rapid transit would be rendered impracticable. The cars of this railway company had the superior right of way, and people who intend to cross its track should be careful to look and listen, in order to avoid a collision with them. It is the duty of the motorman also to look and listen when approaching a public crossing, in order to avoid a collision with persons crossing, and due diligence would probably require him to ring his bell, or give some signal of his approach to the crossing, to put persons about to cross upon notice of his approach; but we do not think the law requires him to stop the car for that purpose, unless he sees that a collision cannot be avoided unless he does stop. On this subject, see Booth, St. Ry. Law, § 304 et seq., and cases cited; 4 Am. & Eng. Enc. Law, "Crossings," p. 951, par. 44, and note. Under the facts of this case, however, giving the jury credit for ordinary intelligence, we do not think the erroneous charge on this subject could have prejudiced the defendant. The evidence fully warranted

the verdict, and we do not feel constrained to grant a new trial for this error alone. Judgment affirmed.

(94 Ga. 175)

### COURSON v. WALKER.

(Supreme Court of Georgia. July 23, 1894.)

PURCHASE-PRICE MORTGAGE—PRIORITY OF LIEN—EXECUTION AGAINST PERSONALTY.

1. The rule announced in *Rasin v. Swann*, 4 S. E. 882, 79 Ga. 703, to the effect that a mortgage to secure purchase money—the mortgage being executed simultaneously with the purchase—has priority over the lien of an existing judgment against the purchaser and mortgagor, applies as well where a part of the purchase money is paid, and the mortgage is to secure the balance, as where none of the purchase money is paid, and the mortgage is for the whole. Failure to record the mortgage—certainly, where the failure does not continue as much as 30 days after its execution—will not affect its lien, relatively to a prior judgment.

2. There is no law requiring the execution which issues upon the foreclosure of a mortgage on personalty to be entered on the general execution docket in order to preserve the lien of the mortgage.

(Syllabus by the Court.)

Error from superior court, Hancock county; J. J. Hunt, Judge.

Action between T. N. Courson and W. A. Walker. From the judgment rendered, Courson brings error. Affirmed.

R. H. Lewis, for plaintiff in error. Jordan & Burwell and Whitfield & Allen, for defendant in error.

SIMMONS, J. 1. This case is controlled by the decision in *Rasin v. Swann*, 79 Ga. 703, 4 S. E. 882, where it was held that a mortgage to secure purchase money—a mortgage being executed simultaneously with the purchase—has priority over the lien of an existing judgment against the purchaser and mortgagor. Counsel for the plaintiff in error sought to take this case out of the ruling in that case on the ground that in that case none of the purchase money was paid, while in the present case part of the purchase money was paid at the time of the sale. He contends that inasmuch as part of the purchase money was paid, the mortgagor got a complete title to the mule, and by reason of his having this title the property became subject to judgments against him older than the mortgage. We think the reasoning of the court in the decision above referred to applies as well where a part of the purchase money is paid as where none of it is paid. In that case the court said: "The presumption is that Swann, Stewart & Co. would not have sold Dukes the mule unless he had given this mortgage to secure the purchase money. \* \* \* For aught that appears in the record, Swann, Stewart & Co. credited him exclusively upon the faith of the property. They sold him the mule on the condition that it was to stand as a security for the purchase money." So

far as the failure to record the mortgage is concerned, we do not think such failure affects the lien of the mortgage relatively to a prior judgment; certainly, not where the failure to do so does not continue as much as 30 days after its execution.

2. There is no law requiring the execution which issues upon the foreclosure of a mortgage on personalty to be entered on the general execution docket in order to preserve the lien of the mortgage. The recording act of 1889 does not apply to such executions. Judgment affirmed.

(93 Ga. 806)

### GEORGIA RAILROAD & BANKING CO. v. KEENER.

(Supreme Court of Georgia. July 16, 1894.)

CARRIERS OF GOODS—LIMITING LIABILITY.

1. Where household goods were shipped by rail under a special contract in writing, expressed in the bill of lading, whereby, in consideration of a reduced rate of freight, the liability of the railroad company, in case of loss, was limited to an arbitrary valuation of \$5 per 100 pounds, and a portion of the goods were stolen after arrival at destination, but before the carrier's responsibility as such was terminated, there being no evidence showing how or under what circumstances the theft occurred, presumptively the loss was occasioned by the company's negligence, and, this being so, it was liable for the full value of the goods so lost. The contract would exempt from the insurance liability imposed by law as to loss not occasioned by negligence.

2. The contract of shipment was not one limiting value by express agreement, but one in which there was no attempt to estimate value.

(Syllabus by the Court.)

Error from superior court, Richmond county; H. C. Roney, Judge.

Action by William E. Keener, administrator, against the Georgia Railroad & Banking Company. Plaintiff had judgment, and defendant brings error. Affirmed.

Jos. B. Cumming and Bryan Cumming, for plaintiff in error. Hamilton Phinizy, for defendant in error.

SIMMONS, J. Prather shipped over the defendant's railroad a quantity of household goods and a trunk containing wearing apparel. The goods reached their destination, and while the car in which they were shipped was standing on a side track, waiting for the plaintiff to call for his property, the trunk was lost. The plaintiff sued the railroad company for the value of the property lost, which he alleged to be \$55, and obtained a verdict for that amount. It appeared from the evidence at the trial that this was the actual value of the trunk and its contents; but the defendant claimed that under the contract of shipment it could not be held liable for more than \$5 for each 100 pounds lost. The court charged the jury that, if the defendant was liable, they might look to the value of the goods that were lost as the amount which the plaintiff would be entitled

to recover; and to this charge the defendant excepted.

It appears that at the time the goods were shipped the plaintiff went to the agent of the defendant and asked for rates, telling him that he wanted to ship wearing apparel and household furniture, and the agent replied that the lowest rate he could make was 37 cents per 100 pounds, which was a released rate; that is, \$5 per 100 pounds valuation." The plaintiff thereupon told the agent that he would ship that way, and took a shipping receipt on which were the words, "Released, \$5 valuation," followed by the plaintiff's name. It was contended that this released the defendant from liability for more than the valuation stated. Where a shipper enters into an express contract with a common carrier by which he agrees, in consideration of a reduced rate of freight, that the carrier shall not be liable for more than a stated sum in case the goods shipped are lost while in the carrier's possession, the contract will be upheld as to loss not involving negligence on the part of the carrier; but carriers cannot by any special contract exempt themselves from liability for loss occasioned by their negligence; and this is so as well where the contract provides for partial or limited exemption as where it contemplates total exemption from liability. The shipper, it is true, may, by his representations or agreement as to the value of the goods, estop himself from recovering their full value, notwithstanding they are lost through the carrier's negligence. This would be the case if, upon being required at the time of shipment to state the value of the goods, the shipper misled the carrier by stating a sum less than their value (Code, § 2080), or if the shipper and the carrier agreed upon a certain sum as the actual value of the goods, and the charge for freight was based upon that valuation. See, on this subject, *Hutch. Carr.* (2d Ed.) § 250, and cases cited; *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151; *Railway Co. v. Chapman* (Ill. Sup.) 23 Am. St. Rep. 587, and notes, 24 N. E. 417; *Alair v. Railroad Co.* (Minn.) 54 N. W. 1072; also, collection of cases in *Railroad Co. v. Wellner*, 29 Am. Law Reg. (1890) p. 771 (Pa. Sup.) 19 Atl. 702. But the principle which relieves the carrier from liability for more than the agreed value does not apply where the valuation is merely arbitrary, and fixed without reference to the real value of the goods, and this is understood by the carrier as well as the shipper. In the present case there was no inquiry on the part of the carrier as to the value of the goods, and it is clear that a valuation of \$5 per 100 pounds for wearing apparel and household goods indiscriminately could not have been understood to represent their actual value. The contract in question was simply an attempt to limit the liability of the carrier, without regard to the actual value of the property; and it follows

from what we have said that it was inoperative for that purpose if the loss was occasioned by negligence on the part of the defendant. There being no explanation as to how the loss occurred, the presumption is that it resulted from the defendant's negligence. A verdict in favor of the plaintiff for the actual value proven was therefore proper, and the court did not err in denying a new trial.

Counsel for the plaintiff in error relied upon the case of *Railroad Co. v. Reid*, 91 Ga. 377, 17 S. E. 984, in which this court treated as valid a stipulation, in a contract for the shipment of live stock, which provided that in case of damage the amount claimed for a mule should not exceed \$125. In that case, however, the question here ruled upon was not made, nor was it decided that such a stipulation would be good in a case in which the negligence of the carrier caused or contributed to the damage. The sole ground of attack upon the stipulation in that case was that no consideration existed for it, the plaintiff contending that the rate of freight charged and collected was not a reduced rate. Besides, such a contract, as we have said, would be valid as to loss not involving negligence on the part of the carrier, and the evidence in that case tended to show that the damage resulted from a cause which did not involve such negligence. See opinion in *Railway Co. v. Sloat* (this term) 20 S. E. 221. In the case last cited, the precise question now decided was not made; but it is presented in the case at bar, and our judgment as to what the true law is has been stated. Judgment affirmed.

BLECKLEY, C. J., disqualified and not presiding.

(94 Ga. 124)

GEORGIA RAILROAD & BANKING CO.  
v. WOOD et al.

(Supreme Court of Georgia. July 16, 1894.)

LIABILITIES OF MASTER FOR WRONGFUL ACT OF SERVANT.

The evidence being silent as to the specific duty of the servant of the railway company, but indicating that he was acting in the capacity of brakeman, and this servant, while the train was in motion, and he was upon it, having thrown a stone at a boy who had just attempted to swing to or climb upon the train, and who with others had previously been in the habit of committing or attempting similar trespasses; the stone being thrown after the boy had ceased attempting to trespass upon the train on the given occasion, and had retreated to private premises adjacent to the street, and while he was there endeavoring to conceal himself behind a post; and the stone by accident having missed the boy, and hit and injured another person, who was then on the same premises,—no presumption arises that at the time of throwing the stone the servant was acting in behalf of the company, or within the scope of his employment, as to anything then done or attempted to be done with a view to injure or affect the boy; consequently, the company is not liable for the injury thus done to the third person.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. Clark, Judge.

Separate actions by Anna Wood and her father against the Georgia Railroad & Banking Company. The two actions were consolidated and tried together, at which plaintiffs recovered a verdict. Defendant brings error. Reversed.

Jos. B. Cumming, Bryan Cumming, and M. A. Candler, for plaintiff in error. Burton Smith and J. T. Pendleton, for defendants in error.

**SIMMONS, J.** Anna Wood, a girl 12 years of age, was struck and injured by a stone thrown from a train of cars by an employé of the railroad company, and her father, as next friend, sued the company in her behalf for damages, and sued in his own behalf for the loss of her services. The cases were consolidated and tried together, and a verdict was rendered in each case in favor of the plaintiff. The railroad company made a motion for a new trial, which was overruled, and it excepted.

It appeared from the evidence that on the day of the injury, as the defendant's train was leaving Stone Mountain, a station on its line of road, a man standing on the top of one of the cars threw a stone at a boy who, with other boys, had just attempted to swing to or climb upon the train, and had previously been in the habit of committing or attempting similar trespasses, but who had then run off from the train into a private yard, and was endeavoring to conceal himself behind a post. The stone missed the boy, and struck the plaintiff's daughter, who was standing on the porch of his house. There was evidence tending to show that the man who threw the stone had been seen to throw stones from the train at these boys on previous occasions, and that he was acting in the capacity of a brakeman. We think the court erred in not granting a new trial. The evidence is silent as to the specific duties of a brakeman, and does not show what authority this employé had from the railroad company to keep trespassers off the train; but, assuming that this came within the scope of his duties, no presumption arises that he was acting within the scope of his employment in throwing a stone at this boy, with a view to injuring him, after he had desisted from the trespass and gone off from the train. A master is not liable for the acts of his servant when such acts are not done within the scope of the employment in which the servant is engaged. If the brakeman, while these boys were engaged in the trespass, had, in attempting to prevent the trespass or cause them to desist, injured one of them through negligence or carelessness, or by using more force than was necessary for the purpose, the company would perhaps be liable. See *Wood, Mast. & Serv.* p. 537; *Rounds v. Railway Co.*, 64 N. Y. 129. But, after the boy had desisted, the

company would not be responsible for an injury inflicted on him by the brakeman in attempting to punish him for the trespass. See *Golden v. Newland*, 52 Iowa, 59, 2 N. W. 609; *Allen v. Railway Co.*, L. R. 6 Q. B. 65. Judgment reversed.

(94 Ga. 135)

# CITY COUNCIL OF AUGUSTA v. HUDSON.

(Supreme Court of Georgia. July 16, 1894.)

**MUNICIPAL CORPORATIONS — DEFECTIVE BRIDGE BETWEEN STATES—ACTION FOR INJURIES—PROXIMATE CAUSE—NEW TRIAL.**

1. If there was any error in admitting in evidence the map of Hamburg, S. C., it was not cause for a new trial.

2. According to the decision in this case when before this court the first time (88 Ga. 599, 15 S. E. 678), it was not incumbent on the plaintiff, in order to establish liability on the part of the defendant, to prove "that, under the statutes of South Carolina, the city is liable civilly for a failure to keep the bridge in repair."

3. The approaches to a toll bridge and its abutments, as well as the bridge proper, must be kept in repair by the owner, the whole having been erected by him, and, so far as appears, no duty resting upon the public to maintain the approaches or abutments as a part of the highway. The defect complained of having existed for a considerable period of time, no question could properly arise as to the duty of the owner to take notice of it.

4. An allegation that railing was absent from the abutment of the bridge may be supported by proof that it was absent from the approach to the bridge.

5. Where a mule, which was being driven to a wagon over a toll bridge owned and kept by a city, became frightened by a train on a railroad near by, ran away, and, because of the absence of a guard rail from the approach to or abutment of the bridge, was precipitated from the structure down a high embankment, the absence of the guard rail was a sufficiently proximate cause of the catastrophe to render the city liable for injuries to person and property thereby occasioned, if such absence was due to the city's negligence.

6. The judge of the superior court has no legal power to receive or hear affidavits of jurors to impeach their verdict.

7. There was nothing in the charges or refusals to charge in relation to the credibility of witnesses, or to the measure of damages, which requires a new trial. There was no error in refusing to grant a nonsuit. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Richmond county; H. C. Roney, Judge.

Action by John W. Hudson against the city council of Augusta. Plaintiff had judgment, and defendant brings error. Affirmed.

John S. Davidson and W. T. Davidson, for plaintiff in error. Boykin Wright and H. Phinlzy, for defendant in error.

**LUMPKIN, J.** The first trial of this case resulted in a verdict for the defendant. The court below granted a new trial, and its judgment was affirmed. 88 Ga. 599, 15 S. E. 678. At the second trial there was a verdict for the plaintiff. The defendant's motion for a new trial, containing 24

grounds, was overruled, and it excepted, and brought the case here for review. It is unnecessary to deal with the grounds of the motion *seriatim*. In quite a number of them no new or important legal question is presented, and, in disposing of the others, they may be treated in groups.

1. Complaint was made that the court erred in admitting in evidence a map of the town of Hamburg, S. C., the ground of objection being that the map had not been properly authenticated or proved as required by law. Whether the map ought to have been received or not, certainly admitting it was no cause for a new trial. Indeed, if the town of Hamburg itself had been put in evidence before the jury (provided such a thing were possible) it would hardly have had an appreciable effect upon the deliberations of the jury. Seriously, there is no profit whatever in bringing to this court so trivial a question as that now presented.

2. When this case was here before, we decided that the city council of Augusta, as the owner and keeper of a toll bridge over the Savannah river, was liable for negligence in failing to keep the abutment resting upon the South Carolina shore in safe condition for use by customers, and that this liability existed even though it might be the law of South Carolina that a municipal corporation of that state would not be liable for like negligence touching a similar bridge owned by it. We thought this portion of the law of the case was thus definitely settled. We were quite serious in laying down what we understood to be the law applicable, and we now adhere to our former conclusion. Consequently, we say, emphatically, the court did not err in refusing to charge that the defendant was not liable unless the plaintiff proved that, "under the statutes of South Carolina, the city is liable civilly for a failure to keep the bridge in repair."

3. The evidence shows that the entire bridge structure, including the approaches and abutment on the South Carolina side, had been erected by the city council of Augusta, and there is not in the record the faintest suggestion that any duty rested upon the public to maintain either the approaches or the abutments as a part of the highway. The city council of Augusta being liable as any other proprietor of a toll bridge over which the public are invited to cross, they paying for the privilege, while not an insurer of the persons or property of its customers, was bound, at least, to ordinary care respecting the safety of its bridge. 1 *Thomp. Neg.* p. 317, § 11. The duty of keeping the bridge in repair included the duty of repairing its approaches and abutments, and carried with it a corresponding liability for damages for nonrepair, and also liability for injuries happening in consequence of the bridge being without suitable railings, or having railings defective or out

of repair. *Id.* pp. 563-564, §§ 8, 9, and cases cited. See, also, 2 *Thomp. Neg.* 770, and cases there cited. The defect complained of in this particular case having existed for some time, no question could properly arise as to the duty of the city council to take notice of it, and have it repaired. Certainly, there was ample time for the municipal authorities to have discovered that the railing was missing, and to have had it replaced before the time when the plaintiff was injured.

4. The approaches and abutments of the bridge all constituting, as above stated, parts of one and the same structure, an allegation that railing was absent from the abutment was supported by evidence showing that it was absent from the approach to the bridge. The question now under consideration, with reference to the facts of the case before us, is by no means the same as that presented in *Railway Co. v. Daniels*, 90 Ga. 608, 17 S. E. 647. There, having reference to the rules of the company, and the statute requiring trains to slow down to a certain speed before running on or crossing any drawbridge, it was held that the restriction as to speed applied to the bridge proper, and not to a long trestle constituting an approach thereto; the obvious purpose of the rules and of the statute being to prevent the precipitation of trains into the river when the "draw" of the bridge was turned around for the passage of boats.

5. Under the facts summarized in the fifth headnote, we think the absence of the guard rail was a sufficiently proximate cause of the catastrophe to render the city liable to the plaintiff for injuries to his person and property. If all animals driven to vehicles were perfectly safe and gentle under all circumstances, guard rails upon bridges might, so far as the use of such animals is concerned, be dispensed with; but we apprehend that guard rails are designed mainly to prevent just such calamities as that which happened in the present case, because of a horse or mule being frightened, or becoming unruly or refractory for any reason. Doubtless, the plaintiff's mule was frightened by the passing train on the railroad near by; but, notwithstanding this fright, the plaintiff, in all probability, would have been enabled to leave the bridge in safety if a strong and sufficient guard rail had been in its proper place to prevent the animal from running off the abutment. The recent case of *Brown v. Laurens Co.*, 38 S. C. 282, 17 S. E. 21, is not in harmony with the views entertained by this court. See *Railroad Co. v. Mayo*, 92 Ga. 223, 17 S. E. 1000, which holds exactly to the contrary of the South Carolina court, as to negligence in failing to provide a bridge railing. The case of *City of Atlanta v. Wilson*, 59 Ga. 544, is also somewhat in point as to the principle involved, and there are other Georgia cases to the same effect. We have no

hesitation in following the doctrine announced in our cases as the true law of the question at issue.

6. One of the grounds of the motion for a new trial relates to improper conduct on the part of some of the jurors in acting upon information not derived from the evidence. This ground was supported by no proof except the affidavit of one of the jurors. This court has so often and distinctly ruled that the affidavit of a juror will not be received to impeach his verdict, it is unnecessary at this time to say anything more on the subject, except to remark most emphatically that a judge of the superior court has no legal power to receive or consider such an affidavit for such a purpose.

7. Complaint was made in numerous grounds as to certain charges, and refusals to charge, in relation to the credibility of witnesses, and as to the measure of damages. We find no error in any of these grounds for which a new trial should be granted, and nothing requiring elaboration at our hands. The refusal of a nonsuit was proper. The amount of the verdict was reasonable, and the evidence warranted a finding in the plaintiff's favor. On the whole, we are quite content to allow the judgment of the court below to stand. Judgment affirmed.

(94 Ga. 171)

#### SANDERLIN v. WILLIS.

(Supreme Court of Georgia. July 23, 1894.)

VENDOR AND PURCHASER — ACTION FOR BALANCE  
— RECOUPMENT — TRESPASS — DAMAGES.

1. The obligee in a bond for titles, who has paid a part of the purchase money for the lands to which the bond relates, may, when sued by the maker of the bond upon a note given for the balance, recoup his damages resulting from a breach of the bond, notwithstanding he retains possession of the land, he having at the maturity of the note offered to pay the same, and demanded compliance with the terms of the bond, and by his plea offering to surrender possession and to account for rents during the time of his occupation of the premises.

2. If the obligor in a bond for titles, after delivering the land to the obligee, enters upon the same, and wrongfully appropriates wood or timber which formed a part of the consideration of a note given for the purchase money of the premises, the obligee, when sued upon the note, may waive the tort, and set off in the action the value of the wood or timber so taken and appropriated.

3. Profits which the obligee in a bond for titles would have made on a contract which he, at the time the bond was executed, had agreed upon for a sale of the premises to a third person, are not recoverable in an action upon the bond or in a plea of recoupment, unless the obligor had notice of such contract at the time of executing the bond, or certainly not unless notice came to him before he made any breach of its condition.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by W. J. Willis against John F. Sanderlin. Plaintiff had judgment, and defendant brings error. Reversed.

Steed & Wimberly, for plaintiff in error.  
Nottingham & Brunson, for defendant in error.

LUMPKIN, J. 1. This was an action brought by Willis against Sanderlin in the city court of Macon upon a promissory note for \$600. The defendant filed a plea of the general issue, and a plea of partial payment, the amount of which was allowed, and a verdict rendered in favor of the plaintiff for the balance. In addition to the defenses above mentioned, the defendant, among other things, also pleaded, in substance, as follows: The note sued upon was given in part payment of the purchase price of a tract of land, described in a bond for titles given by the plaintiff to the defendant contemporaneously with the execution and delivery of the note, these papers evidencing the contract then entered into between the parties. By this bond the plaintiff bound himself to make, or cause to be made, to the defendant, good and sufficient titles to the land when the note should be paid, and the note was given in consideration of this obligation on the part of the plaintiff. Defendant offered to pay the money when the note fell due, and was ready, and has since been ready, to make payment whenever the plaintiff will make or furnish him good and sufficient titles to the land, agreeably to the terms of the bond. At the maturity of the note the defendant called upon the plaintiff to make or furnish "said title," and the plaintiff, in violation of his contract, wholly refused, and has hitherto wholly failed, to make "said title." Defendant has paid to the plaintiff the sum of \$558.06 upon the contract, the whole of which is lost to him, except the rental of the land, of the value of \$150. This plea further alleged that the defendant had hitherto continually offered to return the land to the plaintiff, and pay him full value for the use thereof; and contained an offer to surrender possession and account for the rents received by defendant during the time of his occupation of the premises; and prayed judgment, by way of recoupment, for the amount he had paid, less the rental. On general demurrer, this plea was stricken, and the defendant excepted. We think the court erred in striking this plea. We recognize the rule that the purchaser of land who enters into possession under a warranty deed or a bond for titles cannot, before eviction, defeat an action for the purchase money, unless there has been fraud on the part of the vendor, or the latter is insolvent, or there is some other ground which would in equity entitle the purchaser to relief. This rule seems to be well settled by the cases of *McGehee v. Jones*, 10 Ga. 127; *Watson v. Kemp*, 41 Ga. 586; *McCauley v. Moses*, 43 Ga. 577; *Smith v. Hudson*, 45 Ga. 208; *Booth v. Saffold*, 46 Ga. 278; and numerous other decisions of this court. According to these cases, if the purchaser is in possession under a deed with

covenant of warranty, he must resort to his covenant; if under a bond for titles, he must resort to the bond. The case before us, however, differs from all of those above cited. While it is impossible to know with certainty whether the defendant meant to allege that the plaintiff would not make him any title at all, or to allege only that the plaintiff refused to make the "good and sufficient title" stipulated for in the bond, he does distinctly allege that there was a breach of the bond, and that he thereby sustained damage. In none of the cases above cited did the party seeking to avoid payment of his purchase-money note make such allegations as these. In all of those cases the purchaser actually obtained what he had bargained for, and it was simply held that he must stand upon his contract as made. In the present case the plea alleges that the plaintiff contracted by his bond to make the defendant titles, refused to comply with the bond, and thus broke the contract. It is true the plea does not set out in full the terms of the bond, or make distinct and definite allegations with reference to the breach, but it was sufficiently full and comprehensive to withstand a mere motion, in the nature of a general demurrer, to strike the same. If the defendant had paid the purchase money in full, and had then brought an action upon the bond, containing substantially the same allegations as those now relied upon in his plea, his declaration would have been good as against a general demurrer, and he would have been entitled to go before the jury and prove the alleged breach of the bond, and show how and to what extent he was thereby damaged. This being so, it is his right in the present action to recoup his damages as a defense to the plaintiff's suit. Whether or not the city court of Macon has jurisdiction to administer equitable relief, there can be no question of its power to afford the defendant the relief set up by this plea, if he succeeds in establishing it by satisfactory evidence.

2. Another plea of the defendant which was stricken by the court alleged, in substance, that, after selling him the land, Willis wrongfully and secretly, and without the knowledge or consent of the defendant, entered upon the land and removed therefrom about 20 cords of wood, of the value of \$80, to the injury and damage of the defendant in that sum, and that this was done in plain and direct violation of the contract between the parties. If these allegations are true, Willis tortiously took and carried away from the land wood which, under the contract, belonged to the defendant. It would have been the right of Sanderlin to waive the tort and bring an action against Willis for the value of the wood, and we therefore see no reason why he may not, when sued upon the note, likewise waive the tort and set off against the plaintiff's demand the value of the wood which the latter had

taken and appropriated. So we think this plea ought to have been allowed to stand.

3. Another plea which the court struck was that the defendant purchased the land for the purpose of selling the same to one Smith, who was willing to buy the same from defendant at the price of \$1,300, and that, by reason of the failure of Willis to make the defendant a title to the land, he lost the sale of it to Smith, and was thereby injured and damaged. This plea, we think, was properly stricken. It failed to allege that Willis, either at the time of executing the bond for titles or at any time before he had made a breach of its conditions, had any notice or knowledge of any contract or negotiations between Sanderlin and Smith with reference to the sale of the land. It would hardly be just or lawful to hold Willis liable for prospective profits which Sanderlin might or would have made by selling the land to another, when Willis neither contracted nor broke his contract with reference to any such matter. Judgment reversed.

(94 Ga. 173)

#### BROWN v. FARMER.

(Supreme Court of Georgia. July 23, 1894.)

SALE OF LAND—PURCHASE-MONEY NOTE—REMEDY ON DEFAULT—SUIT AGAINST LAND—NOTES NOT DUE—PROVISION TO SECURE PAYMENT—DECREE FOR SALE.

1. Several promissory notes maturing at different times having been given for the purchase money of land, the vendor retaining title and giving a bond for titles to the vendee, after the maturity of some of the notes an equitable action in the superior court may be maintained upon all of them, irrespective of the question of solvency or insolvency of the maker, with a view to obtaining a decree for the sale of the land and for holding up the surplus proceeds, above the amount necessary to discharge the matured notes, to be applied to the others as they become due. Where one of the notes had matured, and judgment had been obtained on it in a justice's court before the equitable action was brought, the amount of that judgment may be embraced in the decree, but the plaintiff should be charged with the costs which accrued in the justice's court, inasmuch as the proceeding in that court was superfluous. In view of the election which the plaintiff finally made to resort to equity.

2. In such case, where the facts are fully stated in the petition, and the defendant meets it at the trial term with a general demurrer, not having previously filed any plea or answer, the court may render a final decree in passing judgment upon the demurrer, inasmuch as the demurrer admits the facts as alleged. And it is no cause for not signing the decree that at the last moment the defendant offers to plead, and does plead, that he is not insolvent, and that the whole debt is not due, the former fact being immaterial, and the latter being apparent upon the face of the petition, and constituting the ground on which the equitable remedy was invoked. But, in molding the decree, provision should be made for postponing a sale of the premises in case the defendant shall, at any time before the sale, pay off the amount then due, together with the costs with which he is chargeable up to that time. And provision should also be made for stopping the accrual of interest after the sale, in case the defendant shall consent to the immediate application of the proceeds of the sale to the principal and interest then ac-



crued upon the unmatured notes, all of them bearing interest from date.

(Syllabus by the Court.)

Error from superior court, Taliaferro county; H. McWhorter, Judge.

Action by Sallie Farmer, executrix, against M. R. Brown. Judgment for plaintiff, and defendant brings error. Modified.

J. W. Hixon, for plaintiff in error. M. Z. Andrews and Jas. F. Reid, for defendant in error.

**LUMPKIN, J.** 1. The vendor of land who retains the title, giving the purchaser a bond for titles, and taking his promissory notes for the purchase money, maturing at different times in the future, is entitled to enforce against the land itself the collection of the purchase-money notes, irrespective of the solvency or insolvency of the maker. *Hawkins v. Dearing*, 93 Ga. 108, 19 S. E. 717. Where one only of the notes has matured and been reduced to judgment, the vendor could file in the clerk's office a deed conveying the land to the vendee, and then proceed to sell the land under the judgment. Out of the proceeds of the sale, the judgment would first be satisfied; and, as to the surplus, the claim of the vendor for the balance of his unpaid purchase money would undoubtedly be superior to the claims of all other creditors of the vendee. Code, §§ 3586, 3654. As to any of the remaining purchase-money notes which had not matured at the time of the sale, the remedy of the vendor by such sale would not be entirely adequate for his protection. Consequently, he would need the aid of a court of competent jurisdiction in order to have the surplus impounded and applied to the satisfaction of such of the remaining notes as had already matured, and to the others as they became due. A vendor in the position indicated has no right to collect his money upon any of the notes before their maturity, but he may maintain an equitable action in the superior court for the purpose of obtaining a decree for the sale of the land and for holding up the surplus proceeds, above the amount necessary to discharge the matured notes, in order that the same may be applied to the others as they mature. We see no reason why the amount of the judgment already rendered may not be embraced in the decree rendered in the plaintiff's favor; but when he thus elects to resort to equity in order to secure full protection in all his rights the proceeding by which he obtained the judgment on the single note ought to be treated as superfluous, and for that reason the plaintiff should be charged with the costs of that proceeding. This will simply require him to do full equity, a duty incumbent upon every one seeking equitable relief.

2. When a party files an equitable petition of the kind indicated in the preceding note, and the defendant, at the appearance term, files no plea or answer, but at the trial term meets the plaintiffs' petition with a general

demurrer which is without merit, the court, in passing upon the demurrer, may render a final decree in the plaintiff's favor. The demurrer being overruled, and the defendant presenting no other defense to the action, the facts charged in the equitable petition may be taken as confessed, the general demurrer having admitted these facts as alleged, and the defendant presenting no denial in any form as to the truth of them. When, under such circumstances, the court has announced that a decree will be rendered in the plaintiff's favor, stating its terms, and the judge is about to sign the decree, no cause for declining to do so arises from the fact that the defendant then offers to plead, and does plead, that he is not insolvent, and that the whole debt is not due. As already seen, the question of his solvency is immaterial; and the fact that some of the notes have not yet become due being apparent upon the face of the petition, and constituting the very ground on which the equitable remedy was based, this certainly would present no reason for not signing the decree. The court in this case rendered an absolute decree in favor of the plaintiff for the full amount of the balance due him upon the purchase-money notes, with interest, without regard to the fact that some of the notes were not due. We think that in molding the decree it should have been provided that if, at any time before a sale of the land, the defendant would pay off the amount of the debt then due, together with all costs chargeable to him up to that time, the sale might be postponed; and inasmuch as the defendant, after a sale, would be deprived of the use of the land, and at the same time interest would be accruing on the unpaid notes, all of which bear interest from their date, the decree ought further to have provided that, in case the defendant should consent to the immediate application of the proceeds of the sale to the payment of the principal and interest then accrued upon the plaintiff's debt, whether all of the same had matured or not, this might be done, and thus stop the further accrual of interest upon the plaintiff's debt, if thus paid in full; and, if not paid in full, then upon so much of it as would be satisfied out of the proceeds of the sale. Accordingly, in the judgment we have rendered in this case, we have given appropriate direction for the modification of the decree which the court rendered. Judgment affirmed, with direction.

(94 Ga. 183)

#### SEYMORE v. RICE.

(Supreme Court of Georgia. July 23, 1894.)

ELECTION OF REMEDIES—FRAUD AND BREACH OF WARRANTY—SALE OF LAND—MISREPRESENTATIONS AS TO QUANTITY.

1. Where the plaintiff founds his action both upon fraud and breach of warranty touching the quantity of land which he bought from the defendant and paid for, it is proper to require him to elect so as to confine him to a recovery either

for the deceit or the breach of warranty; and, when he has elected to treat the action as one *ex delicto*, it is not error to order all superfluous allegations in the declaration touching warranty and breach thereof to be stricken.

2. The description of the land as to quantity set out in the deed from the defendant to the plaintiff being that it contained 170 acres, more or less, evidence that by actual subsequent survey the tract was found to contain only 119 acres, together with evidence that the defendant, in the oral contract of sale, or in the negotiations which resulted in that contract, represented it to contain 170 acres, and that the plaintiff in consequence of the representation believed it did contain that quantity, and had no knowledge to the contrary until after he paid the whole of the purchase money, was sufficient to carry the case to the jury, and the court erred in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Hart county; H. McWhorter, Judge.

Action by J. J. Seymore against Robert Rice. Judgment for defendant, and plaintiff brings error. Reversed.

P. P. Proffitt and A. G. McCurry, for plaintiff in error. W. S. Hodges and L. C. Van Duzer, for defendant in error.

**LUMPKIN, J.** It appears from the record that Seymore bought a tract of land from Rice, paid for it, and took from Rice a warranty deed. Afterwards, Seymore brought an action against Rice to recover a portion of the price paid for the land, because of an alleged deficiency in the quantity of it. The first trial of the case resulted in a verdict for the plaintiff; the trial judge granted a new trial, and his judgment was affirmed by this court. 89 Ga. 372, 15 S. E. 478.

1. As originally filed, the declaration was based both on the alleged fraud and deceit of Rice in making representations to Seymore as to the quantity of the land, and also upon the breach of warranty expressed in the deed. At the last trial the court required the plaintiff to elect between these two remedies, so as to confine him to a recovery either for the deceit or the breach of warranty. Under this ruling, the plaintiff elected to treat the action as one *ex delicto*, and to proceed for the fraud and deceit. Thereupon the court ordered all the allegations in the declaration touching the warranty and a breach thereof to be stricken as superfluous. The bill of exceptions assigns error both upon requiring the plaintiff to make the election and upon striking from the declaration the allegations mentioned. The court was right in both rulings. A plaintiff may join in the same action all claims against the defendant arising *ex contractu*, and all claims arising *ex delicto* may in like manner be joined; but he cannot join in the same action two distinct claims, one sounding in contract for the breach thereof, and the other in tort. Code, § 3261. It often happens that a party may sue either for a tort or for the breach of a contract, but in such cases he must elect on which he will proceed. *Id.* § 3063. It is therefore plain that the court was right in requiring the plaintiff

to make his election; and this being so, it follows beyond doubt that the declaration ought to have been cleared of all unnecessary and irrelevant allegations.

2. The deed from Rice to Seymore described the land as containing 170 acres, more or less. The evidence clearly showed that, by actual survey made subsequently to the execution of the deed, the tract really contained only 119 acres, showing a deficiency of 51 acres, which amounted to exactly 30 per cent. of the quantity specified in the deed. There was other evidence tending to show that in the oral contract of sale, or in the negotiations which led up thereto, Rice positively represented the land to contain 170 acres; that the plaintiff believed this representation, and on the faith of it paid the whole of the purchase money, some time before discovering that the deficiency existed. Taken all together, there was enough evidence to carry the case to the jury, and the court should not have granted a nonsuit. The deficiency of 51 acres in a tract of this size was quite considerable, and it was the province of the jury, and not of the court, to say whether or not Rice was guilty of actual and willful deceit in making the sale. Judgment reversed.

(94 Ga. 186)

#### RIVES et al. v. LAMAR.

(Supreme Court of Georgia. July 23, 1894.)

PARTITION PROCEEDING—SUFFICIENCY OF PLEADING—HOW TESTED—ISSUE AS TO GIFT TO DEFENDANT—EVIDENCE—WILL OF PLAINTIFF'S TESTATOR—DISCLAIMER OF TITLE—ESTOPPEL.

1. Where the caveator or respondent in a proceeding for partition introduces an affirmative pleading praying for equitable relief as against the petitioners for partition, and touching the premises described in the original petition, no question as to the regularity or sufficiency of the new pleading can be raised by motion for a new trial. Such questions are properly made by objection, demurrer, or motion before trial, and rulings of the court thereon should come to this court by direct exception to the same, and not by exception to the refusal of a new trial.

2. Though the application by the executors for partition was founded on the will of the testator, and was made to execute one of the provisions of the will, yet, as there was no controversy touching the right of the executors to have partition if their testator had title to the land in question at the time of his death, and as the whole dispute at the trial was upon the question of an alleged previous gift by him to his son, and the extent of that gift, there was no error in excluding the will from the jury when offered in evidence by the executors.

3. The official appraisal of the testator's estate is not admissible to illustrate the question as to whether he had, many years before his death, made a parol gift of land to one of his children.

4. Upon a trial involving the question of a parol gift of land, evidence of declarations of the donor tending to show a motive for the gift are admissible in evidence for the donee, although they would be inadmissible if offered for the purpose of ingrafting a trust upon a deed previously made by which the premises were conveyed to the donor.

5. Mere declarations by a donee adverse to his title, the same not having been acted upon to the injury of the donor, will not estop the for-

mer from proving and insisting upon the gift, if any was made.

6. There being evidence tending to show a disclaimer by the son after the expiration of seven years from the commencement of his possession, and this evidence of disclaimer being confined to a part of the premises only, and having relation more to the true boundary of the parcel embraced by the alleged gift than to the making of the gift itself, the evidence was available for the purpose of identifying the land given, and distinguishing it from the land not given, and for this purpose might be as effectual as if the alleged disclaimer had been made before the seven years expired; hence, whether the doctrine of the instruction be correct or not in the abstract, it was, under the facts of the actual case, error to charge the jury that if the son held exclusively for seven years in the lifetime of the father, without payment of rent, the jury should find for the son's administrator, unless the evidence shows further that within that seven years the son disclaimed title, or acknowledged a dominion claimed by his father.

7. In order to enforce specifically a parol gift of land upon the ground that the donee has made valuable improvements on the faith of the gift, the allegata and the probata must correspond. Consequently, where the gift alleged was of a definite part of a tract of land, proof that the whole tract was given will not warrant a decree for specific performance.

(Syllabus by the Court.)

Error from superior court, Hancock county; J. J. Hunt, Judge.

Petition by George S. Rives and others, executors, against D. L. Rives. Defendant having died, T. B. Lamar, his administrator, was made defendant. Judgment for defendant, and plaintiffs bring error. Reversed.

J. T. Jordan, T. M. Hunt, and Hines & Felder, for plaintiffs in error. Reese & Little, for defendant in error.

SIMMONS, J. The executors of George S. Rives filed their petition for partition against D. L. Rives, in which they alleged that by his last will, duly probated, George S. Rives left a half interest in a tract of land in Hancock county, known as the "Evans Tract," and containing 1,700 acres, to D. L. Rives; that they had assented to the legacy, and the other half interest still remained in them; that they had given notice to D. L. Rives, and prayed the appointment of partitioners to make partition of said land. D. L. Rives filed his answer, and alleged therein that the matters set forth in the petition were untrue; that partitioners should not be appointed, because when George S. Rives, his father, died, there was no common ownership of the land between him and the defendant, nor was there such ownership between them at any time prior or subsequent to the death of George S.; that the defendant was the absolute and exclusive owner of the land, and held and occupied it adversely to said George S. and all other persons; that in 1866 he went into possession of the whole of said land, under a parol gift from his father, and held possession and kept it for more than seven years next before the death of George S.; that he had been in possession from that time until the present, during which posses-

sion he had made valuable improvements, etc. Pending the suit D. L. Rives died, and Lamar was appointed his administrator and made a party. By amendment he alleged that George S. Rives made a parol gift to D. L. Rives of the land sought to be partitioned, or so much thereof as lay south of Island Creek, containing 1,200 acres, more or less, and that D. L. went into possession of the last-described land, and made valuable improvements, etc. He prayed that the executors be required to specifically perform said agreement, and be required to make respondent good and satisfactory titles to said described premises. The jury found for the defendant, and the plaintiffs made a motion for a new trial, which was overruled, and they excepted.

1. It was complained in the motion for a new trial that the court erred in overruling a demurrer to the amendment made by Lamar. This court has held so often that the overruling of a demurrer is no ground for a new trial that it surprises us when counsel persist in treating it as such. If anything can be regarded as settled by repeated rulings of an appellate court, it seems to us that this point ought to be considered as settled. These rulings apply as well to a demurrer to a cross petition seeking affirmative relief as they do to a demurrer to an original petition.

2. The executors having filed an equitable petition against the defendant, and he having made no objection to the form of the proceeding, and not controverting the right of the executors to have partition in the land if the testator had title thereto, and the whole dispute at the trial being upon the question of an alleged previous gift by the testator to his son, and the extent of the gift, there was no error in excluding the will from the jury when offered in evidence by the executors. The will could not possibly illustrate any of the issues made by the pleadings. It would not have shown title in the testator. It will throw no light upon the extent of the gift which was alleged to have been made 20 years before the death of the testator. Testimony which sheds no light upon any of the issues made by the pleadings should be excluded.

3. The plaintiffs offered in evidence the official appraisal made of the testator's estate. We do not see how this appraisal, made many years after the alleged gift, could illustrate the question as to whether he had made such a gift or not. There was no error in excluding it.

4. A witness was permitted to testify, over the objection of the plaintiffs, that she heard George S. Rives say that "the land was David's and Nancy's. He said he bought the land with David's and Nancy's money, that they got from their grandparents; that he invested it for them in the Evans place. \* \* \* It was soon after he bought the land." We think this was admissible as tending to show a motive for the gift. Although he took the

title to the land in his own name, the fact that the money he paid for it came from the source mentioned by him may have been an inducement to him to give a portion of it to one of the children. Of course, if the purpose of its introduction was to ingraft a parol trust on the deed which he had taken in his own name, it would not have been admissible; but it was not admitted for that purpose.

5. After the amendment above referred to was made by the administrator of D. L. Rives, title in the intestate was claimed only in that part of the Evans place which lay south of Island Creek. The plaintiffs introduced in evidence a son of D. L., who testified that his father pointed out to him an old hedgerow as the boundary of his land, and that his father said he did not claim any of the land north of that, or between that and Island Creek. A considerable portion of the land claimed lay between the old hedgerow and Island Creek. The plaintiffs requested the court to charge that if D. L. Rives pointed out the old hedgerow as his line, and disclaimed title to the land north of that, such disclaimer would amount to an estoppel, and his administrator could not recover the land lying between the hedgerow and the creek. The court refused to give this in charge, and was right in so doing. If the original gift embraced all the land to Island Creek, and the donee had been in possession a sufficient length of time to ripen into a title under the gift, his declarations made to his son would not estop him from insisting on the amount of land embraced in the gift, it not appearing that the donor was present, or ever heard of the declarations, or acted upon them in any way to his injury. "Nobody ought to be estopped from averring the truth, or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something or to abstain from doing something by reason of what he had said or done or omitted, to say or do." 2 Herm. Estop. § 760.

6. The court charged the jury, in substance, that if D. L. Rives held the land exclusively for seven years in the lifetime of his father without payment of rent, they should find for his administrator, unless the evidence showed further that within that seven years he disclaimed title, or acknowledged a dominion claimed by his father. Even if this clause was, in the abstract, correct, we do not think it should have been given under the particular facts of this case. It is very evident from a reading of this record that the true boundary of the land claimed to have been given by the father to the son was in great doubt. The son, in his answer to the petition, claimed the whole 1,700 acres embraced in the Evans tract. When he died, his administrator claimed only 1,200 acres, and fixed the boundary at Island Creek. The testimony of D. L. Rives' son to the effect that D. L. claimed only to the hedgerow, although, as we have held, it did

not estop his administrator from claiming to Island Creek, throws light on the question, and tends to show that D. L. regarded the hedgerow as the true boundary. This declaration, if made by D. L., might be as effectual against the claim of his estate, as to the boundary, as if it had been made before the seven years had expired. A man may think he has title to a whole tract of land as a gift from his father, and may be of that opinion for more than seven years after the gift, but he may become convinced after that that his true boundary does not include the whole tract, and may disclaim title to land outside of the true boundary. His disclaimer might be viewed by the jury as settling the true boundary, especially when there is doubt as to where the true boundary is. We think, therefore, that the judge should not have ignored this testimony in his charge, but should have left it to the jury to say what effect should be given to it as indicating where the boundary was. In other words, the court should not have eliminated all the conduct and declarations of D. L. Rives, after the first seven years had expired, touching the true boundary of the land. The evidence of disclaimer related, not to the gift, but to boundary, but the charge treats the evidence as if it related to the gift. The danger was that the jury would thus be misled, and fail to give the disclaimer any consideration at all because it was not made within seven years.

7. The ruling embodied in the seventh head-note does not require further discussion. Judgment reversed.

(116 N. C. 389)

#### BLACKNALL v. ROWLAND et al.

(Supreme Court of North Carolina. March 19, 1895.)

#### DECEIT—SALE OF CORPORATE STOCK — REPRESENTATIONS AS TO VALUE.

1. A contract for the exchange of corporate stock for lands, reciting that the trade is conditioned on the truth of the representations of the stockholder as to the financial condition of the corporation and the value of the stock, is a part of the same transaction as an assignment of the stock made two weeks afterwards to the other party, and the fact that the assignment does not itself contain the same representations as the contract does not prevent a recovery for a breach thereof.

2. Statements in a contract for the exchange of corporate stock for land as to the value of the stock and the financial condition of the corporation are statements of fact, and not of a mere opinion, where the contract recites that the trade is conditioned on the truth of such representations.

Appeal from superior court, Durham county; Shuford, Judge.

Action by W. O. Blacknall against W. H. Rowland and W. R. Cooper. There was a verdict for defendants, and from an order denying a new trial plaintiff appeals. Reversed.

For former opinion, see 13 S. E. 191.

J. S. Manning, for appellant. J. W. Graham and Boone & Boone, for appellees.

MONTGOMERY, J. On the 4th of October, 1888, the plaintiff and the defendants entered into an agreement, which is in the following words and figures: "W. H. Rowland and W. R. Cooper propose to sell, and W. O. Blacknall agrees to buy, the interest of said Rowland & Cooper in fifty shares of the capital stock of the Durham Sash, Door & Blind Manufacturing Company. As the basis of the proposition and acceptance, it is represented and understood that said stock is of the par value of \$50 a share; that fifty per cent. of the par value of each share has been paid thereon in cash, and twenty-five per cent. of the par value thereof has been paid by a declaration of dividends out of the net profits of the business and operations of the company, so that seventy-five per cent. of the par value of the stock of said company is now legally paid up; that the company owes for machinery \$2,000, for lumber about \$——, and floating debt of \$600 to \$700; that its assets are available and in good condition, and exceed its liabilities by \$3,000; that Rowland & Cooper will be able to legally assign said stock or interest, and have the same duly transferred on the company's books to said Blacknall. In exchange of said stock or interest, said Blacknall is to convey to said Rowland & Cooper and their heirs, by good and sufficient deed in fee simple, an unincumbered title to 28 acres of land in Durham county, adjoining T. B. Lyon on the east, N. C. R. R. Co. on the south, W. O. Blacknall on the west, S. J. Hester on the north; it being just east of the 30 acres now under mortgage. This trade is conditioned upon the representations above as to condition of business and stock of said company and other statements being verified upon examination of its affairs by an expert bookkeeper of Blacknall's selection and at his expense, and upon the condition that his title to the land named above is good. Witness the signature of W. H. Rowland and W. R. Cooper and W. O. Blacknall, October 4th, 1888. [Signed] Rowland & Cooper. W. O. Blacknall. Test: E. J. Parrish." Two weeks afterwards the defendants assigned and set over to the plaintiff the stock mentioned in the agreement, by a paper writing in these words: "For full value, and with consent of all the stockholders, we assign, set over, and convey to W. O. Blacknall, and his executors, administrators, and assigns, all our right, title, and interest in and to fifty shares of stock in the Durham Sash, Door & Blind Manufacturing Company, and in the property, assets, franchises, and effects of said company; and we hereby authorize a transfer upon the books of said company of all our said interests to said W. O. Blacknall, and we hereby assign the annexed re-

ceipts for payments upon said stock and our subscription thereto. Said receipts show the amounts paid by us on said subscriptions in cash, twenty-five per cent. thereof in addition to cash having been credited to us in dividends declared by said company. Witness our hands and seals this October 19, 1888. Wm. H. Rowland. [Seal.] W. R. Cooper. [Seal.] Witness: N. A. Ramsey." The plaintiff conveyed the land to the defendants on the same day the stock was assigned to him.

It is contended by the defendants that the two paper writings executed by them have no connection one with the other; that the latter one constitutes in itself the sale of the stock, independent of the agreement; and, being without representations or warranty, the doctrine of caveat emptor applies. We do not take this view of the matter. The writing last executed by the defendants is not the whole of the transaction between the parties. It is simply the assignment of the stock under the agreement, and was made, as an inference of law, under it, and had for its basis that instrument. But, even if it is admitted that the assignment of the stock be the paper which passes title to the property, and the principal instrument in the sale, yet the agreement would be a collateral undertaking, and form a part of the contract, by its express terms, as set forth in these words: "W. H. Rowland and W. R. Cooper propose to sell, and W. O. Blacknall agrees to buy, the interest of said Rowland & Cooper in 50 shares of the capital stock of the Durham Sash, Door & Blind Manufacturing Company. As the basis of the proposition and acceptance, it is represented and understood that said stock is," etc. The defendants further contend that, whatever legal effect the agreement might have had when it was entered into, the opportunity which the plaintiff had in the interim between the agreement and the assignment of the stock to examine into the representations and statements made in the agreement relieves the defendants of any liability which might have attached originally to them on account of such representations. We are not of this opinion. The plaintiff was not bound to make any examination into the facts stated in the agreement. He had a right to rely upon them. When this case was before this court at February term, 1891 (reported in 108 N. C. 554, 13 S. E. 191), Chief Justice Merrimon, in delivering the opinion, said on this point: "He [plaintiff] was not bound to verify the representations made. He might, as a matter of caution, have done so, but he might not unreasonably believe, rely, and act upon the plain, pertinent, and material statements made by the defendants to him in the paper writing and otherwise." We will now consider the nature and legal effect of the agreement. If the representations are only expressions

of opinion, then, to enable the plaintiff to recover, they must not only be false, but fraudulent. Not so, however, with representations as facts. Are these representations merely expressions of opinion offered as inducements to the plaintiff to bring about the trade, or are they solemn statements of fact, of which the defendants had peculiar means of knowledge, and of which the plaintiff was ignorant? These statements, as to the value of the stock, indebtedness of the company and its assets, are not only specifically set out, but they are preceded by the words, "as the basis of the proposition and acceptance it is represented and understood," etc. This is no "trade talk"; "no puffing of one's wares." They must mean that the defendants intended to say that they would make good to the plaintiff any damage he might sustain in the trade, if they turned out to be not true. There is therefore in the agreement a warranty of the facts stated therein as being true. His honor below instructed the jury that the agreement of October 4, 1888, was not a warranty. We are of the opinion that there was error in the instruction given. The plaintiff is entitled to a new trial.

(116 N. C. 558)

**WILLIAMS v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.**

(Supreme Court of North Carolina. March 26, 1895.)

**APPLICATION FOR REMOVAL—FORUM OF JURISDICTION—TIME OF MAKING—EVIDENCE—DECLARATION BY SERVANT.**

1. An application for removal from a state to a federal court on the ground of local prejudice must be made to the federal, and not to the state, court.

2. An application for removal for diversity of citizenship may be made in the state court.

3. Where an application for removal for diversity of citizenship is not made at the term at which the answer in the case should be filed, the right of removal is forfeited, though it is afterwards made at the time of filing the answer, which is treated as if filed in proper time.

4. In an action against a corporation for personal injuries, evidence of an admission made by defendant's general manager, after the injury occurred, that the person who caused the injury was an employé of defendant, is inadmissible.

Appeal from superior court, New Hanover county; Boykin, Judge.

Action by Duncan M. Williams against the Southern Bell Telephone & Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is a civil action for alleged injury to the plaintiff, sustained through the negligence of defendant. Summons issued on the 1st day of March, 1894, returnable to April term, 1894, of the New Hanover superior court. This court, according to law, should have commenced on the 15th day of April, 1894; but, owing to the absence of the judge, it did not in fact commence until the 17th; and adjourned on the evening of

the 20th. Plaintiff filed his complaint on the 17th day of April; and defendant, on the 15th day of June, 1894, filed an answer and a petition and bond for removal to the circuit court of the United States for trial, and at September term, 1894, of the New Hanover superior court, moved for an order of removal to said circuit court. This order was refused, and defendant excepted, and assigns this refusal to remove as one ground of error in this appeal. The plaintiff was introduced as a witness in his own behalf, and was allowed to testify, under the objection of defendant, that "I saw the dicky after I was hurt. I do not know his name, and did not know then in whose employ he was. I found out—Mr. Coghill told me—that the dicky was one of the company's servants, working for them at the time." Defendant excepted. It was admitted that Coghill is the local manager in Wilmington of the defendant company, which is a foreign corporation. There were some other exceptions, but we think a consideration of these two will dispose of the case on appeal.

Jones & Tillett, Sheppard & Busbee, and Iredell Meares, for appellant. A. M. Waddell and N. J. Rouse, for appellee.

FURCHES, J. (after stating the case). We do not think the defendant's first exception, based upon the refusal to remove the case to the circuit court for trial, can be sustained. In defendant's application to remove the case, two grounds are alleged: First, a diversity of citizenship,—that plaintiff is a citizen of North Carolina, and the defendant a citizen of New York; and, secondly, the ground of local prejudice.

This ground of local prejudice should have been made to the circuit court, if made at all. The state court had no right to entertain or consider a motion for removal based upon this ground. *Blackwell v. Railroad Co.*, 107 N. C. 219, 12 S. E. 133. The state court had the right to grant the motion upon the ground of diversity of citizenship, if it had been made in apt time; that is, during the April term, 1894, of the superior court of New Hanover. This was not done. The term of the court ended on the evening of the 20th of April, and the defendant's petition and bond for removal were not filed until the 15th of June following. By this delay, the defendant forfeited all rights it may have had to a removal, and, indeed, the court lost its power to make the removal. 2 *Fost. Fed. Prac.* p. 823, § 385; *Car Co. v. Speck*, 113 U. S. (Coop. Ed.) 925, 5 *Sup. Ct.* 374, and cases cited.

The learned counsel for defendant contend that as the April term of New Hanover court closed a week earlier than the time allowed by law, and as the defendant filed an answer on the 15th of June, which was afterwards treated as an answer, the

time for making the motion to remove was extended, and defendant's application was in time; and they cite the case of *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.* as authority for this contention. This opinion is by Judge Simonton, for whose opinions this court has very great respect. But it is not of that class of cases that we would feel bound to follow, unless we find it sustained by reason and precedent. Judge Simonton admits that there are quite a number of cases that appear to differ with this opinion of his, and that as many as two opinions of other circuit court judges are directly in point against this opinion. But this case of Judge Simonton is not in point, and our opinion in this case is not in conflict with the opinion of Judge Simonton. 60 Fed. 929. In that case there was an order of court extending the time for defendant to answer for 20 days. And defendant's application to remove was made within this 20 days, and he puts his order to remove upon that ground. In our case there is no order of court extending the time for defendant to answer. And therein is the distinction between that case and our case. But the case of *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.*, supra, is directly in conflict with 2 Fost. Fed. Prac. p. 823, §§ 3, 5, and with the decision of the supreme court of the United States in *Car Co. v. Speck*, supra.

But the evidence of plaintiff that "I found out afterwards—Mr. Coghill told me—that the darky was one of the company's servants, working for them at the time," was incompetent, and should have been rejected by the court upon the objection of defendant. This was a statement made by Coghill some months after plaintiff received the injury complained of, was not part of the *res gestae*, and was therefore incompetent. The fact that Coghill was the general manager of the defendant makes no difference. He was still but an employé of the defendant, and not the defendant; and any statement of his that was not a part of the *res gestae* was but hearsay and incompetent. *Rumbough v. Improvement Co.*, 112 N. C. 751, 17 S. E. 536; *Southerland v. Railroad Co.*, 106 N. C. 154, 11 S. E. 189; *Egerton v. Railroad Co.*, 115 N. C. 645, 20 S. E. 184; *Branch v. Railroad*, 88 N. C. 575; *Smith v. Railroad*, 68 N. C. 107. This testimony of plaintiff was directly in point upon the main issue submitted to the jury, and entitled the defendant to a new trial, unless the error of the court in admitting this evidence is cured by the affidavit of defendant, which was put in evidence by plaintiff, and this is the contention of plaintiff. If two witnesses testify to the same state of facts, but the evidence of one is competent and the other is not, the party against whom the evidence is given is entitled to a new trial, because the court cannot know which witness the jury believed.

*State v. Allen*, 1 Hawks, 6. But plaintiff insists that this case is different from *State v. Allen*, supra, and that class of cases; that here the affidavit is the declaration of defendant, and the jury is bound to believe it. The court agrees with the plaintiff as to this proposition of law. And this brings us to the consideration of the admissions contained in the affidavit. If they are the same as the declarations of Coghill, testified to by plaintiff, or as full and direct as the declarations of Coghill, though not in the same terms, then it seems that the error of the court in admitting Coghill's declarations would be cured. At first the writer of this opinion was of that opinion; but upon a more careful examination, and comparison of the affidavit and the declarations of Coghill, testified to by plaintiff, I am of a different opinion. Then, we do not think the admissions in the affidavit are equivalent to the declarations of Coghill, as testified to by the plaintiff. And in fact, upon an examination of the judge's charge, we find that he does not refer to the affidavit in any manner whatever; but the attention of the jury is specially called to the declarations of Coghill, in the following language: "As to the fact that the poles at the intersection of the streets where the accident is alleged to have occurred belonged to the defendant company, Coghill, who was agent and representative of the company, admitted to the plaintiff, in a conversation subsequent to the accident, that the party employed in the arrangement of the glass insulators was a servant of the defendant company." Upon this instruction, specially calling the attention of the jury to the declarations of Coghill, telling them that Coghill "admitted \* \* \* that the party employed \* \* \* was a servant of the defendant company," we cannot say that the declarations of Coghill did not influence the verdict of the jury. Indeed, we think it most probable they did.

We considered the question of removal because, upon awarding a new trial, that question would be the first to present itself, and therefore should be disposed of.

There is error, and the defendant is entitled to a new trial.

(116 N. C. 365)

BLUE v. ABERDEEN & W. E. R. CO.

(Supreme Court of North Carolina. March 26, 1895.)

RAILROAD COMPANY—LIABILITY FOR FIRE—BLOWING OF SPARKS—INSTRUCTIONS—CHARACTER OF WIND.

In an action for a fire started by sparks from an engine, it is error to instruct that if the wind causing the escape of sparks from defendant's engine was "unusual and extraordinary," and if, but for the "unusual and extraordinary" character of the wind, the sparks would not have escaped, and communicated the fire to plaintiff's premises, defendant is not liable, without explaining the meaning of the words

"unusual and extraordinary," so as to present to the jury the question whether the wind could have been reasonably expected at that season in that section of the country, the witnesses having described the wind in general terms as "hard," "unusual," and "extraordinary."

Appeal from superior court, Moore county; Brown, Judge.

Action by Daniel Blue against the Aberdeen & West End Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

J. W. Hinsdale and MacRae & Day, for appellant. Black & Adams, W. C. Douglass, and Shaw & Scales, for appellee.

MONTGOMERY, J. The plaintiff, in his complaint, claims damages against the defendant for negligently permitting fire to be communicated from its engines or property to the lands adjoining its railroad and right of way, by which said fire, and the spread and the extension thereof, the plaintiff's property was destroyed and damaged. It appears from the case on appeal that the plaintiff admitted on the trial that the engine of the defendant company was in good condition, and had a proper spark arrester, and that the only claim of negligence made by the plaintiff was upon the ground of rubbish on the right of way, or upon or near the roadbed, to which fire was communicated. From these admissions it would seem that it was only necessary to have submitted that phase of the case to the jury. Upon this view, his honor charged "that if the jury find from the evidence that the defendant company permitted dead grass and straw, dried-up leaves, and an accumulation of combustible matter to exist on its right of way, so near the track as to catch fire from the engine, and it did catch from the engine, and the fire spread across the lands of another person to plaintiff's lands, defendant company would be liable to plaintiff for damages sustained. There is no evidence of contributory negligence upon the part of plaintiff." There is no error here, and no exception made by the defendant. But the court, at the request of the defendant, made the following special charge: "That the defendant could only be required to provide against usual and ordinary weather, and if the jury should find that the wind which caused the escape of the sparks and fire was unusual and extraordinary, and but for the unusual and extraordinary character of the wind the sparks and fire would not have escaped from defendant's engine, and would not have been communicated to plaintiff's premises, the defendant would not be guilty of negligence, and plaintiff could not recover." This instruction must have been given to cover another view presented to the jury; that is, that the fire might have been communicated directly to the plaintiff's lands from sparks and fire blown from the defendant's engine.

Plaintiff excepted to the special instruction, and this raises the only point for decision here. While this instruction seems to be unnecessary to have been given upon the case first presented, yet, after it was made, it may have influenced the jury, and have diverted their attention from the very plain charge theretofore made by his honor. As to the nature and kind of the winds, the testimony was variable and conflicting. Some of the witnesses described it in such general terms as "wind blowing in gusts, hard wind, blowing hard, wind blowing very hard, very windy, unusual wind, unusually and extraordinarily windy." As to the witnesses who testified to particulars, some said: "Wind would have blown hat fifty yards, sparks further." "Sparks from stack would have blown fifty or seventy-five yards." "Wind would have blown sparks one hundred or two hundred yards." We think the exception is well taken. The instruction is all right so far as it goes, but the language used is too general. It contains no explanation to the jury as to the manner in which they were asked to consider the testimony, whether by comparison with other winds in the same climate or other seasons of the year, or whether to be taken in connection with that testimony which went into the particulars of the wind or to be considered as independent proof. The words "unusual and extraordinary," as in common use, very often are exaggerations of speech, and in many cases, if properly inquired into and explained, would be found not to be synonymous with "unnatural and unexpected." And, further, the testimony in its particulars does not disclose any unnatural or unexpected wind. We think that his honor should have so explained the meaning of the words "unusual and extraordinary," in conjunction with the particular testimony offered, as to have presented the question whether or not this wind could reasonably have been anticipated and expected by the defendants in the climate and season and section of country. In *Emery v. Railroad Co.*, 102 N. C. 226, 9 S. E. 130, the judge below instructed the jury upon the question of negligence that "it was the duty of defendant to have constructed its culvert so it would carry off the stream under all ordinary circumstances and the usual course of nature, even to the extent of such heavy rains as are ordinarily expected. \* \* \* If the defendant so constructed the culvert that it was not sufficient to carry off the water of the stream under ordinary circumstances (and by ordinary circumstances is meant the usual rainfall), even if such heavy rains are occasional, and, by reason of an insufficient culvert, the plaintiff's land was overflowed, the answer to the first issue [Has the defendant negligently ponded water back upon the plaintiff's land?] should be, 'Yes,' unless the defendant had acquired the right to pond water on the plaintiff's land." Justice Avery, in delivering the opin-



ion, in sustaining the ruling of the trial judge, went on to say: "His honor, in addition to the language quoted from his charge, told the jury that the defendant was 'not negligent if the overflow was the result of extraordinary and unusual rainfall.'" It is not to be inferred, however, that the additional words "extraordinary and unusual" alone would have been a sufficient charge to the jury on the question of negligence. There was error in the instruction given, and there must be a new trial.

(116 N. C. 530)

**SPRINGER et al. v. COLWELL.**

(Supreme Court of North Carolina. March 26, 1895.)

**ASSIGNMENT OF HOMESTEAD—LANDS IN DIFFERENT COUNTIES—RIGHTS OF EXECUTION DEBTOR.**

Where the value of a homestead assigned to a judgment debtor, consisting of all his land in the county of his residence, is less than \$1,000, as allowed by Const. art. 10, § 2, his failure to file exceptions to such assignment does not estop him, upon the levy of execution under the same judgment on his land in another county, from claiming an additional assignment of such land, in order to make his whole exemption \$1,000.

Appeal from superior court, Sampson county; Hoke, Judge.

Action by William E. Springer & Co. against D. F. Colwell. Judgment was rendered for plaintiffs, and land in which defendant claimed a homestead exemption was sold thereunder. From a judgment thereafter rendered allowing defendant's claim of exemption, plaintiffs appeal. Affirmed.

Plaintiffs obtained a judgment against defendant, upon which execution was duly issued to the sheriff of Sampson county, under which was assigned to defendant, as real-estate exemption, land of the value of \$625, including the lands on which the defendant then resided. Execution was also issued upon the judgment to the sheriff of Duplin county, upon which was indorsed the fact that homestead returns had been filed under an execution in Sampson county. Defendant filed a transcript of the homestead returns with the clerk of the superior court of Duplin county, and had him deliver a copy to the sheriff of Duplin county, and demanded an assignment by this sheriff, out of his lands in that county, of a quantity sufficient in value to make, with the \$625 worth assigned in Sampson county, \$1,000 worth; which the sheriff declined to do, but sold the land to plaintiffs, and made a deed therefor to them.

A. D. Ward, for appellees.

MONTGOMERY, J. Except for sale for taxes and for payment of obligations for the purchase of the premises, every homestead owned and occupied by any resident of this state, and not exceeding the value of \$1,000, shall be exempt from sale under execution or other final process obtained on any debt. Const. art. 10, § 2. Section 519 of the Code provides that, if the judgment debtor enti-

tled to homestead shall be dissatisfied with the valuation and allotment of the appraisers, he, within 10 days thereafter and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and "file with the clerk of the superior court of the county where the said allotment shall be made a transcript of the return of the appraisers; \* \* \* and thereupon the said clerk shall put the same on the civil issue docket of said superior court for trial at the next term thereof as other civil actions." It was decided by this court in the case of *Whitehead v. Spivey*, 108 N. C. 66, 9 S. E. 319, that an allotment of homestead to the debtor of lands of value less than \$1,000, regular in form and unobjected to within the time allowed by law, was an estoppel of the debtor from claiming any additional allotment in other lands which he had at the time of the allotment. That opinion followed in the line of *Burton v. Splers*, 87 N. C. 87, and *Spoon v. Reid*, 78 N. C. 244. In all of these cases, however, the several judgment debtors at the time of the allotment owned no lands outside of the counties in which they resided. In the case before us the defendant owned land in Sampson county, where he resided, valued by the appraisers at \$625, and he also owned other land in Duplin county.

Now, the question is, does the law applied to the facts in *Whitehead v. Spivey* fit the facts of the present case? We do not think that it does. Neither the sheriff nor the appraisers had the right to go out of Sampson into Duplin county, to allot to the defendant any part of his homestead in lands situated in the latter county, and they gave him all the real estate he owned in Sampson county. What, then, did he have to object to, except to the overvaluation of the land, about which he made no question? Then, too, what would the objection have amounted to if he had made it? Suppose he had objected that the sheriff and appraisers did not go into Duplin, and allot to him the balance of his homestead in lands belonging to him in that county, would not the objection have been a vain thing, seeing that they had no power to do so?

But there is another view which is conclusive of the matter. If the defendant, as the plaintiffs contend, was required to make some sort of exception or statement, and give notice of it to the adverse party and to the sheriff, to the effect that he had other lands in Duplin county which he wished to have allotted to him to complete his homestead, and the clerk of the superior court had put the same on the civil docket of the superior court for trial at the next term, the defendant would have been met by the objection of wrong venue. Section 90 of the Code declares that actions for the recovery of real property, or of any estate or interest in it, or for the determination in any form of such right or interest, and for injuries to real property, must be tried in the county where

the real estate is situated. The defendant, it seems, took the precaution to have a copy of the homestead proceedings, under the certificate and seal of the clerk of the superior court of Sampson, filed with the clerk of the superior court of Duplin, and had also a copy served on the sheriff of the last-named county, before he made the sale, accompanying the service of the paper on the sheriff with the request to have allotted to him enough of his lands in Duplin county to make up the full amount of his homestead. There is no error in the judgment of the court below, and the same is affirmed.

(116 N. C. 147)

**JARVIS v. VANDERFORD et al.**

(Supreme Court of North Carolina. March 26, 1895.)

**PRESUMPTIONS—EVIDENCE—HANDWRITING DECLARATIONS AGAINST TITLE.**

1. The fact that one was a clerk of court at a certain date does not create a presumption that he held the office before that time.

2. A witness, not an expert, who never saw a certain person write, and never corresponded with him, is not competent to testify as to that person's handwriting.

3. A declaration against title, made by a mortgagor after the execution of the mortgage, is not competent evidence against one claiming under the mortgagee in an action by him to recover the mortgaged premises.

Appeal from superior court, Pitt county; Bynum, Judge.

Action by T. J. Jarvis against J. H. Vanderford and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Plaintiff claims the land in suit under a mortgage given by W. H. Burnett to one F. G. James, while defendants claim as heirs of Burnett's grantor.

Jas. E. Moore, for appellants. Shepherd & Busbee, for appellee.

**FURCHES, J.** This is an action for the possession of land, in which there was a verdict and judgment for plaintiff, and defendants appealed. The record presents but two exceptions: First, the exclusion of the evidence as to the handwriting of Alexander Evans; second, the refusal to permit defendants to put in evidence a paper writing purporting to be a copy of the will of David Averett. We do not think either one of these exceptions can be sustained. It was not shown that Alexander Evans was clerk, or that Richard Evans was deputy clerk, of the court of pleas and quarter sessions in 1808. And, although there was evidence tending to show that Alexander Evans was clerk, and Richard Evans was deputy clerk, in 1818, this did not create a presumption that they were such officers in 1808, 10 years before that time. Lawson, Pres. Ev. p. 190. But the paper produced purported to have been signed by "Richard Evans, assistant clerk," and not by Alexander Evans; and why it was that defendants wanted to offer

evidence to prove the handwriting of Alexander Evans, we do not exactly see. But, be that as it may, we think the evidence offered was clearly incompetent. The witnesses offered had never seen Alexander Evans write, had never had any business correspondence with him, but "that he had seen some old papers at home, which were signed by Alexander Evans, clerk,—one an order of sale. I don't know that he was clerk, or that he signed them. Don't remember the dates. They are very old papers, and very much worn. I have seen some handwriting said to be Alexander Evans'. Don't know it myself." Defendants proposed to hand to the witness the paper writing "A," and ask him if the signature of Alexander Evans is in the same handwriting he has at home, and if it is the same he has seen, and which was said to be the handwriting of Alexander Evans. As the witness had never seen Alexander Evans write, and had not had any correspondence with him, the only way he could testify was as an expert. And it seems clear to us that he had not qualified himself to do this, even by a comparison of handwritings. But he had no standard to compare this paper with. The papers he had at home were not admitted to be in the handwriting of Alexander Evans, nor did they appear in the case, or in any other way, so as to estop the plaintiff. *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28; *State v. Allen*, 1 Hawks, 6. This disposes of defendants' first exception, and also of the second exception, so far as we can see, as it could not be introduced as a certified copy under the statute (Code, § 1342); nor can it be introduced as color of title, as an ancient document, as an unregistered deed could be. *Brown v. Brown*, 106 N. C. 451, 11 S. E. 647; *Davis v. Higgins*, 91 N. C. 382. And, although there was evidence tending to show that Burnett, through whom plaintiff derives his title, at some time said that "A" was a copy of David Averett's will, that would not make it competent evidence against the plaintiff; and certainly not unless it was shown that it was made before he mortgaged to James. *Headen v. Womack*, 88 N. C. 468. There is no error, and the judgment is affirmed.

(116 N. C. 491)

**PRETZFELDER et al. v. MERCHANTS' INS. CO. et al.**

(Supreme Court of North Carolina. March 26, 1895.)

**JOINDER OF ACTIONS—SUITS AGAINST INSURANCE COMPANIES—ARBITRATORS—EFFECT OF FAILURE TO AGREE.**

1. Under Code, § 267, providing that several causes of action arising out of contract may be united in one complaint when they affect all parties to the action, and do not require different places of trial, where a person was insured in several companies, and each policy limited the amount of his recovery thereunder to the propor-

tion of the loss which the policy should bear to the total insurance, it was proper, in an action to recover for a loss, to make each company a party defendant.

2. Where arbitrators appointed to determine the loss under a policy of fire insurance fail to agree, and the parties cannot agree on other arbitrators, the insured may sue on the policy.

Appeal from superior court, Guilford county; Hoke, Judge.

Action by M. Pretzfelder & Co. against the Merchants' Insurance Company and others upon policies of fire insurance. From a judgment for plaintiffs, defendants appeal. Affirmed.

MacRae & Day and J. W. Hinsdale, for appellants. Dillard & King and Jas. E. Boyd, for appellees.

CLARK, J. The plaintiff was insured in several companies, the contract with each containing the provision that the plaintiff's right of recovery against each was limited to the proportion of the loss which the amount named in the policy of each company should bear to the whole amount insured. It is not only no misjoinder, but essentially proper, that all the companies should be made parties defendant. If each company should be sued separately, not only would the same propositions of law arise and the same evidence be gone over in five different actions, at an expense of five times the amount of court costs, and much needless consumption of the time of the courts, but, as the trial would be before five different juries, the loss might be assessed at five different amounts. There is no method to gauge accurately the pro rata loss of each company so readily as by one verdict and one apportionment, according to the varying amount of risk taken by each company. By their stipulation to apportion the loss, the companies have, to that extent at least, made the five policies one contract, the amount of damages accruing upon which should be assessed and apportioned in one joint action. Adams, Eq. 200; 1 Pom. Eq. Jur. §§ 245, 274; Black v. Shreeve, 7 N. J. Eq. 440, 456. The verdict necessarily "affects all parties to the action." The joinder is therefore within the purview of Code, § 267.<sup>1</sup> Hamlin v. Tucker, 72 N. C. 502; Young v. Young, 81 N. C. 91; Heggie v. Hill, 95 N. C. 303. Where there is a misjoinder of causes of action, the court may allow the action to be divided (Code, § 272; Hodges v. Railroad Co., 105 N. C. 170, 10 S. E. 917), or, where there is a misjoinder of parties, the court in its discretion can do the same (Code, § 407; Bryan v. Spivey, 106 N. C. 95, 11 S. E. 510; but here there is neither misjoinder of parties nor of causes of action.

The arbitrators were appointed, but dis-

<sup>1</sup> Code, § 267, provides that several causes of action may be united in the same complaint when they all arise out of contract, express or implied, and affect all the parties to the action, and do not require different places of trial.

agreed and refused to go on, and finally broke up without making an award. Subsequent attempts to agree upon another board failed. The parties were thus relegated to their legal rights, and the action can be maintained. Braddy v. Insurance Co., 115 N. C. 354, 20 S. E. 477. Indeed, as intimated in that case, we think the proper rule is laid down in Insurance Co. v. Hocking, 115 Pa. St. 416, 8 Atl. 586, that where the arbitrators, or a majority of them, fail to agree upon an award, the plaintiff (unless he is shown to have acted in bad faith in selecting his arbitrator) is not compelled to submit to another arbitration and another delay, but may forthwith bring his action in the courts. No error.

(116 N. C. 629)

#### CAMPBELL v. MORRISON et al.

(Supreme Court of North Carolina. March 26, 1895.)

##### EJECTMENT—EVIDENCE—INSTRUCTIONS.

1. Plaintiff in an action to recover land is not precluded from introducing in evidence a deed under which he claims title by the fact that the calls therein covering the locus in quo, as alleged by him, do not correspond with those of the copy of a grant from the state previously introduced in evidence by him.

2. Where plaintiff's deed covers the land in question, but a grant previously introduced does not cover such land, and defendant's evidence is to the effect that plaintiff's deed originally corresponded with the grant, and also tends to establish adverse possession, a charge that, if a certain point on the plat was the corner of plaintiff's grant, he has located his land, disregarding the other matters in question, is erroneous.

Appeal from superior court, Moore county; Winston, Judge.

Action by Alexander Campbell against B. M. Morrison and others for possession of land. From a verdict and judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Black & Adams, W. C. Douglass, and Shaw & Scales, for appellants. W. E. Murchison, for appellee.

FURCHES, J. Plaintiff, for the purpose of making out his title, introduced a copy of a grant from the state to Malcom Gilchrist, bearing date the 18th of December, 1797, and then offered a deed from Malcom Gilchrist to Daniel Campbell, the calls of the deed covering the locus in quo, as plaintiff alleged, while it seems the copy of the grant did not. Defendant objected to the introduction of this deed for the reason, as they alleged, that plaintiff had introduced the grant, and was bound by that. The court overruled this objection, and defendants excepted.

We do not see any grounds upon which this exception can be sustained. This is too clear to admit of argument. But the courses and distances in the grant from the state to Malcom Gilchrist, taking the point A on the map as the proper beginning corner (and this was admitted by both sides), does not seem to cov-

er the locus in quo, while it seems that the calls in the deed from Malcom Gilchrist to Daniel Campbell do, if the survey is correct. But defendants offered evidence tending to show—and which, so far as we can see from the case presented by the record, was uncontradicted—that this deed originally contained the same calls as the grant to Malcom Gilchrist. Defendants also offered a deed from Duncan Bule to Morris Morrison, a deed from Morris Morrison to Allen B. Morrison, dated 15th of July, 1843, and a deed from Allen B. Morrison to defendants for 100 acres of land, which defendants contend covers the locus in quo, and which, according to the survey and plot, does cover the land in dispute. Defendants also offered evidence tending to show that defendants had been in the actual possession of the locus in quo ever since 1872, and that this action was not commenced until the 28th day of July, 1880. Upon the evidence the judge charged “that if the point at A on the plat was the beginning corner of the plaintiff’s grant, or the copy of the grant and of his deed, then the plaintiff had located his land”; to which charge the defendants excepted. We think there was error in this charge which entitles the defendants to a new trial. The rest of the judge’s charge is not given, and therefore we can see nothing to correct this error, if there was anything in the charge to correct it, and therefore pass upon it as it appears from the record which was sent in answer to a writ of certiorari issued from this court. It seems to us from this record that there are several questions presented which should have been submitted to the jury under proper instructions from the court, such as the location of the grant and deeds, the question as to the alteration of calls in the deed from Gilchrist to Daniel Morrison, the location of defendants’ deed, and the question of actual possession of the locus in quo by the defendants under their deeds. There is error, and a new trial is ordered.

(116 N. C. 952)

**GRADY v. RICHMOND & D. R. CO.**

(Supreme Court of North Carolina. March 26, 1895.)

**SUMMONS—SERVICE ON RECEIVER—AMENDMENT OF RETURN.**

1. A valid service of summons upon a railroad company in the hands of receivers may be made upon a local agent of the receivers.

2. A return of service of summons which was made upon a local agent of a railroad company in the hands of receivers, reciting that it was served by delivering a copy to a person named “agent of the defendants Co.” may be amended by striking out the word “Co.”

Appeal from superior court, Duplin county; Hoke, Judge.

Action by L. V. Grady against the Richmond & Danville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The summons was issued against the Richmond & Danville Railroad Company and

Samuel Spencer, F. W. Huidekoper, and Reuben Foster, receivers, who were then in charge of its property, returnable to Duplin superior court on the first Monday in August, 1894 (August 6th), and was served 23d May, 1894, by the sheriff of Wayne county, who delivered a copy of it to C. M. Levister, who was “the local agent employed in charge of the freight office at Goldsboro, collecting freight charges,” etc. The sheriff returned the summons indorsed, “Served by delivering a copy of this summons to C. M. Levister, agent of the defendants Co.” At the August term judgment by default and inquiry was taken, and at December term a jury was impaneled, and final judgment entered. At February term, 1895, the defendants, upon notice dated 3d January, 1895, moved to set aside the said judgments, because they are “irregular and void, and entered without any service of process upon the defendants above named, or any of them.” His honor found as facts that Levister, at the date of the service of the summons, May 23, 1894, was the agent of the receivers, then operating the railroad, and that the copy of the summons was delivered to him as such agent. He permitted the sheriff to amend his return by striking out the word “Co.,” so that the return stands “Served on C. M. Levister, agent of the defendants.” He held that the judgment was valid, and refused defendant leave to file an answer. Defendant appealed.

F. H. Busbee, for appellant. A. D. Ward, for appellee.

CLARK, J. The power of the court to permit the sheriff to amend his return, both before and after judgment, so as to make it speak the truth, is settled beyond discussion. *Campbell v. Smith*, 115 N. C. 498, 20 S. E. 723, and cases cited; *Clark’s Code*, pp. 222, 227, 498, 499. The amendment “related back to the original return, and has the same effect as if the amended return had been originally made.” *Murfree, Sheriffs*, § 880; 22 Am. & Eng. Enc. Law, 204; *Freem. Ex’ns*, 358. There was no ground, therefore, on which to permit an answer to be now filed. The service upon “the local agent” was valid under the statute. *Code*, § 217; *Jones v. Insurance Co.*, 88 N. C. 499; *Katzenstein v. Railroad Co.*, 78 N. C. 286; *State v. Western N. C. R. Co.*, 89 N. C. 584. “The receivers were only temporarily in charge of the corporation, in lieu of the regular officers, and a service upon their local agent is a service upon them. Whether the judgment recovered will or will not be paid in preference to other liabilities of the corporation does not affect this question.” *Farris v. Railroad Co.*, 115 N. C. 600, 20 S. E. 167. Service upon the receivers is service upon the corporation, as fully as if made upon the president and superintendent, whose duties they are temporarily discharging, as they come within the term “other

head of the corporation" (Code, § 217), and a service upon their local agent is merely a substitute for, and has the same legal effect as, service upon them personally. *General Trust Co. v. St. Louis, A. & T. R. Co.*, 40 Fed. 426; *Ganebin v. Phelan*, 5 Colo. 83. The statute (Code, § 200) contains no exception or discrimination which requires service of summons to be made, as to railroad companies or their receivers, more than 10 days before the term. Here the service was legally and duly made on the defendants 75 days before the next term. We concur, therefore, in the ruling of the learned judge that the proceedings were not "irregular and void," nor "without due service of process upon the defendants." His judgment is in all respects affirmed.

(116 N. C. 595)

PEARCE et al. v. ELWELL et al.

(Supreme Court of North Carolina. March 26, 1895.)

REVIEW ON APPEAL—FINDING OF FACTS—RECEIVERS—RIGHT TO APPOINTMENT.

1. Where the supreme court has a right to review the findings of fact of the lower court, it may find the facts if they are not found by the lower court.

2. A complaint on an application for receivers alleged that defendant debtor and other defendants named, all of whom were insolvent, had combined to defraud the plaintiff out of his claims against the debtor. None of the defendants except the debtor denied these allegations. The court appointed a receiver for the debtor, but refused as to the other defendants. *Held*, that such refusal was error.

Appeal from superior court, Robeson county; Bryan, Judge.

Action by Robeson & Co., Pearce Bros. & Co., and others against J. W. Elwell and others for the appointment of a receiver. From a judgment appointing a receiver as to defendant J. W. Elwell, and refusing the application as to the other defendants, plaintiffs appeal. Reversed.

Battle & Mordecai and McNeill & McLean, for appellants.

FURCHES, J. This is an application for a receiver, heard by Bryan, J., from whose order plaintiffs appealed to this court. The motion was heard upon plaintiffs' complaints, used as affidavits, the affidavit of W. H. Miller, and the answer of J. W. Elwell, used as an affidavit. The judge does not find the facts, but simply renders his judgment, appointing a receiver as to Elwell, and refusing to appoint a receiver for the other defendants. If his honor had found the facts, this court has the right to review his finding (*Coates v. Wilkes*, 92 N. C. 376); and it certainly has the right to find the facts where they were not found by the court below if it has the right to review his findings. We are not inadvertent to the fact that cases may be found where it is held that this court cannot review the findings of fact in the court

below. But they are distinguishable from this case. Then, the fact that Elwell and Woolard, doing business under the firm name of Elwell & Co., are indebted to the plaintiffs, is alleged, and not denied. The complaints both allege, as well as the affidavit of W. H. Miller, that all the defendants are insolvent; that M. S. Lassiter is the wife of M. B. Lassiter, and that Sam Lassiter is the infant son of M. B. Lassiter, and that the sale, or pretended sale, of Elwell to M. B. Lassiter, and the pretended sale of M. B. Lassiter to his wife and infant son, were all a part of a fraud concocted from the beginning to cheat and defraud the plaintiffs out of their just debts; that defendants have made different and contradictory statements as to the terms of said sales; and that defendant Elwell is now sporting on the ill-gotten gains of this fraudulent transaction. The defendant Elwell is the only defendant that pretends to deny any of these damaging charges; and he only denies that his sale to S. B. Lassiter was fraudulent, and, if said Lassiter was insolvent, it was unknown to him. This denial raises an issue. But the surrounding circumstances throw such a shadow upon this transaction that the court below properly held that plaintiffs were entitled to have a receiver as to the defendant Elwell. And if plaintiffs were entitled to a receiver as to Elwell, who answered and made the denials stated above, we cannot see why they were not entitled to have a receiver as to the defendants who made no denial of the frauds, insolvency, coverture, and infancy, as alleged. *Ellett v. Newman*, 92 N. C. 519; *Rheinstein v. Bixby*, Id. 307; *S. C. Forsaith Mach. Co. v. Hope Mills Lumber Co.*, 109 N. C. 576; 13 S. E. 869; *Bank v. Bridgers*, 114 N. C. 381, 19 S. E. 642. In applications for ancillary relief, it is not necessary that proof should be as full and as complete as if the trial was before the jury upon the main issues. *Falson v. Hardy*, 114 N. C. 58, 19 S. E. 91; *Bank v. Bridgers*, supra. And we are clearly of the opinion that there is sufficient undisputed evidence in the case to entitle the plaintiffs to a receiver as to the other defendants, as well as against the defendant Elwell. It may be that a receiver, at this late day, will be of but little benefit to plaintiffs. But this is not a matter for us.

There is error, and the plaintiffs are entitled to have a receiver as to the other defendants, as well as to Elwell. Error.

(43 S. C. 370)

HOBBS et al. v. BEARD.

(Supreme Court of South Carolina. March 25, 1895.)

SUIT FOR LAND—PLEADING AND PROOF—SECONDARY EVIDENCE—LOST RECORD—REVIEW ON APPEAL—CONTENTS OF INSTRUMENT.

1. For the purpose of reviewing the exclusion of a letter as evidence, statements of the contents of the letter made by an attorney in the course of argument in the lower court and in the supreme court cannot be considered.

2. Secondary evidence of the contents of the record of a deed is admissible without giving the notice required by statute of an intention to introduce a record.

3. Where a deed is lost, and the record of it destroyed, one who has read the record may testify as to its contents, provided no higher evidence is obtainable.

4. Declarations by a grantor made after the conveyance of the land and surrender of possession are inadmissible, after his death, to prove the contents of the deed.

5. Plaintiffs, in an action to recover land, alleged title in fee simple; that they were entitled to and defendants were in possession of the land; and then set up title under a deed as remainder-men. On the trial they failed to prove title under this deed, but showed title as heirs. *Held*, that judgment of nonsuit was properly refused.

Appeal from common pleas circuit court of Richland county; T. B. Fraser, Judge.

Action by Martha Hobbs and others against Frances Beard. From a judgment for defendant, plaintiffs appeal. Reversed.

The following was the charge to the jury:

"This is an action to recover the tract of land described in the complaint. The complaint goes on and sets out a cause of action—a complete cause of action—as to that tract; that the plaintiffs were seised in fee simple of the land, and entitled to the possession of it; and that defendant was in possession of it. If they had stopped there, and demanded possession after the allegation of damages, that would have been enough; but plaintiffs went further than that, and stated the mode by which that title was obtained. I don't know that that was necessary. It was putting in the complaint what we sometimes call 'evidential facts,'—facts which could have been proved just as well without having been in the complaint at all, therefore surplusage; and therefore, under the terms of this complaint, the plaintiff had a right to establish any title that he could establish by proper testimony. This is an action on the part of these plaintiffs to recover the whole of that lot of land. As one of the plaintiffs died since the commencement of the action, his children, heirs at law, have been substituted in his place. That is the reason of the order which you heard taken in this case. Bringing them forward entitles them to the share which their parent would have been entitled to.

"The rule is, the plaintiff must recover on the strength of his own title, not only in this case, but in all cases. There have been a good many requests to charge submitted, but, in the view I take of it, I propose to charge you generally, without saying anything about them. If I am in error, the error can be corrected as well that way as any other. When you undertake to prove title to personal property,—a horse, for instance,—all that is necessary to do is to prove that the person had the horse in his possession. Possession is evidence of title,—one hour's possession. If I have a horse in my possession to-day, and somebody else is found in possession to-morrow, unless he can prove

I never had possession, never had title to him, my possession would be evidence against him. Possession of personal property is prima facie evidence of title. Not so with reference to possession of land. In proving title to land, the first thing to do is to prove that the plaintiff has some title in the estate. That is done in several ways. The first and most complete way is to produce the original grant, signed by the governor and secretary of state under the great seal of the state, and then connect this by a regular chain of title. That has not been done here. There is another mode just as good as that, and it is the one which is resorted to in the large number of cases which find their way to the courts in consequence of the loss of original papers; that is, either to get a certified copy of that original grant from the secretary of state's office, or to prove that some person or a number of persons claiming one under another directly, one from another, had possession of that land for twenty consecutive years. When you do that, the presumption is there was a grant commencing at the beginning of possession; and, if in this case it was shown to you that Mrs. Wolfe had twenty years' consecutive possession of that land, it is just as good as though she had produced on the stand the original grant from the secretary of state's office, and all you have got to do is to connect your possession with Mrs. Wolfe's. There is another way: Sometimes they are unable to produce the original grant or a certified copy of the grant, or to prove twenty years' possession. In those cases, if they prove that both parties to the action claim under the same common person, then neither of them is permitted to deny that that person had a good title in the estate. That is what is called proving title by common source. In this case you have heard the testimony. You can prove title from a common source in a good many ways. Sometimes it is done by proving a deed. If there be a deed shown here from Mrs. Wolfe to James L. Beard for life, and the defendant in this case claims under James L. Beard, and these plaintiffs show that they were the heirs at law of Mrs. Wolfe, then no one can go behind that, and whoever has a good title from Mrs. Wolfe will prevail, provided it was filed (?) in time.

"In this case the plaintiffs were not allowed to introduce secondary evidence of some papers which they said they had, and which they proposed to claim under. I ruled that out. They claim, however, that they are heirs of Mrs. Wolfe. Well, that depends upon the proof. Now, gentlemen, as to the statute of limitations. If James L. Beard was in possession of that land, and admitted, while he was in possession, that he was only a life tenant, then it is an admission, in the absence of other proof, that he was a life tenant, holding under one who had a

title in fee; and if it be true that he claimed under Mrs. Wolfe, or if it be true that Mrs. Wolfe had possession for twenty years, then it is an admission on the face of that paper that he was a life tenant under her. If he was, then ten years, or forty years, could not make out such adverse title as to make out a complete title against her heirs. Therefore, while possession in James L. Beard may have been a very long one, yet, if he held that possession in subordination to Mrs. Wolfe's title, then it was not adverse title, and it conferred no rights upon him, no matter how long. In that view of the case, the only question is whether these parties have proved that they are heirs at law. You have heard the testimony of the witnesses. I cannot tell you. If there were six brothers and sisters, or children of deceased brothers and sisters, and only six of them, then those six were entitled to that property after her death. If only three are here, those are entitled each to one-sixth. If one is dead, represented by three, then each is entitled to one-third of one-sixth. I think I have covered about all the case. It is one of those cases, I see no reason why I should say anything to the jury about expecting them to do their duty. It is plain matters of fact and law, like adding up a sum in arithmetic. Indicate your verdict, and the lawyers will put it in shape when you come out."

The following are exceptions of plaintiffs:

"(1) Because his honor, the presiding judge, erred in ruling that the letter of James L. Beard, of date 20th June, 1887, was inadmissible to prove the existence and contents of the deed of Mary Anne Wolfe, conveying the premises in question to the said James L. Beard for life, with remainder to the children of Thomas Beard; whereas his honor should have ruled that the same was competent and admissible both to prove the existence and contents of the said deed. (2) Because his honor erred in refusing to allow the witness H. G. Guerry to testify that the said Wolfe deed was on record in the office of the register of mesne conveyances for Richland county; and his honor erred, further, in refusing to allow the said witness to testify to the contents of the said record, as secondary evidence of the contents of the said Wolfe deed, it appearing in the evidence that the said records had been destroyed in 1865; whereas his honor should have held that, under the facts proved, the record of the said deed was admissible as evidence to prove both the existence and contents of the said deed. (3) Because his honor erred in ruling that the declarations of Mary Anne Wolfe were inadmissible as evidence to prove the existence and contents of the deed previously executed by her to James L. Beard, conveying the premises in dispute to the said James L. Beard for life, with remainder to the children of Thomas Beard; whereas his

honor should have held that the said declarations were admissible as evidence in corroboration of other evidence, and in proof of the contents of the said deed."

The following are exceptions of defendant:

"(1) Because his honor erred in not granting the nonsuit: (a) Because there was a total failure of any evidence showing that plaintiffs were heirs at law of Mary Wolfe; (b) because the plaintiffs, having brought their action as remainder-men, could not recover as heirs at law. (2) Because his honor erred in refusing to charge the jury: 'That if jury believe from the evidence that James L. Beard was in possession of the lot in dispute, receiving rents and profits, and paying taxes, for over twenty years, and his possession was open, notorious, and continuous, then, from the possession of twenty years, a grant or title would be presumed in J. L. Beard, and he would have a good title;' and, on the contrary, charged the jury: 'There have been a good many requests to charge submitted; but, in the view I take of it, I propose to charge you generally, without saying anything about them,' etc., and refused said request. (3) That his honor erred in refusing to charge the following request, submitted by defendant: 'That if the jury believe from the evidence that James L. Beard occupied and possessed the land in dispute, using it and renting it, for ten years before the death of Mrs. Wolfe, then, if he held ten years adversely in his own right, at the expiration thereof the title would vest in him, and he would have a good title;' but, on the contrary, his honor refused so to charge. (4) That his honor erred in refusing to charge the following request, submitted by defendant: 'Even though the jury may believe that, on the death of Mary Wolfe, the plaintiffs and James L. Beard were her heirs at law, and entitled, as such, to the lot in dispute, yet, if they further believe that James L. Beard took possession of said lot, received the rents, and exercised control over the same continuously, openly, and adversely for the period of twenty years, then the law presumes an ouster, or a title from plaintiffs to Beard.' (5) Because his honor erred in his charge to jury in construing the deed of James L. Beard to Frances Beard to the effect that she took only a life estate, whereas he ought to have held said deed to be a deed in fee simple absolute. You are further notified that the defendant will, in the argument of this cause, sustain the rulings of his honor as to the admissibility of the testimony of Guerry and Henry L. Beard, on the further ground that said testimony was incompetent, under section 400 of Code."

Andrew Crawford and Melton & Melton, for appellants. John McMaster and F. W. McMaster, for respondent.

GARY, J. The above-entitled action was commenced on the 15th day of February, 1893, by Martha Hobbs, Henry Beard, and

Samuel Beard for the possession of the whole of certain premises situated in the city of Columbia. Before the trial of the cause Samuel Beard died, and his heirs at law, Frank Beard, Eugene A. Beard, and Henry E. Beard, were, by an order of the court, substituted in his stead as coplaintiffs of the said Martha Hobbs and Henry Beard. It is set forth in the complaint that the plaintiffs, as tenants in common, are seised in fee, and entitled to the immediate possession, of the said premises; that the defendant is in the possession thereof, and withholds the same from them, notwithstanding demand made therefor. In addition to these facts, the manner in which the plaintiffs claimed to have derived title is set forth, in substance, as follows: That one Mary Ann Wolfe, being the common source of title of the plaintiffs and defendant, executed a deed whereby she conveyed the said premises to one James L. Beard for life, with remainder after his death to the children of Thomas Beard, in fee simple, who should be alive at the falling in of the said life estate; that the said James L. Beard departed this life on or about the — day of January, 1893; and that the plaintiffs are the remaindermen under the said deed. The defendant, by her answer, interposed a general denial of all the allegations of the complaint, and pleaded title by presumption of time and the statute of limitations. After introducing testimony to show the loss of the deed alleged to have been executed by Mary Anne Wolfe conveying a life estate to James L. Beard, the plaintiffs undertook to prove its existence and contents by the declaration of James L. Beard contained in a letter alleged to have been written by him while in possession and control of the said premises, by the oral declarations of the said Mary Anne Wolfe, and by the evidence of the record of the deed in the office of the R. M. C. of Richland county, which record was destroyed by fire, years ago. This evidence was held to be incompetent by the presiding judge, whereupon the plaintiffs introduced testimony to show the following facts: That the possession of the said premises by Mary Anne Wolfe continued over a period of more than 20 years; that the possession of James L. Beard commenced immediately thereafter, was connected therewith; that James L. Beard made the admission, during the continuance of his possession of the said premises, in his deed thereof to Francis Beard, to the effect that he had only life interest in the same; that the said deed of James L. Beard conveyed his life interest to Frances Beard, the defendant, and the possession of Frances commenced immediately after and was connected with that of the said James L. Beard; the death of the said James L. Beard and of Mary Anne Wolfe; and that the plaintiffs are some of her heirs at law. At the close of plaintiffs' testimony, the defendant made a motion for a nonsuit, which

his honor refused. It seems to be an undisputed fact that James L. Beard derived his title from Mary Anne Wolfe. The defendant, to establish her title, introduced testimony of long possession in James L. Beard, continuing over 40 years to the time of his death, in 1893, and various acts of ownership during that time. His honor then charged the jury as will appear in the report of the case. The jury rendered the following verdict: "We find for the plaintiffs Henry Beard and Martha Hobbs, each, one-sixth of the land in dispute; another one-sixth for Frank P. Beard, Henry E. Beard, and Eugene A. Beard, heirs at law of Samuel Beard, deceased." Judgment was entered up in accordance with the said verdict on the 1st day of May, 1894. The plaintiffs and defendant both appealed from said judgment, upon exceptions which will be set out in the report of the case.

We will now consider the plaintiffs' exceptions in regular order.

1. In the case of *Sims v. Jones* (S. C.) 20 S. E. 905, the court says: "Where the rulings of the circuit judge are brought in review before this court, two things must appear: (1) That the ruling to which exception was taken is erroneous; (2) that the appellant has suffered prejudice by such erroneous ruling." The letter mentioned in the first exception is not set out in the case; and plaintiffs' attorneys, no doubt realizing the difficulty under which the court would labor in undertaking to pass upon this exception without knowing the contents of the letter, have incorporated in their written argument before this court such parts of said letter as they supposed were material for our consideration. This court cannot, however, consider any facts not appearing in the "case." It is true that, in the argument upon circuit, plaintiffs' attorneys stated a part of the contents of such letter; but, while not doubting for a moment the correctness of that statement, it cannot be regarded as evidence in the case. This exception is therefore overruled.

2. The second exception relates to the testimony of the deed. The witness Henry G. Guerry testified: "I had a conversation with James L. Beard about the property in dispute about the year 1852 or 1853, and he offered to sell me the premises. I then examined the records in the R. M. C. office, Richland county, and found that the property was entailed." Upon objection being made to the witness testifying as to the records, his honor said: "I was inclined to allow secondary evidence on the showing submitted, but I cannot allow this witness to speak of what he saw in the books in the R. M. C. office. The only way a record of that court can come into this court at all is by the mode provided by law, which is that a notice, so many days beforehand, shall be given to produce the paper, and, in case of nonproduction, use the office copy. If that



book itself were here to-day, it would be no evidence in regard to the contents of that deed. There must be a notice that you intend to introduce it, and you are confined to that notice. I have had books brought in, and ruled out. If you can't prove by the books themselves, I don't see how you can prove it by a witness who saw that book." It will be observed that his honor did not reject the testimony because he was not satisfied with the showing made that the deed was lost. The loss of a paper is always a preliminary question, addressed to the discretion of the presiding judge, and his ruling is not ordinarily the subject of review by this court. The presiding judge ruled the testimony incompetent on other grounds, however, that can be reviewed by this court. As a general proposition, the rule announced by the presiding judge is correctly stated. This case falls under a different rule, because the record of the deed has been destroyed by fire. The offer of testimony was not intended as an attempt to comply with the requirements of the statute as to the introduction of an office copy of the record, but as the best evidence, though secondary, of which the case, in its nature, was susceptible. If the presiding judge had ruled that the plaintiffs had it in their power to produce a higher degree of evidence than that offered, this, being a preliminary question, could not have been considered on appeal, unless it appeared that the discretion of the presiding judge had been abused. No objection was made to the testimony on this ground, and it was not rejected by the circuit judge on such ground. After proof of the loss of a deed, the next step is to prove its existence; then its contents. *State v. McCoy*, 2 Spears, 714. Section 818, Rev. St. 1893, provides that "before any deed or other instrument in writing can be recorded in this state, the execution thereof shall be first proved by the affidavit of a subscribing witness to said instrument taken before some officer within this state competent to administer an oath." It thus appears that, before a deed can be recorded, its execution must have been proved in the solemn manner just stated. The fact, therefore, that the deed was recorded, after its execution had necessarily been proved as required by law, was evidence of the existence of the deed. *Culpepper v. Wheeler*, 2 McMul. 68.

We will now consider whether the testimony should have been received to prove the contents of the deed. The question as to the loss of the deed, or that the plaintiffs could have produced better testimony, is not before us. The sole question, then, for our consideration, is whether, under the circumstances of this case, the testimony was competent to prove the contents of the lost deed. In the case of *Hunter v. Glenn*, 1 Bailey, 542, the court says: "In general, any fact or circumstance which leads the mind to the affirmative or negative of any given proposi-

tion constitutes proof; but when it is certain or even probable that more conclusive or satisfactory evidence exists, and is in the power of the party to produce, the mind is not satisfied with slight and doubtful circumstances; and hence the rule that the best evidence of which the case is susceptible is always required. If a contract be in writing, and in the power of the party, that must be produced, because it is more certain than memory. For the same reason, it must be proved by the subscribing witness, if there be one. If there be none, then proof of the handwriting is the next best. If the party whose handwriting is required to be proved is not accustomed to write much, and it is for that cause impossible to prove it, other circumstances would be admissible; but for the reason before given, to let in inferior proof, the party offering it must show that no higher is in his power." See, also, *Riggs v. Tayloe*, 9 Wheat. 483; *Renner v. Bank*, Id. 581; *Winn v. Patterson*, 9 Pet. 663; 1 Greenl. Ev. § 84; and note; and see Id. § 558. If his honor was satisfied that the deed was lost, and that the plaintiffs did not have it in their power to produce higher evidence than that offered by them as to the contents of the deed, then the testimony was competent, and the witness should have been allowed to testify what the record of the deed contained. This exception is sustained.

3. It seems that the declarations of Mrs. Wolfe, mentioned in the third exception, were made after she had conveyed the land and surrendered possession. Her declarations were therefore inadmissible. *Renwick v. Renwick*, 9 Rich. Law, 53; *McCord v. McCord*, 3 S. C. 577. The third exception is overruled.

We come now to a consideration of the defendant's exceptions.

The first complains of error on the part of the circuit judge in refusing the motion for a nonsuit. The following appears in the case: "Mr. McMaster made a motion for nonsuit, upon the ground 'that plaintiffs had failed to prove that any deed was ever in existence, and that they are not suing as heirs at law; the proper parties are not before the court; that the plaintiffs' whole case depends on the transfer of title, and defendant holds title and possession.' The Court: They have proved a long possession, over twenty years, by Mrs. Mary Anne Wolfe, and that these parties are some of the heirs at law. Mr. McMaster: They have proved that Mrs. Wolfe died in '50. The Court: How long does this witness say that Mrs. Mary Anne Wolfe was in possession? Mr. Crawford: From twenty-five to fifty years. The Court: As I understand it, twenty years proves a grant from the state. I have, on motion of the defendant, ruled out everything showing that Mrs. Wolfe ever made a deed. Now we are faced with this proposition: that Mrs. Wolfe was in possession of that land, and is presumed to have title—a grant

from the state—by virtue of her twenty years' possession, and that these plaintiffs are her heirs at law. Any question of limitation in this matter of defense I cannot rule upon now. I refuse a nonsuit." This court is satisfied that the motion for a nonsuit was properly refused, and the first exception is therefore overruled.

In regard to the requests to charge mentioned in the other exceptions, the circuit judge said: "There have been a good many requests to charge submitted, but, in the view I take of it, I propose to charge you generally, without saying anything about them. If I am in error, the error can be corrected as well that way as any other." To determine to what extent the presiding judge refused said requests would require a critical examination of the entire charge, which, we think, is unnecessary, as the case must be remanded for a new trial on another ground.

The defendant's attorneys also gave notice that they would, in the argument of the cause on appeal, endeavor to sustain the rulings of his honor as to the admissibility of the testimony of Guerry and Henry L. Beard, on the further ground that said testimony was incompetent, under section 400 of the Code. Waiving all objection as to the form of the notice, it is sufficient to say that no such objection was made on circuit.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded for a new trial.

(43 S. C. 428)

#### RIVERS v. GOODING.

#### SAME v. RIVERS.

(Supreme Court of South Carolina. March 29, 1895.)

#### DOWER—DEVISE IN LIEU.

Testator, after devising a tract of land to each of his two nephews, provided that one of them should keep together his entire property, and support his wife during her life or widowhood out of the proceeds, and also gave the wife all cash on hand at testator's death. *Held*, that the provisions for the wife were not in lieu of dower in the lands devised the nephews.

Appeal from common pleas circuit court of Hampton county; D. A. Townsend, Judge.

Actions by Rebecca H. Rivers, now heiress, against Annie E. Gooding, guardian of Mary Ann Rivers, and against N. D. Rivers, guardian of R. M. D. Rivers. There was a judgment in each case for plaintiff, and defendants appeal. Affirmed.

The will referred to in the opinion was as follows: "I, Franklin D. Rivers, of the county and state aforesaid, being of sound and disposing mind, and knowing the uncertainties of life, do make, ordain, and publish this, my last will and testament, in manner and form following, thereby revoking all former wills by me made at any time heretofore: First of all, I desire to commit my soul to God, who gave it, and my body to be buried in a Christian-like manner, and all

expenses for said purposes paid from my cash money in hand. Then I desire that my executor, hereinafter named, shall pay all my just debts from my estate. For and in consideration of the love and affection which I bear and have for my nephew George Thomas Rivers I give and bequeath to him my entire home tract of land, where I live, containing 255 acres, more or less, as is designated on plat drawn for me by R. J. Manker, surveyor, September 6, 1877, 'A,' and bounded on the north by lands of C. M. Rivers and John M. Rivers, on the east by lands of John M. Rivers, on the south by lands of my 'B' tract on said plat, and on the west by lands of John M. Rivers and Steinmeyer & Stokes; together with my two mules, Dunk and Etta, my stock of neat cattle, the brand and mark, my whole stock of hogs, with mark, my entire stock of plantation tools, plows, and gears, wagon, sugar mill, sugar bollers, household and kitchen furniture, and my entire stock of provisions on hand, together with my entire crop or crops that may be made or grown on my place this year. It is further my will that my nephew George Thomas Rivers keep my entire property together during the life of my wife or her widowhood; and it is further my last will and testament that my wife, Rebecca H. Rivers, remain, as she now lives, on my place at home, during her natural life or widowhood, and that the said George Thomas Rivers is to protect and support her during such life or widowhood comfortably, out of the proceeds of my estate, without any expense or trouble to my wife; and in case my wife, Rebecca H. Rivers, and my nephew George Thomas Rivers, cannot live agreeably, it is my will and pleasure that my nephew George Thomas Rivers provide a home for himself or for my wife to live comfortably in on my place, and to continue to support and protect her during her natural life or her widowhood; and, in case my wife should marry after my death, then all claims of protection or support from my nephew George Thomas Rivers shall cease, and all provision in my will for her support cease, except that it is my will and pleasure that my wife take as her own all the cash money I have on hand, after paying the expenses of making and harvesting my present crop. It is further my will that should my nephew George Thomas Rivers die before he reaches the age of manhood or twenty-one years, or die leaving no lawful issue after arriving at such age, it is further my will and pleasure that my nephew Jacob Henry Rivers take possession of my property or estate hereinbefore named, and be my lawful heir; and, should he get possession during the life of my wife or during her widowhood, every part and sentence of my will enjoined upon my nephew George Thomas Rivers for the support and protection of my wife during her natural life or widowhood is as strictly enjoined on my nephew Jacob Henry Rivers. It is further my will and

pleasure that my nephew Jacob Henry Rivers shall have the mule I bought him this year, and that any obligations given for it shall be canceled. It is also my will that my nephew W. M. D. Rivers, son of my brother, J. Martin Rivers, shall have in fee simple that tract of land I bought from my brother, J. Martin Rivers, and containing 228 acres, and is designated on plat drawn for me by R. J. Manker, September 6, 1877, as 'B,' and bounded as follows: On the north by my home tract of 255 acres and said plat marked 'A' that I have willed to my nephew George Thomas Rivers, on the east by lands of John M. Rivers and George H. Hoover, on the south by lands of R. H. Dewitt, Mrs. Walling, George H. Hoover, and Benj. R. Lewis, and on the west by Steinmeyer & Stokes and John M. Rivers. It is further my will and pleasure that should my nephew W. M. D. Rivers die before arriving of age (twenty-one years), or after arriving at such age, leaving no lawful issue, the tract of land 'B' is to go to my brother, J. Martin Rivers, and, in case he is not living, it shall be equally divided among his surviving heirs. And 'tis further my will and pleasure that my brother, J. Martin Rivers, qualify and act as guardian for my nephew, W. M. D. Rivers, his son; take charge of the tract of land 'B' that I have willed him, until he arrives of age. It is further my last will and testament that should my nephew George Thomas Rivers die leaving lawful heirs, before any of the said heirs arrive at the age of discretion or legal age, that my nephew Jacob Henry Rivers take charge of the property willed to my nephew George Thomas Rivers, and manage to best advantage said property, duly observing my will in every particular, until the oldest child of George Thomas Rivers becomes of age, when he is by my will to be relieved of further care or control of said property. It is further my last will and testament that I nominate and appoint C. M. Rivers and J. W. Rivers my sole executors of my last will and testament, charging them with the execution of the provisions in my will above stated, with full power to take moneys enough out of my cash money on hand to pay all expenses incurred settling my will. In witness," etc.

E. F. Warren and A. M. Boozer, for appellants. W. S. Tillinghamst, for respondent.

McIVER, C. J. These two cases, based upon the same facts substantially, and involving the same questions of law, were heard and will be considered together. The only question presented is whether the defendant is barred of her dower by reason of her acceptance of the provision made for her by the will of her first husband. A copy of this will should be incorporated in the report of this case, as we only propose here to state what we understand to be the provisions therein made for the demandant. The testator, after

providing for the payment of his debts and funeral expenses, devises to his nephew George Thomas Rivers his home tract of land containing 255 acres, more or less, designated on the plat therein referred to by the letter "A," together with two mules, stock of cattle and hogs, besides other personal property therein specified, and then proceeds as follows: "It is further my will that my nephew, George Thomas Rivers, keep my entire property together during the life of my wife or her widowhood; and it is further my last will and testament that my wife, Rebecca H. Rivers, remain, as she now lives, on my place at home, during her natural life or widowhood, and that the said George Thomas Rivers is to protect and support her during such life or widowhood comfortably out of the proceeds of my estate, without any expense or trouble to my wife; and, in case my wife, Rebecca H. Rivers, and my nephew, George Thomas Rivers, cannot live agreeably, it is my will and pleasure that my nephew George Thomas Rivers provide a home for himself or for my wife to live comfortably in on my place, and to continue to support and protect her during her natural life or her widowhood; and, in case my wife should marry after my death, then all claims of protection or support from my nephew George Thomas Rivers shall cease, and all provision in my will for her support cease, except that it is my will and pleasure that my wife take as her own all the cash money I have on hand, after paying the expenses of making and harvesting my present crop." In a subsequent clause the testator devises to his nephew W. M. D. Rivers another tract of land, containing 228 acres, more or less, designated on the plat above mentioned by the letter "B." It is conceded that the demandant continued to live on testator's home place, after his death, for nearly three years, and until her intermarriage with her present husband, N. T. Hiers, deriving her support and maintenance therefrom. The provision made for her in the will having ceased, upon her second marriage, by the express terms of the will, she instituted these two actions in the court of probate, claiming dower out of the two tracts of land above referred to as designated by the letters "A" and "B." Her claims of dower having been allowed by the judge of probate, the defendants respectively appealed to the circuit court, where the decrees of the court of probate were affirmed, and judgment rendered accordingly. From these judgments defendants again appealed to this court upon the several grounds set out in the record, which need not be repeated here, as they practically raised only the single question, to wit, whether the demandant, by accepting the provision made for her in the will of her first husband, has barred her claim of dower.

It is well settled that dower is a highly favored right, which, inchoate during coverture, becomes a vested estate in the wife immediately upon the death of her husband, over

which he has no more control than he has over any other separate estate of his wife. It follows, therefore, that when the husband undertakes to devise any real estate of which he was seised during coverture, it must be presumed that such devise is made subject to the wife's right of dower, for it would be absurd to suppose that he intended to devise that over which he has no control, and no right to dispose of. But, while this doctrine is universally recognized, the law also recognizes the power of the husband, by proper provisions for that purpose in his will, to put his wife to her election whether she will take the provision made for her in the will or insist upon her legal right of dower; and if, in such a case, she elects to take the provision made for her in the will, she loses her right of dower; not, however, by any act of her husband, but only by reason of her voluntary surrender of such right. In other words, where the husband, by his will, practically says to his wife, "I recognize fully your right to dower in a given tract of land, and concede that I have no power to deprive you of such right, but, as I wish to give the entire estate in that land to my son, freed from your recognized right of dower therein, I will make another provision for you in lieu of that right." In such a case the wife is put to her election whether she will agree to the terms proposed; and, while she cannot be compelled to surrender her claim of dower, yet, if she accepts the provision made for her in lieu of such claim, she is regarded as having voluntarily surrendered her right of dower, as she cannot, in the case supposed, claim both. But, in order to put the wife to her election, it must appear upon the face of the will, either in express terms or by necessary implication, that the testator intended to annex as a condition to the provision made for the wife that she should surrender her right of dower. As is said by Lord Redesdale in *Birmingham v. Kirwan*, 2 Schoales & L., at page 452: "It is, however, to be collected from all the authorities that, as the right to dower is in itself a clear legal right, an intent to exclude that right by voluntary gift must be demonstrated either by express words or by clear and manifest implication. If there be anything ambiguous or doubtful, if the court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported. And to make a case of election that is necessary, for a gift is to be taken as pure until a condition appears." To same effect, see remarks of Dargan, Ch., in his circuit decree in *Cunningham v. Shannon*, 4 Rich. Eq., at pages 139, 140, which, as to this point, were affirmed by the court of appeals. Indeed, these general principles do not seem to be anywhere disputed, the only difficulty being in their application to the facts of any given case. In the present case it is not pretended that the will contains anything like an express declaration that the provision made

for his wife was intended to be in lieu of her dower, and the only inquiry is whether there is anything in the will clearly and manifestly implying that there was any such intention. The test of this is said in *Callahan v. Robinson*, 30 S. C., at page 254, 9 S. E. 120, quoting from the previous case of *Hair v. Goldsmith*, 22 S. C. 566, to be "whether the two are so manifestly repugnant that they cannot stand together"; that the provision in the will is so manifestly repugnant to the right of dower that the two cannot stand together. We confess that in this case we do not see any such repugnance. The right of dower, when it becomes vested, is an estate, and we do not understand that by the terms of this will any estate or interest of any kind in any property is given to the wife except in the cash on hand, which is not in question here. The only provision made for her is that she shall be allowed to "remain, as she now lives, on my place at home, during her natural life or widowhood," and that she is to be provided with a support by George Thomas Rivers "out of the proceeds of my estate," for which purpose he is directed to "keep my entire property together during the life of my wife or her widowhood." No estate or property of any kind is given to the wife, except the cash above referred to, for tract "A" is given directly to George Thomas Rivers, and tract "B" is given directly to another nephew, W. M. D. Rivers. The provision for the wife seems to have been in the nature of an annuity for her life or widowhood, charged upon the "entire property" of the testator, with a permission for her to live upon the home place with the nephew George Thomas Rivers, if agreeable to both parties, but, if not, that the nephew shall provide another house on the same place, either for himself or for the wife. There was no life estate in any of the property given to the wife, and hence the point decided in *Wilson v. Hayne*, *Oheves*, 37; *Caston v. Caston*, 2 Rich. Eq. 1; and *Cunningham v. Shannon*, *supra*,—does not arise. As we have said, the provision for her was rather in the nature of the annuity; so that the question is whether a provision of that kind necessarily, or even clearly and manifestly, implies an intention to exclude the claim of dower. That point has been distinctly decided in the case of *Holdich v. Holdich*, 2 *Younge & O. Ch.* 18, recognized in *Cunningham v. Shannon*, *supra*, where it was held that a gift of an annuity to the testator's widow, although charged on all the testator's property, is not sufficient to put her to her election, and the widow's claim of dower was allowed. Inasmuch as the judgment below was rested largely, if not entirely, upon the case of *Sumerel v. Sumerel*, 34 S. C. 85, 12 S. E. 932, as conclusive of this case, we think it necessary for us to say that we cannot accept that view. In that case dower was not claimed out of the land which seemed to have been set apart for the benefit of the widow, but out of two other tracts, which were

directed to be sold, and the proceeds divided between those of the brothers and sisters of testator who were given no interest whatever in the tract of land from which the widow of testator was to derive her support. There was, therefore, no question in that case, as there is here, as to whether the widow was entitled to dower in the tract of land from which she was to derive her support, and hence we do not regard that case as decisive of this. But, having reached the same result as that reached by the circuit judge, for the reasons we have set forth the judgment of this court is that the judgment of the circuit court be affirmed.

(43 S. C. 410)

## STATE v. WAY.

(Supreme Court of South Carolina. Jan. 18, 1895.)

CRIMINAL LAW—NEW TRIAL AFTER APPEAL—  
AFTER-DISCOVERED EVIDENCE.

After the supreme court affirmed a conviction of murder, and directed a new day to be assigned for execution of the sentence, defendant moved for a new trial on the ground of after-discovered evidence. Upon appeal from an order refusing to hear the motion, it was adjudged that defendant have leave to apply to the circuit court for a new trial, and that the appeal be suspended pending the result of the motion. *Held*, that it was the duty of the circuit court, in accordance with this order, to hear the testimony offered, decide such motion on its merits, and certify the result to the supreme court.

Appeal from general sessions circuit court of Orangeburg county; I. D. Witherspoon, Judge.

Jeff M. Way was convicted of murder, and appealed. The judgment having been affirmed, defendant made a motion for a new trial upon the ground of after-discovered evidence. From an order granting a hearing upon such motion, the state appeals. Affirmed.

Solicitor Jervey, for the State. S. G. Mayfield, for respondent.

McIVER, C. J. Upon the hearing of this appeal, this court is satisfied that the circuit judge, in his order appealed from, of May term, 1894, in said county, properly construed the order of this court herein, dated the 2d day of January, 1894, and did not err in holding that it was his duty thereunder to hear the motion made by the defendant for a new trial on the ground of after-discovered testimony. The reasons for this conclusion will be set forth in the opinion of this court hereinafter to be filed. It is therefore, on motion of respondent's attorney, ordered and adjudged that this appeal be dismissed, and the case remitted to the circuit court for the purpose of its hearing such motion for a new trial on the ground of after-discovered testimony, according to said order of this court, and that the clerk of this court do forthwith send down to the court below a copy of this order, duly certified.

(March 18, 1895.)

GARY, J. The defendant having been convicted of murder, and sentenced to death, an appeal was taken to the supreme court, which court, after argument, sent down the following remittitur: "It is adjudged by the court that the judgment of the circuit court be affirmed, and that the case be remanded to the circuit court for Orangeburg county for the purpose of having a new day assigned for the execution of the sentence heretofore imposed." 17 S. E. 39. In accordance with which, at the May term, 1893, the mandate of the supreme court was carried out, and a new day assigned for execution. Thereafter, to wit, at the September term of the court of general sessions for Orangeburg county, the defendant, through his counsel, moved for a new trial on the ground of after-discovered evidence, whereupon his honor, Judge Norton, after reciting the previous history of the case, ordered and adjudged as follows: "After argument by counsel as to my jurisdiction to hear the motion, I decline to hear the motion, for the reason that the circuit court has no jurisdiction to hear a motion for a new trial on the ground of after-discovered evidence after an appeal to the supreme court, and an affirmance of the judgment appealed from, and the case has been remanded for the purpose of assigning a new day for the execution of the sentence, and such new day has been assigned by the circuit court. My reasons for refusing to hear the motion in the case at bar are the same assigned by me in the case of State v. Turner, recently heard by me on a similar motion, and which has recently been passed upon and sustained by the supreme court. [17 S. E. 752, 885.] I am unable to distinguish between the present case and the case of State v. Turner, above referred to, in so far as the motion for a new trial is concerned; and, upon the authority of that case, I decline to hear the motion, as, from my view, I have no jurisdiction." An appeal having been taken from this order by the defendant, it came up to be heard by the supreme court at the November term, 1893, whereupon a motion was made by the appellant that the appeal be suspended, and that the defendant have leave to apply to the circuit court for a new trial on the ground of after-discovered evidence. Chief Justice McIver, delivering the opinion of the court (40 S. C. 297, 18 S. E. 676), said: "But as the supreme court has not been invested with power to determine questions of fact, except in a class of cases to which the present case does not belong, and as the determination of a motion for a new trial on the ground of after-discovered evidence necessarily involves the determination of questions of fact, though questions of law also may sometimes be involved, it is very obvious that this court has no power to decide such a motion. And, as the circuit court cannot exercise any jurisdiction in a case while an appeal is pending, the practice has been adopted, from the ne-

cessity of the case, of suspending the appeal for the purpose of enabling the moving party to apply to the circuit court—a tribunal which is invested with the power to determine questions of fact—for a new trial upon the ground of after-discovered evidence, provided a proper showing is made to this court for that purpose. The only inquiry for this court is whether the appellant has made a prima facie showing, leaving it entirely for the court to determine whether the showing made is sufficient, uninfluenced by the fact that this court has determined that a prima facie showing has been made here, for such prima facie showing may be rebutted or overthrown by the showing before the circuit court. \* \* \* It is therefore ordered that the appellant have leave to apply to the circuit court for a new trial upon the ground of after-discovered evidence, and that the result of such motion be certified to this court by the circuit judge before whom the motion is made, and, for this purpose, that the present appeal be suspended until the coming in of such certificate." In accordance with this mandate, at the May term, 1894, of the court of general sessions, the defendant did apply to the said court for a new trial on the ground set forth before the supreme court. Whereupon, objection being made by the solicitor, on the several grounds set forth in the exceptions, to the jurisdiction of the circuit court to entertain such motion, his honor, Judge Witherspoon, after argument, ordered and adjudged as follows: "This case came before me on a motion by the defendant for a new trial on after-discovered evidence. The solicitor on behalf of the state objected to the hearing of the motion on the ground that this court had no jurisdiction to hear such motion. After due consideration of the remittitur herein, and the order of the supreme court suspending the appeal and granting the defendant leave to apply to the circuit court for a new trial upon the ground of after-discovered evidence, and after argument of counsel, I feel constrained to hold that it is the duty of this court to entertain the motion." The solicitor having excepted and given notice of appeal in open court, the presiding judge ordered that further proceedings in the circuit court be stayed until the determination of the appeal upon this question. The solicitor appealed upon eight exceptions, which raised practically but the single question, did the circuit judge correctly construe the order of the supreme court? It was the object of the supreme court, in suspending the hearing of the appeal and granting the defendant leave to make a motion in the circuit court for a new trial on the ground of after-discovered evidence, that the circuit court, on such motion being made, should hear the testimony offered, decide said motion on its merits, and certify the result to this court. The circuit judge was correct in his construction of said order, and the exceptions are overruled. The order in accordance with these views has already been filed.

(43 S. C. 426)

POWELL v. ROBERSON et al.  
(Supreme Court of South Carolina. March 23, 1895.)

## REVIEW ON APPEAL.

The conclusion reached by the trial court on questions of fact alone will not, on appeal, be disturbed, unless it is without evidence to sustain it, or is contrary to the overwhelming weight of the testimony.

Appeal from common pleas circuit court of Alken county; J. J. Norton, Judge.

Action by Mary A. Powell against William Roberson and others to foreclose an equitable mortgage. Defendant James Powell appeals from a judgment denying him affirmative relief against his codefendant Caesar Moore. Affirmed.

The following are the exceptions of James Powell: "Take notice that the defendant James Powell appeals from the decree of his honor, Judge Norton, herein, to the supreme court of this state, and will move said court to reverse the same upon the following grounds, to wit: (1) That from the evidence it appears that the defendant Caesar Moore is indebted to the defendant James Powell, by the condition of the bond, in the sum of one hundred dollars, with interest at 10 per cent. per annum from July 29, 1889, and that his honor erred in not so finding. (2) That it further appears from the evidence that the bond was conditioned so that the defendant Caesar Moore would pay unto said James Powell all future notes that he might owe unto him, to the amount of one hundred dollars, with interest thereon at 10 per cent. per annum. That it appears by the clear weight of the evidence that said Caesar became indebted to James Powell, since the execution of said bond, in the sum of seventy-five dollars on a note dated February 26, 1890, and also upon a note dated June 6, 1890, for ten dollars, and also upon a lien for twenty dollars dated April 11, 1892. That it appears from the evidence that said obligations were due to said Powell and unpaid, and his honor erred in not so deciding. (3) That his honor erred in finding that Caesar Moore had paid his indebtedness to James Powell, for each finding is against the weight of the evidence. (4) That his honor erred in finding that the lien to Shade Woodward was void; for it is submitted that, while it may have been void as to some subsequent creditor who might attempt to force a junior lien, yet as against the lienor it is a valid debt, because he would be estopped from denying the same; and his honor erred in not deciding the same to be valid."

The following are the exceptions of Robert Moore: "Following up the notice of appeal herein, the defendant Robert Moore will ask the supreme court to reverse the decree of his honor, Judge Norton, upon the following grounds, to wit: (1) It is respectfully submitted that his honor erred in finding that Stepney Moore settled upon the tract of land, the subject of this action, soon after the war,

and that he had bought said land from De Caradeux. (2) That his honor erred in finding that the children of Stepney Moore had ever held the possession of the land, or exercised any rights of ownership over it, as the heirs at law of their father. (3) That there was no evidence showing that De Caradeux or Stepney Moore ever had legal title to said tract of land, and that the circuit judge erred in so finding. (4) That the evidence conclusively shows that Robert Moore, Sr., and his legal representatives, held the land adversely for more than twenty years; and the circuit judge erred in not so finding. (5) Because it appears from the evidence that Robert Moore, the elder, held the lands in question adversely in his own right from the date of the assignment of the tax deed up to his death, and that after his death his heirs at law continued to hold the same adversely for a period sufficient to give them a good title under the statute of limitations, and hence Robert Moore, the younger, has a good title by such possession to an undivided one-third part thereof in fee; and his honor erred in not so finding."

Croft & Chafee, for appellant. O. C. Jordan, for respondent Robert Moore. Bates & Simms, for respondent Caesar Moore.

McIVER, C. J. The plaintiff brought this action to foreclose an equitable mortgage held by her against the defendants William and Sarah Roberson, and the other defendants were made parties as having or claiming some interest in the mortgaged premises. The judgment being satisfactory to the plaintiff, as well as to the two defendants against whom she prayed for foreclosure, there is no appeal upon the part of either of these parties, and hence that branch of the case need not be further stated or considered. The defendant Robert Moore, however, did appeal, but, as his appeal was dismissed under rules 8 and 11 of this court, it requires no further consideration. The defendant Powell in his answer set up a claim for affirmative relief against his codefendant Caesar Moore, and, his claim having been dismissed by his honor, Judge Norton, he appeals upon the several grounds set out in the record. This claim of said Powell was for the foreclosure of a mortgage, to which the defendant Caesar Moore pleaded payment and satisfaction of the mortgage debt, which plea of payment was sustained by the circuit judge. All of the grounds of appeal taken by Powell, with the exception of the fourth, which was abandoned on the argument here, present nothing but questions of fact, pure and simple, and, under the well-settled rule, the conclusion reached by the circuit judge will be accepted by this court unless it is without any evidence to sustain it, or is contrary to the overwhelming weight of the testimony. Now, it is very clear that the conclusion reached by the circuit judge is not without any evidence to support it, for

not only Caesar Moore himself testifies to full payment, but he also produces a disinterested witness who testifies to the same effect. It is equally clear that Judge Norton's conclusion is not against the overwhelming weight of the evidence, for, on the contrary, a careful examination of the evidence convinces us that the weight of the evidence is in favor of the view adopted by the circuit judge. To the explicit and positive testimony of Caesar Moore, and that of his disinterested witness, Sam Gantt, who seems to have acted as an agent for Caesar Moore in making the settlement with Powell, the latter makes no "very clear denial," as the circuit judge expresses it. On the contrary, he speaks indefinitely. For example, when asked about the settlement testified to by Sam Gantt, when he, Powell, cast up the account of Caesar Moore, and ascertained that the balance due him was \$48, which was settled by his agreeing to take the horse at \$55, and account for the overplus, — \$7,—he says: "Never made any such settlement, unless it was to settle open accounts, or something that way." The whole testimony of Powell impresses us as being more of an argumentative than of a positive character, and characterized by an indefiniteness, which might have been made more definite by the production of his books, which he admits he kept, especially when he speaks of certain payments, claimed by Caesar Moore to have been made on the mortgage, as having been made on the open accounts. He seems to argue from the fact that he retained the possession of the mortgage, which he says was never demanded of him, though Sam Gantt testifies explicitly to the contrary, that the mortgage could not have been paid; and he argues that, as it was his custom to give receipts, he could not have given one, as Sam Gantt distinctly swore he did, upon the final settlement of the balance of \$48, which receipt had been lost. Without noticing other instances in which there is clearly a conflict in the testimony, it is sufficient to say that where there is a conflict of testimony this court will rarely, if ever, disturb the finding below; and we certainly will not do so in this case, where we think the preponderance of the evidence was in favor of the respondents. The judgment of this court is that the judgment of the circuit court be affirmed.

(43 S. C. 398)

#### DUNN v. TOWN COUNCIL OF BARNWELL.

(Supreme Court of South Carolina. March 26, 1895.)

#### CITIES—LIABILITIES—DEFECTIVE STREETS.

Act 1892 (21 St. at Large, 91; Rev. St. 1893, § 1582), entitled "An act providing for a right of action against a municipal corporation by reason of defects in the repair of streets," provides that any person injured through a defect in any street, or by reason of defect or mis-

management of anything under control of the corporation, may recover actual damage sustained, provided that the corporation shall not be liable unless said defect was occasioned by its neglect or mismanagement. *Held*, that the city is only liable for injuries caused by "defects" in the street, or by its mismanagement in making repairs of the street, and not for injuries to plaintiff's horse caused by its becoming frightened at merchandise negligently allowed to be displayed on the street.

Appeal from common pleas circuit court of Barnwell county; D. A. Townsend, Judge.

Action by Uriah Dunn against the town council of Barnwell. There was a judgment for defendants, and plaintiff appeals. Affirmed.

James E. Davis, for appellant. Bellinger, Townsend & O'Bannon, for respondents.

McIVER, C. J. The sole question presented by this appeal is whether the circuit judge erred in sustaining a demurrer to the complaint, based upon the ground that the facts stated therein are not sufficient to constitute a cause of action. To determine this question it is necessary first to ascertain what are the facts stated in the complaint. Omitting the merely formal allegations, these facts are substantially stated: (1) That it is made the duty of defendants to keep the streets of the town "in good order, to cause to be removed therefrom all obstructions of whatever kind, so that persons traveling thereon might pass and repass with safety." (2) That a certain street in said town, known as "Main street," "was and is much used by the citizens thereof and the public generally, so much so that said duty of said defendants becomes a matter of public concern." (3) That on the 23d of September, 1893, the defendants "negligently allowed to be placed and maintained in said street, at a point where the same was very narrow, a dangerous obstruction, commonly called a 'booth,' or long table on which they allowed persons to display goods, wares, and merchandise for sale, and by maintaining the same there the said street was rendered unsafe to persons riding or driving thereon." (4) That on the day above mentioned "the defendants negligently allowed the narrow pass in said street, caused as aforesaid, to be thronged with vehicles of various kinds, and to remain therein for an unreasonable time, and the plaintiff, who was at the time the owner of a valuable horse, of the value of one hundred and fifty dollars, and while the same was being ridden along said street, without any fault on the part of the plaintiff, and while attempting to ride between said throng and booth, or table, as aforesaid, which was the only apparent safe way along said street at said time, the said horse became greatly frightened at the flaming goods displayed at and upon said table, and ran against the point of a buggy shaft, which was congregated in said street as aforesaid, seriously injuring said horse, and causing its death, to the damage of the plaintiff one hundred and fifty dollars."

Inasmuch as it is the settled law of this

state that a municipal corporation, charged by its charter with the duty of keeping in proper repair the streets or public highways within the corporate limits, is not liable to a civil action for damages, at the suit of an individual who has sustained an injury, either in person or property, by reason of a failure on the part of the corporation to perform such duty, in the absence of a statute imposing such liability, we must next inquire whether we have any statute upon the subject, and, if so, what are its terms. The statute referred to, and relied upon by the appellant as authorizing the action, is the act of 1892 (21 St. at Large, 91), incorporated in Rev. St. 1893 as section 1532. The terms of that statute are as follows: "That any person who shall receive bodily injury or damages, in his person or property, through a defect in any street, causeway, bridge or public way, or by reason of defect or mismanagement of anything under control of the corporation, within the limits of any town or city, may recover in an action against the same, the amount of actual damage sustained by him by reason thereof. If any such defect in a street, causeway or bridge existed before such injury or damage occurred such damage shall not be recovered by the person so injured if his load exceed the ordinary weight: Provided. The said corporation shall not be liable unless said defect was occasioned by its neglect or mismanagement." The second proviso, relating, as it does, to contributory negligence, not being pertinent to the present inquiry, need not be set out. It is apparent from the title of this act, as well as from the terms used in the body of the act, that the sole purpose was to give a person who had sustained an injury by reason of a defect in a street a right of action to recover damages for such injury. The title of the act is as follows: "An act providing for a right of action against a municipal corporation for damage sustained by reason of defects in the repair of streets, sidewalks and bridges within the limits of said municipal corporation." And it is manifest that the purpose thus declared in the title was adhered to in the body of the act; especially from the language used in the proviso above set out, where it is declared that the corporation should not be liable "unless said defect was occasioned by its neglect or mismanagement," indicating very clearly that the term "mismanagement," as used in a previous part of the act, meant mismanagement in making repairs on the streets, so that the corporation should be held liable, not only for neglect in making the repairs on the street, but also for mismanagement of anything under the control of the corporation in making such repairs. There is nothing whatever in the act indicating an intention on the part of the legislature to make a municipal corporation liable for any other nonfeasance or misfeasance on its part, except such as was connected with the keeping of the streets, etc., in proper and safe repair. Now, in this case it is very apparent that there is no allegation



in the complaint that the injury complained of arose from, or was caused by, any neglect or mismanagement on the part of the defendants in keeping the streets of the town in proper and safe repair. On the contrary, the allegation is that the injury resulted from the fright taken by plaintiff's horse at certain objects exposed for sale in the streets of the town, and was not in any wise due to any fault of defendants in allowing any defects in the street to remain unrepaired, or any mismanagement in making the repairs. On the contrary, one of the allegations in the complaint is that there was an "apparent safe way along said street at said time," over which plaintiff could have safely passed but for the fright his horse took at certain goods, wares, and merchandise displayed for sale. This does not give the plaintiff any cause of action, either under the statute or at common law, as has been held by this court in several cases, when called upon to construe a previous statute of similar tenor, so far as the present question is concerned, though differing in some other respects not pertinent to the present inquiry. See what is said in *Acker v. Anderson Co.*, 20 S. C., at page 498, where, though the point was not decided, because not necessary to that case, yet a very strong intimation was thrown out in favor of our view. See, also, *Brown v. Laurens Co.*, 38 S. C. 282, 17 S. E. 21, and *Mason v. Spartanburg Co.*, 40 S. C. 390, 19 S. E. 15, where the point is decided. The cases from Massachusetts and Maine cited by respondents' counsel seem to support the same view. The judgment of this court is that the judgment of the circuit court be affirmed.

43 S. C. 389)

#### GARLINGTON et al. v. COPELAND.

(Supreme Court of South Carolina. March 26, 1895.)

#### INJUNCTION—DISSOLUTION—DAMAGES.

On the dissolution of an injunction enjoining a judgment creditor, on the ground of his insolvency, from collecting a judgment recovered in another action, sued out in an action by the judgment debtor to recover a claim against the judgment creditor, the injunction having been dissolved because of the debtor's failure to recover on his claim, the judgment creditor is not entitled to recover, as damages, attorney fees paid for an unsuccessful attempt to procure the dissolution of the injunction before the final hearing on its merits of the judgment debtor's claim.

Appeal from common pleas circuit court of Laurens county; Ernest Gary, judge.

Action by Mary Y. Garlington and another against George P. Copeland. From a judgment denying defendant damages on the dissolution of an injunction, he appeals. Affirmed.

The report of the master, referred to in the opinion, was as follows:

"The order of this court passed herein on the 20th day of May, 1890, provides, amongst other things, that said cause be, and the

same is hereby, referred to C. D. Barksdale, Esq., master for said county, to ascertain and report to this court what amount of damage said defendant has sustained by reason of said injunction, if any, with leave to report any special matter. References have been held under this order, and, they being now ended, I submit the following as my report:

"The facts necessary to be considered in determining the question involved, as to whether the defendant, Copeland, is entitled to recover any damage of plaintiffs on account of the injunction obtained by plaintiffs herein, are, to some extent, set out in the opinion of the supreme court in this case, as reported in 25 S. C., at pages 42, 43. It appears that the defendant, George P. Copeland, recovered a judgment about the 30th of August, 1884, against George F. Young, one of the plaintiffs herein, and the land of the said Young having been levied upon, and being about to be sold under said judgment, this action was commenced for the purpose of requiring the said George P. Copeland to account to these plaintiffs for the rents and profits of certain lands of plaintiffs, and to enjoin and restrain the enforcement of said judgment until the determination of this case upon its merits. On hearing the verified complaint, Judge Pressley passed an order requiring the said George P. Copeland to show cause why the injunction should not be granted. This rule to show cause was heard by Judge Cothran, who granted the order of injunction, stating his reasons therefor as follows: '(1) It is apparent that the defendant herein is greatly embarrassed, if, indeed, he is not insolvent. (2) Improvident action on my part would, in one event at least, seriously affect the rights and interest of the plaintiffs. (3) The matters involved are important and very complicated, and it is hazardous to determine such on the perfunctory proceedings by motion. (4) No injury to the defendant, other than such as may result from delay, can occur to him, which is not comparable to that which the plaintiffs may sustain if their claim is found to be meritorious. That would be irreparable. The other may be amply provided against by bond and security.' In compliance with this order, it seems that a bond was duly given and executed by these plaintiffs in the sum of five hundred dollars, though it is not produced here, because it seems it cannot now be found in the clerk's office. This order of Judge Cothran was appealed from by the defendant, Copeland, but the appeal was dismissed by the supreme court upon the ground that the order was not appealable. 25 S. C. 41. So the injunction stood as it was until the final determination of the suit upon its merits, which being in the defendant's favor, the injunction was then dissolved. It may be said here that the case was decided on the circuit in favor of the plaintiffs, and a judgment pronounced in their favor, for a considerable sum, against the defendant; but this judgment was re-

versed by the supreme court upon the single ground that plaintiffs' title to the land from which defendant had gotten the rents and profits was not complete before the commencement of the action. It is a fact that prior to the commencement of this action the defendant herein, George P. Copeland, made, executed, and delivered to Messrs. Holmes & Simpson a paper in the following words: 'I hereby authorize Messrs. Holmes & Simpson to collect the funds due me from George F. Young on judgment I have against him, and also the amount due me on the note against Hasting Dial's estate by R. P. Todd, and apply the same to the oldest judgments against me, and I hereby assign the same to them for that purpose.' This paper was dated 16th of October, 1884. The defendant, George P. Copeland, paid to his attorneys a fee of \$250 for the purpose of having the injunction dissolved, and he also paid them a fee of \$500 for other services in the case, but at what particular times these fees were paid does not appear from the testimony. The whole of the principal and interest which was due upon the judgment recovered by George P. Copeland against George F. Young, as aforesaid, was paid to Messrs. Holmes & Simpson, as the assignees thereof, after the determination of this case on its merits, who applied the proceeds thereof to the oldest judgments against the said Copeland, as provided by the terms of the said assignment. The defendant, Copeland, now claims that he has been damaged to the amount of the attorney's fee paid by him for the purpose of having the injunction dissolved, to wit, two hundred and fifty dollars, with interest. The foregoing are about the facts of this matter, as I understand them. I conclude, as matter of law, that the defendant is not entitled to recover of these plaintiffs any damages at all; and I will, as briefly as I can, state the reasons upon which I base this conclusion:

"(1) It is seen by the foregoing statement of facts that it was highly important to these plaintiffs that the defendant, Copeland, should not be permitted to proceed with the collection of his judgment against the plaintiff Young until this case was determined upon its merits, because if he was allowed to do so, and the court should finally render a judgment in favor of plaintiffs herein, such judgment would practically amount to nothing, for the reason, as stated by Judge Cothran in the restraining order, that the said Copeland was 'greatly embarrassed, if, indeed, he' was 'not' then 'insolvent'; and such being the case, if the injunction had not been granted, and the Copeland judgment had been forthwith collected in full, the injury to plaintiffs would have been 'irreparable,' in the event they succeeded in obtaining a judgment against Copeland in this action. And as we have seen, they very nearly succeeded in this, as the case was decided in their favor on circuit, which decision was reversed by the supreme court up-

on the single ground that their title was not perfect at the commencement of the action. The injunction, therefore, was not improperly, wrongfully, or improvidently sued out. Mr. High, in his work on Injunctions, on page 1061, in section 1685, lays down this proposition: 'A reasonable amount of compensation paid as counsel fees in *procuring the dissolution* of an injunction may be recovered in an action upon the bond, or in the assessment of damages in the injunction suit after dissolution, when that practice prevails, *if the injunction was improperly or wrongfully sued out*; the amount being limited to fees paid counsel for *procuring the dissolution*, and not for defending the entire case.' (Italics mine.) And in section 1686, p. 1063, he further says: 'The allowance of counsel fees as damages upon dissolving an injunction is based upon the fact that defendant has been *compelled* to employ aid in ridding himself of an *unjust* restriction, which has been placed upon him by the action of plaintiff. And the true test with regard to allowance of counsel fees as damages would seem to be that if they are *necessarily* incurred in *procuring the dissolution* of the injunction, *when that is the sole relief sought by the action*, they may be recovered; but if the injunction is only *ancillary* to the principal object of the action, and the liability for counsel fees is incurred in defending the action generally, *the dissolution of the injunction being only incidental* to that result, then such fees cannot be recovered. Thus, where the principal purpose of the action was to adjudicate a question of title, and an interlocutory injunction was obtained, but no motion was ever made or argued for its dissolution, and the case was finally tried upon its merits upon the question of title, and decided in favor of defendants, and the injunction was thereupon dissolved by virtue of the judgment upon the main controversy, it was held that counsel fees for dissolution could not be recovered in an action upon the bond.' (Italics mine.) See, also, to the same effect, Suth. Dam. pp. 64-69, and the case of Oelricks v. Spain, 15 Wall. 211, cited by both Mr. High and Mr. Sutherland, and by our own supreme court, in the case of Hill v. Thomas, 19 S. C. 236, 237. These authorities seem to me to be conclusive of the matter. The injunction here was only ancillary to the principal object of the action, and was really only dissolved as a necessary consequence of the judgment upon the main controversy, and when that judgment had been rendered. It was never dissolved before. It is true an effort was made to dissolve it by appealing from the order to the supreme court, but, as we have seen, that court dismissed the appeal upon the ground that the order was not appealable; that the law does not provide for an appeal from such an order. It was a mistake then to take that step, and it was for services rendered in and about this mis-

taken effort to dissolve the injunction that the defendant paid his attorneys the fee of \$250, which he now claims as damages, as I understand the testimony. Having taken that step improperly, and in the face of the provisions of the law on the subject, and having failed to dissolve the injunction, that expense, as it strikes me, was unnecessarily incurred; and the matter stood as if he had never made any motion to dissolve the injunction, so far as plaintiffs' liability to him for damages on account of counsel fees paid therefor is concerned. 'Generally, the costs and expenses of an unsuccessful application to dissolve will not be allowed, though the motion is regular, and the court, in its discretion, continues the injunction to the final hearing, and then dissolves it on the merits.' *Suth. Dam.* p. 69. Here the motion was not even regular, and was denied upon that ground,—all the more reason, it seems to me, why the expense incurred thereby should not be allowed.

"(2) It is urged by plaintiffs' counsel here that the claim for damages must be disallowed for the further reason that the order of injunction had no restraining power upon the enforcement of defendant's judgment against Young, because defendant had assigned the judgment before the commencement of this action, and before the order of injunction was passed, but, if it had such restraining power upon his assignees of the judgment, that the payment by defendant of counsel fees with the view and for the purpose of having the injunction dissolved was as if paid by a mere volunteer, since the assignment deprived him of all control of or interest in the judgment. The introduction of this paper was objected to upon the ground of irrelevancy; and it was also very earnestly argued by counsel for defendant that plaintiffs were estopped from taking this position, since the obtaining of the injunction was their act, and they chose to proceed only against this defendant, and did not make his assignees parties to the application for the order. But it seems that the knowledge of the assignment first came to plaintiffs or their counsel at the hearing of the rule to show cause. And it seems to me we must look to the legal effect of the order. I am inclined to the opinion that the position first above stated, as taken by plaintiffs' counsel, is the correct one, or, in any event, that it was not necessary for the defendant to employ counsel to dissolve the injunction, but that was a matter which he might well have left to the assignees for the benefit of creditors, if necessary for any one to do so. It is true that the assignees abstained, it seems, from taking any steps towards the enforcement of the judgment against Young until after the determination of this case on its merits, and they probably did so abstain because of the passage of the restraining order; but that fact cannot, I think, alter the case, since nothing was lost

by the delay, as the judgment against Young was paid in full, including interest and all costs thereon, after this case was determined. I therefore recommend that the claim for damages be denied, and that the defendant, George P. Copeland, be required to pay all costs which have accrued in connection with these proceedings for the establishment of said claim.

"My notes of testimony are herewith filed, as a part of this report. All of which is respectfully submitted. C. D. Barksdale, Formerly Master, L. C."

Haskell & Dial, for appellant. Ferguson & Featherstone, for respondents.

McIVER, C. J. The controversy in this case grows out of a claim on the part of the defendant for damages alleged to have been sustained by him by reason of an injunction granted in the outset of the case. It seems that the defendant herein had previously recovered judgment against George F. Young, one of the plaintiffs herein, for a considerable sum of money, under which a levy had been made upon the lands of the said Young. Thereupon, the present action was commenced, mainly for the purpose of recovering a large sum of money claimed to be due by Copeland, the defendant herein, to the plaintiffs; and, under the allegation that Copeland was insolvent, an injunction was asked for, restraining the sale of the said Young's property until the plaintiffs could have an opportunity of establishing their claim against said Copeland, which, without such injunction, would become fruitless. On hearing the verified complaint, his honor, Judge Pressley, granted a rule requiring Copeland to show cause why the injunction prayed for could not be granted, and in the meantime restraining Copeland from enforcing his judgment against Young. This rule to show cause was heard by his honor, Judge Cothran, who, upon the pleadings, and affidavits submitted, granted an order containing the restraining order previously granted by Judge Pressley until a decision is made upon the merits, upon the plaintiffs entering into the usual undertaking provided for by statute. One of the reasons given by Judge Cothran for his action is thus expressed by him: "It is apparent that the defendant herein is greatly embarrassed, if, indeed, he is not insolvent." From this order, Copeland appealed, and his appeal was dismissed, mainly upon the ground that the order of Judge Cothran was not appealable. See *Garlington v. Copeland*, 25 S. C. 41. So that the result was that the restraining order continued in force until the final decision upon the merits, when, by its own terms, it fell. After stoutly contested litigation, the plaintiffs succeeded in recovering, in the circuit court, a judgment against Copeland, which, upon appeal, and after two hearings in the supreme court, was reversed, and complaint dismissed, sole-

ly upon the ground that the plaintiffs had failed to show that they had title to the lands out of which rent was claimed, at the time they commenced their action. See *Garlington v. Copeland*, 32 S. C. 57, 10 S. E. 616. Thereupon, the present proceeding was commenced for the purpose of having the damages assessed which defendant claims that he sustained by reason of said injunction. The whole matter was referred to Master Barksdale, who heard the testimony and made his report, denying the defendant's claim for damages. To this report, defendant filed exceptions, and the case thus came before his honor, Judge Ernest Gary, who overruled all of the exceptions, and confirmed the master's report, saying in his order that: "This report is so full and exhaustive that it is needless to repeat any of the matter contained therein. After considering it, I am satisfied that the principles of law announced, and the findings of fact, are correct." From this order or judgment the defendant appeals, upon the several exceptions set out in the record, which are practically identical with the exceptions taken by him to the master's report.

We indorse fully what is said by the circuit judge as to the very satisfactory character of the master's report. The conclusion which he reaches is so well vindicated by the reasoning which he employs and the authorities which he recites that any attempt on our part to add thereto seems wholly unnecessary, and would involve mere repetitions. For this reason the report of the master should be set out in full in the report of the case. There is, however, another view which may lend some support to the conclusion reached by the master. The undertaking which constitutes the basis of the present proceedings having been lost, its precise terms do not appear in the case, but we must presume that it conforms with the provision of the statute, which (Code, § 243) are as follows: "When no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto." Now, it does not appear that any court has finally decided that the plaintiffs were not entitled to the injunction which they obtained. On the contrary, the circuit court expressly held that they were entitled to the injunction, and this court expressly declined to consider that question, upon jurisdictional grounds. The fact that the plaintiffs failed to establish their claim against the defendant does not necessarily show that the injunction was improperly granted in the first instance, for a case may be conceived of in which a court of equity, as a precautionary measure, and in the interest of justice, might

grant an injunction to preserve matters in statu quo until the parties could have the opportunity of having what they honestly conceived to be their rights investigated. That the plaintiffs litigated in the best of faith, and that their claims were not sham and pretensive, abundantly appears in the main case, found in 32 S. C. 57, 10 S. E. 616, above referred to; and that the injunction never was held to have been improperly granted, but, on the contrary, the effort to have it vacated failed, as is also apparent, as well as the fact that it fell simply as an incident to the main case. The judgment of this court is that the judgment of the circuit court be affirmed.

(43 S. C. 284)

BRYCE v. MASSEY et al.

(Supreme Court of South Carolina. March 26, 1895.)

RES JUDICATA — PARTIAL REVERSAL OF DECREE — MANDATE AND PROCEEDINGS BELOW — RIGHT TO ATTACK PREVIOUS DECREE.

Plaintiff sued for certain amounts advanced to defendant to enable him to carry on two plantations. Upon an appeal by the defendant, the judgment of the lower court was affirmed, except as to the exact sum due plaintiff, and it was decided that, since the amount to be loaned on both plantations was not to exceed \$10,000, and defendant had paid all advances on plantation A., his remaining liability was the difference between the amount so paid and \$10,000. The sum loaned on plantation B., as reported by the referee, was adjudged correct, and the case was remanded solely to have the amount advanced on plantation A. determined. *Held*, that defendant could not, on the subsequent proceedings below, question the correctness of the original report of the referee in stating the sums due by defendant on account of plantation B., this being matter already adjudicated.

Appeal from common pleas circuit court of Lancaster county; Ernest Gary, Judge.

Action by J. Y. Bryce, as administrator of T. W. Dewey, deceased, against James R. Massey and another. From a judgment for plaintiff, defendant Massey appeals. Affirmed.

Ernest Moore, for appellant. R. E. & R. B. Allison, for respondent.

McIVER, C. J. This is the second appeal in this case, and for a full statement of the nature of the case, and the facts developed at the former hearing, reference must be had to the case as reported in 35 S. C. 127, 14 S. E. 768. It is sufficient to state here, in general terms, that the object of the action was to recover the amount advanced to the appellant under two papers which were held in the former case to amount to an equitable mortgage. Advances to an amount not exceeding \$10,000, for the purpose of carrying on two plantations owned by appellant, one called the "Landsford Place," situate in Chester county, and the other called the "Lancaster Place," situate in the county of Lancaster, were contracted for and secured by this equitable mortgage. But while the

amount advanced for the Landsford place was ascertained at the former hearing, the amount advanced for the Lancaster place was not ascertained; probably for the reason that the advances for the Lancaster place had been paid by the appellant. But the court held that, inasmuch as the advances for both of the places were limited to the sum of \$10,000, it was necessary that the amount advanced for the Lancaster place should be ascertained and deducted from the total sum to be advanced, as the appellant could only be held liable, under the lien, for advances on the Landsford place to the extent of the balance thus ascertained, after crediting appellant with such amounts as the plaintiff may have received from the Landsford place, as well as for a balance of \$1,118.81 due by plaintiff to defendant Jones, the agent of appellant in managing the Landsford place, as the result of his operations of a previous year. For this purpose alone the case was remanded to the circuit court, the language of the court being: "But while the amount of the advances made for the use of the Landsford place has been ascertained by the report of the referee, as stated in Exhibit X, we do not find anywhere in this voluminous record any statement of the amount advanced for the use of the Lancaster plantation under the terms of paper D; and hence the case must go back for the purpose of requiring the referee to ascertain such amount." Under that judgment of this court the case went back, and the referee made his report, ascertaining the amount advanced for the use of the Lancaster plantation during the year 1869 to be the sum of \$1,650.33, to which appellant filed sundry exceptions, set out in the case, which, without questioning the correctness of the amount found to have been advanced for the Lancaster place, raise sundry questions as to the amount due by appellant to the plaintiff; mainly contesting sundry advances which had been previously charged as made for the Landsford place in the former report of the referee. Upon this report and the exceptions thereto, the case came before his honor, Judge Ernest Gary, for hearing. The circuit judge held that the referee had very properly confined his inquiry to the issue submitted to him, "viz. the amount advanced by J. Y. Bryce & Co. for the use of the Lancaster plantation under the terms of paper D," and, holding that the exceptions taken by the present appellant undertook to open up questions previously decided, held that plaintiff was entitled to recover from defendant the balance ascertained by first deducting from the said sum of \$10,000 the amount of the advances for the Lancaster plantation, together with the above-mentioned sum of \$1,118.81, and the sum of \$5,456.76, for which appellant had been previously adjudged to be entitled to credit, to wit, "the sum of seventeen hundred and seventy-four dollars and ten cents, and that any and all property in-

cluded in the equitable mortgage D is hereby charged, under the terms of the same, with the payment of said sum, and the plaintiff is privileged, at the foot of this decree, to apply for any such orders as may be necessary to enforce the same." From this judgment the defendant appeals upon numerous grounds set out in the record, all of which except the 22d, 23d, and 24th complain of error in not restricting the amount of the advances made for the use of the Landsford place to charges for "provisions and merchandise."

It is very obvious that the real question raised by this appeal, passing by for the present exceptions 22, 23, and 24, is whether the circuit judge has erred in construing the former judgment of this court. We do not see how there can be a doubt upon this point. It seems to us that a simple reading of the opinion in the former appeal, especially that part of it from which the foregoing extract is taken, is abundantly sufficient to show that Judge Gary was entirely correct in the construction which he placed upon the former judgment. In view of the fact that this court held that "the amount of the advances made for the use of the Landsford place has been ascertained by the report of the referee, as stated in Exhibit X," it seems to us very clear that any exception to the amount thus ascertained is an attempt to reopen questions already adjudicated, which, upon well-settled principles, cannot be permitted. Again, we find the following language in the opinion rendered under the former appeal: "The defendant Massey, in his argument here, has made objection to sundry items charged by the referee as advances made for the use of the Landsford place, in the account filed with his report as Exhibit X; but as we do not find any exceptions to the report of the referee, based upon such alleged erroneous charges, they cannot be considered *new*." It seems to us that, if the account filed with the original report of the referee contained any charge supposed to be erroneous upon any ground, then was the proper time to take exception thereto, and if not then taken it is now too late to do so. *Huson v. Wallace*, 1 Rich. Eq. 1; *Boyce v. Boyce*, 6 Rich. Eq. 302. We think, therefore, it is now too late to raise any question as to the correctness of the amount heretofore ascertained to have been advanced for the use of the Landsford place, even if such a question could at any time have been successfully raised, which is more than doubtful, as the language used in the addition made to paper D by the appellant himself is well calculated to show that advances in money, as well as in provisions and merchandise, were contemplated by the parties. Exception 22 imputes error to the circuit judge "in granting leave to the plaintiff to apply at the foot of the decree for an order or decree of foreclosure without requiring the said plaintiff first to amend his complaint so as to allege what property was

covered by the mortgage paper D herein, and without requiring plaintiff to prove what property was so covered." Exception 23 complains of error in granting leave to plaintiff to apply at foot of decree for judgment of foreclosure without showing by affidavit or certificate of the clerk that notice of the pendency of the action had been duly filed. Exception 24 is very much to same effect. These three exceptions relate to matters which do not seem to have been brought to the attention of the circuit judge, and therefore he made no ruling as to them, and hence there is nothing for us to review. Besides, these are matters more proper to be considered when application is made for a sale of the property claimed to be covered by the mortgage, and certainly cannot be regarded as constituting any error in the judgment appealed from. In addition to this, it appears from the case that notice of the pendency of the action was filed when the action was first instituted, and again when the supplemental complaint was filed. So that there does not seem to be any foundation for these exceptions, at least so far as the present appeal is concerned. The judgment of this court is that the judgment of the circuit court be affirmed.

(43 S. C. 486)

**DRUMMOND v. NICHOLLS, Sheriff.**

(Supreme Court of South Carolina. April 8, 1895.)

**NONSUIT—QUESTION FOR JURY.**

In replevin for crops alleged to have been raised by plaintiff as tenant, and seized to satisfy a lien created by the landlord, where there was evidence that the relation of tenancy existed, it was error to grant a nonsuit on the theory that plaintiff was a mere laborer.

Appeal from common pleas circuit court of Spartanburg county; I. D. Witherspoon, Judge.

Action of replevin by Elias Drummond against John M. Nicholls. From a judgment of nonsuit, plaintiff appeals. Reversed.

Duncan & Sanders, for appellant. Bomar & Simpson, for respondent.

**POPE, J.** This was an action for claim and delivery of certain personal property, brought by the plaintiff against the defendant in the court of common pleas for Spartanburg county, which came on for trial before his honor, Judge Witherspoon, and a jury, at — term, 189—. After the plaintiff had closed his testimony, the defendant moved for a nonsuit, which, after argument, was granted. After judgment was entered the plaintiff appealed on 12 grounds, as follows: (1) Ruling and holding that the liens given by W. D. Brandenburg were valid and binding liens on the crops grown by the plaintiff in 1891. (2) That the liens given by Brandenburg to Parks & Gray and to Gaston covered the property in dispute, and were valid liens on this property. (3) In ruling

and holding that the plaintiff was a mere laborer. (4) In not ruling and holding that the plaintiff was a tenant of Brandenburg. (5) In not at least submitting it to the jury, and in not allowing the jury to determine from the evidence, whether the plaintiff was a tenant or laborer of Brandenburg. (6) In ruling and holding that there was no evidence on any of the issues to be passed on by the jury. (7) In not ruling and holding that the plaintiff had such an interest in the crop grown by him as could not be bound by any lien given by W. D. Brandenburg. (8) Because his honor erred in admitting in evidence Exhibit 2 in the lien from W. D. Brandenburg to Parks & Gray. (9) In not allowing the witness W. D. Brandenburg to answer the question, "Did you give a lien on Elias Drummond's crop,—on his part of the crop?" (10) In not allowing the witness W. D. Brandenburg to be examined as to his intention in giving the lien to Gaston, and to testify whether he intended to give a lien on the crop of Elias Drummond. (11) In not allowing the witness W. D. Brandenburg to answer the question, "What knowledge did Elias Drummond have of your giving a lien to A. W. Gaston, or signing any paper?" (12) In not allowing the witness W. D. Brandenburg to testify as to what crops were intended to be bound by the lien given to A. W. Gaston, and on what lands he supposed these crops were to be grown.

It may be proper to give a brief outline of the transaction here involved, in order that we may the more correctly apprehend the true significance to be attached to the questions here presented to be answered. It seems that in 1891 (early in the year) William D. Brandenburg, having in his charge and under his control 150 acres of land of his own, 300 acres that belonged to his mother-in-law, Mrs. A. F. Crosswell, and 42 acres that belonged to his wife, Mrs. W. D. Brandenburg, went in person to A. W. Gaston and borrowed \$400, in the shape of 4 bales of cotton, in order to make crops upon said lands during the year 1891, and, in accordance with the provisions of our statute law on that subject, gave a lien on all the crops grown or to be grown on said lands during that year (1891). See *Brandenburg v. Gaston* (S. C.) 20 S. E. 157. Brandenburg not paying the debt accrued by his lien, Gaston sued out, before the clerk of court, warrants to seize the crops raised upon said lands during the year 1891; and the sheriff, Nicholls, as was required by law, took possession of said crops. Among the crops so seized were 430 pounds of seed cotton, of the value of \$10; 670 pounds of corn in the ear, of the value of \$10; and 1,242 pounds of seed cotton, of the value of \$30,—aggregating \$50. All this personal property was claimed by the plaintiff as his own property, and, the sheriff refusing to deliver it up to him, he brought his action for claim and delivery. The defendant, by his answer, set

up his possession as rightful under the said lien of A. W. Gaston, and certain liens held by Parks & Gray, similar in character to that of A. W. Gaston. At the hearing quite a number of witnesses were examined by the plaintiff, and, as before stated, the defendant moved for a nonsuit, which was granted.

The grounds of appeal, from 9 to 12, inclusive, cannot be sustained. A mere inspection will show that they are untenable. But from 1 to 8, inclusive, they present, in different phases, the question of the character of the relation of the plaintiff to Brandenburg, that are not free from difficulty. Indeed, they appear to us to be meritorious, to this extent, at least, viz. as presenting the difference in law which exists between a tenant and a laborer; for, if the plaintiff is entitled to be regarded as a tenant, then Brandenburg could not give a lien to Gaston, or anybody else, that would deprive the plaintiff, as a tenant, of any crops raised by him. This difficulty would not exist if he (the plaintiff) could be held, in law, to be a mere laborer of Brandenburg. There is certainly testimony disclosed in the case bearing upon this issue. And, if there is, then the circuit judge was in error in granting the nonsuit. Such being our conclusion, we think a new trial should be granted; but it must be distinctly understood that this court has no opinion, and declines to express any opinion, as to the sufficiency of this testimony. We prefer to leave every issue open. It is the judgment of this court that the judgment of the circuit court be reversed, and the cause is now remanded to that court for a new trial.

(43 S. C. 459)

# MICHALSON v. ALL et al.

(Supreme Court of South Carolina. April 2, 1895.)

## ACTION ON THE CASE—CONVERTING PROPERTY SUBJECT TO LIEN.

Where a person, with the connivance of the owner, converts to his own use farm products subject to an agricultural lien, and places them beyond the reach of the lienholder under the statutory proceedings, the latter may, in an action similar to case at common law, recover his damages.

Appeal from common pleas circuit court of Barnwell county; I. D. Witherspoon, Judge.

Action by Isaac Michalson against W. A. All, Jr., & Co. There was a judgment for defendants, and plaintiff appeals. Reversed.

James E. Davis and A. M. Boozer, for appellant. Patterson & Holman, for respondents.

POPE, J. The plaintiff, by his complaint, alleged that on the 6th day of February, 1893, one John Kirkland executed to him an agricultural lien,—that is, a lien on all the crops the said John Kirkland should make during the year 1893 on the plantation of land known as the "Boynton Place,"—to secure some \$270

advanced to said Kirkland by the plaintiff in supplies to make such crops; that all the cotton made by said Kirkland was three bales of cotton; and that the defendants, well knowing that the said Kirkland had given to the plaintiff an agricultural lien on said cotton, and in fraud of plaintiff's rights, induced the said Kirkland, in the nighttime, to haul said three bales of cotton from the Boynton place to the defendants' place of business; that the defendants thereafter placed the said three bales of cotton beyond the reach of the agricultural lien, and converted the same to their own use, to the damage of the plaintiff \$270. The defendant demurred to this complaint, because it failed to state facts sufficient to constitute a cause of action. The cause came on to be heard before his honor, Judge Witherspoon, on the complaint and the demurrer thereto; whereupon the said circuit judge sustained the demurrer, in the following judgment: "The defendants interpose a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The plaintiff seeks in this action to enforce his rights upon an agricultural lien. It was held in *Sternberger v. McSween*, 14 S. C. 35, and *Kennedy v. Reames*, 15 S. C. 548, that the only remedy to enforce rights under an agricultural lien is that provided by the statute. After hearing argument by counsel, I conclude that the defendants' demurrer must be sustained, with costs; and it is hereby so ordered and adjudged." The plaintiff now appeals from such judgment, upon the single ground that the circuit judge erred in sustaining the demurrer.

It seems to us that the circuit judge is in error, as we shall now attempt to point out. Unquestionably, if these three bales of cotton were still in Barnwell county, the plaintiff could have them seized under the warrant of the clerk, directed to the sheriff of that county, commanding such sheriff to seize said three bales of cotton, no matter in whose hands the same might be. This power to set this machinery in motion is vested by the statute in the plaintiff; and, if the cotton was there, the plaintiff would be forced to adopt that remedy. But the plaintiff, by his complaint, alleges that such three bales of cotton have been carried off by defendants, and converted to their own use, so that such warrant cannot reach them. All these facts are admitted by the demurrer. Do not these facts suggest the remedy of an action on the case,—trespass on the case, under the old common law? It seems so to us. It makes no difference that, under our present Code of Civil Procedure, the specific action of trespass on the case is abolished, for the present pleadings by complaint are adapted to meet all those old forms of action. We do not think the two cases cited by the circuit judge, when critically examined, conflict with this view. It is the judgment of this court that the judgment of the circuit court be reversed,

and that the cause be remanded to the circuit court, with leave to the defendants to answer.

(43 S. C. 414)

**KEY et al. v. WEATHERSBEE et al.**  
(Supreme Court of South Carolina. March 29, 1895.)

**WILLS—VALIDITY—HUSBAND OF DEVISEE AS WITNESS.**

1. That the husband of a life devisee of lands was a subscribing witness to the will, does not destroy the remainder interests, and render the estate distributable as in the case of intestacy, but the remainders are thereby accelerated, and take effect at once, under Rev. St. S. C. § 1991, which provides that a devise to which the husband of the devisee is a subscribing witness shall be void to the extent that the amount of the devise exceeds the amount the devisee would have taken as heir.

2. Life devisees of lands who are directed to pay over the rents and profits to their children between the death of testator and of the survivor of the life devisees, whereupon the lands themselves, together with the income therefrom, are to go to a third person, have no beneficial interest in the lands, but are at most only trustees for their children as to the income; and the fact that they were witnesses to the will does not invalidate the devise.

Appeal from common pleas circuit court of Barnwell county; J. J. Norton, Judge.

Action by James Key and others against Charice Ann Weathersbee and others to obtain a construction of a will. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

The following are the decree of the lower court, and exceptions thereto:

"This action was brought for the partition of the real estate of Bethaney Moore, deceased. The cause came on to be heard before me at Barnwell at the March, 1894, term of the court of common pleas for that county. The plaintiffs allege in their complaint that the said Bethaney Moore left a last will and testament, and two codicils thereto, which have been duly admitted to probate, and which contain devises to Floyd W. Weathersbee and Charice Ann Weathersbee, his wife; and it is further alleged that, because the said Floyd W. Weathersbee is a witness to the said will and codicils, he can take nothing under the same, he not being an heir at law of the testatrix; and it is further alleged that, the devises to the said Charice Ann Weathersbee (who is an heir at law of the testatrix) being of greater value than the interest that she would take in the said estate as an heir at law, it follows such devises to her are null and void; and it is then alleged that, there being no particular estate to support the remainders which are devised to Bessie, Jane B., and James Moore Weathersbee, the same are defeated, and partition is asked of the real estate left by the testatrix the same as if there had been no last will and testament. The answer of the defendants deny that the plaintiffs have any interest in the said estate, and it is further alleged in the answer that, even if the devise to

Floyd W. Weathersbee is forfeited under the statute, and that the estate devised to Charice Ann Weathersbee is in part forfeited under the statute, the remainder to James Moore and Bessie are not defeated, but, to the contrary, are thereby accelerated, and vest at once.

"The case is presented mainly upon an agreed statement of facts, and I find therefrom as follows: That Bethaney Moore died in the early part of the year 1890, leaving a last will and testament and two codicils thereto, which were duly admitted to probate in the court of probate for Barnwell county; that Floyd W. Weathersbee is one of the subscribing witnesses to said will and each of the codicils; that the plaintiffs and the defendant Charice Ann Weathersbee are the heirs at law of the testatrix, and as such would be interested in her estate in the proportion set forth in the complaint; that Floyd W. Weathersbee is not an heir at law of the testatrix, but the husband of the defendant Charice Ann Weathersbee, and Bessie, Jane B., and James Moore Weathersbee are the children of Floyd W. and Charice Ann Weathersbee, and they are the grand nieces and nephew of Bethaney Moore. The will, as modified by the codicils, contains the following devises, namely: To Floyd W. Weathersbee and Charice Ann, his wife, is given a life estate in the testatrix's home place and the Darlington place, to have and to hold the same in common between themselves for and during the term of their natural lives, and should one survive the other, the whole shall remain in such surviving one during the term of his or her natural life. At the death of the survivor of the said Floyd W. Weathersbee and Charice Ann the homestead place is devised in fee to Bessie Weathersbee, and the Darlington place and the Dickes place is at the same period devised to the said James Moore Weathersbee. By the fifth clause of the will all the rents and profits arising from the Dickes place, which may accrue between the death of the testatrix and the death of the survivor of the said Floyd W. and Charice Ann, is devised to the said Bessie, Jane B., and James Moore Weathersbee, to be equally divided between them; Floyd W. and Charice Ann Weathersbee taking no beneficial interest in the Dickes place. A legacy of two hundred dollars in gold is given to the said Bessie Weathersbee, and directed to be used in purchasing a piano for her when she arrived at the age of twelve years, or sooner if the executors of the will saw fit to do so. A legacy of nine hundred and fifty dollars is given to the said Charice Ann Weathersbee and her said children Bessie, Jane B., and James Moore Weathersbee. Under this provision the said Charice Ann takes one-fourth of the nine hundred and fifty dollars; and one-fourth of the said amount goes to each of the said children. The balance of testator's property, after the legacies are paid, is devised to Floyd W. and Charice Ann Weathersbee.



"Under these facts the plaintiffs allege, as above stated, that the will is practically superseded by the statute law of this state (section 1991 of the Revised Statutes [New Ed.]); that there is no precedent estate to support the remainder in the real estate; that Floyd W. Weathersbee takes nothing, and Charlice Ann, his wife, only as much as she would take under the statute as heir at law, and not under the will. But I hold to the contrary, that the statute provides that 'such devise, legacy and bequest shall be valid and effectual \* \* \* except so far as the property, estate, or interest so devised or bequeathed shall exceed in value any property, estate or interest to which such witness, or the husband or wife of such witness, would be entitled upon the failure to establish such will, \* \* \* but to the extent of such excess the said devise, legacy or bequest shall be null and void.' It is clear, under section 1991, that the devise to Floyd W. Weathersbee is void, and that the devise to Charlice Ann Weathersbee, his wife, is void as to the excess of such devise over and above what she would take as heir at law; but to that extent it is valid, and she takes the same under the will. It appears that the said Charlice Ann would be entitled to the onetwenty-fifth ( $\frac{1}{25}$ ) part of the entire estate as heir at law, and to that extent her devise under the will is valid. The agreed facts are not sufficiently full for me to ascertain the value of the estate, and it will be necessary to refer the case to the master to ascertain such value.

"The ascertained will of the testatrix is contained in the written instrument as admitted to probate. It can be defeated only by enforcing the forfeiture pronounced by the statute on account of Floyd W. Weathersbee being a subscribing witness thereto. This will be done so as to inflict as little injury as possible upon innocent third parties who were the objects of the testatrix's bounty, and interfere no more with the terms of the will than necessary to meet the requirements of the law. In my judgment, that is fully done in declaring as forfeited all that Floyd W. Weathersbee would take under the will, and in cutting down the estate and legacy to Charlice Ann to an amount equal in value to what she would have taken as heir at law of the testatrix, which we have seen amounts to one twenty-fifth ( $\frac{1}{25}$ ) part of the estate. It is manifest from the will that the reason why the testatrix postponed the enjoyment of the estate left to her grand nephew and nieces was because she supposed that the devise of the life estate to Floyd W. and Charlice Ann Weathersbee was valid. Such life estate, being defeated wholly as to Floyd W. Weathersbee, and in part as to Charlice Ann, will not, on that account, destroy the remainder to their children, but the effect is, the life estate being out of the way, the remainders are accelerated, and vest at once in the children. It cannot be doubted that the testatrix postponed the enjoyment of the estate left to the grand

nephew and nieces solely because she desired the parents to have a life estate. Now, it matters not how the life estate falls in, whether by the death of the life tenant or by the forfeiture under the statute; in either case the remainder-man takes as soon as the life estate ceases to exist. This construction seems to me sound upon principle, and is supported elsewhere by the most respectable authority. The reasoning in the case of *Jul v. Jacobs*, 3 Ch. Div. 709, cited by defendants' counsel, meets my hearty approval; and the case of *Woodbery v. Collins*, 1 Desaus. Eq. 424, while not in point, yet shows the inclination of our courts to construe the statute the same as the English courts have done. See, also, 20 Am. & Eng. Enc. Law, 895, where the case of *Jul v. Jacobs* is cited with full quotation. But, whatever view I might entertain as to the argument presented by the plaintiffs' counsel, I could not interfere with the testatrix's disposition of the Dicks place, the whole beneficial interest in which is devised to other than those against whom the law inflicts its penalties; nor of the two hundred and fifty dollars given to Bessie Weathersbee, nor of at least three-fourths of the nine hundred and fifty dollars given to the children of the said Charlice Ann.

"It is therefore ordered, adjudged, and decreed that the vested remainder of Bessie Weathersbee in the homestead place and of James Moore Weathersbee in the Darlington place be, and the same are hereby, declared accelerated as to the whole or any part of the life estate not required to make up to the said Charlice Ann Weathersbee the one twenty-fifth part in the value of the testatrix's estate. It is further ordered and adjudged that it be referred to the master of Barnwell county to ascertain and report the total value of the real and personal estate left by the said Bethaney Moore, deceased, and how much thereof has been expended in the payment of the expenses of the administration, including the probate cost of this suit. That he also ascertain and report the value of the life estate devised to Charlice Ann Weathersbee in each the homestead place and the Darlington place. That the said master also ascertain and report the value of the fourth part of the nine hundred and fifty dollars bequeathed to the said Charlice Ann, the remaining three-fourths part of said sum having been bequeathed to her children, as hereinbefore stated; and the said master do further ascertain and report whether there be any other personal property of said estate, after paying the said specific legacy of \$950 just mentioned, and the legacy of \$200 given to Bessie Weathersbee, and, if there be any such other property, the value thereof; and that he also ascertain and report whether the testatrix owned at the time of her death other real estate than that enumerated in her will, and, if any, what is the value of the same; and that he do also ascertain and report whether the one twenty-fifth ( $\frac{1}{25}$ ) part of the whole estate can be paid

out of the one-fourth part of the \$950 bequeathed to the said Charlice Ann and the residuary estate, and, if not, how much the deficiency will be. It is further ordered and adjudged that the master report in detail a scheme for setting apart to the said Charlice Ann Weathersbee the one twenty-fifth ( $\frac{1}{25}$ ) part in value of the estate of the testatrix out of the interest devised or bequeathed to her in the following order, to wit: First, out of the one-fourth part of the \$950 bequeathed to her; second, out of the residuary estate; and, third, out of the life estate devised to her and her husband in the homestead and Darlington places. It is further ordered and adjudged that when the foregoing provisions of the order have been carried out, and if it therefrom appear that there is a surplus of the residuary estate of testatrix, then such surplus be divided among the plaintiffs according to their respective interests as set forth in the complaint therein, excluding in such division the defendant Charlice Ann Weathersbee. It was stated at the hearing that there were no debts against the estate of the testatrix, hence there is no reason why the rights of the parties hereto may not now be fully adjudicated."

"Exceptions: The plaintiffs except to the judgment and decree of his honor, Judge J. J. Norton, filed herein on the 3d day of July, A. D. 1894, and will move the supreme court of the said state to reverse the said judgment upon the following grounds, to wit: (1) Because his honor erred in holding that, where the life estates intended to support remainders, as in this case, are void in their creation by virtue of a statute, that the remainders would be accelerated and vest at once. (2) Because his honor should have held that, there being no particular precedent estate in this case to support the remainders limited to the children of Floyd W. and Charlice Ann Weathersbee by the will of Bethaney Moore, the same were void, and that the estates devised should pass as intestate property. (3) Because his honor erred in holding as follows: 'Now, it matters not how the life estate falls in, whether by death of the life tenant or by forfeiture. Under the statute, in either case, the remainder-men takes as soon as the life estate ceases to exist, for the reason that in this case no life estate ever existed to cease, the same being void in its creation by operation of law.' (4) Because his honor erred in holding that Charlice Ann and Floyd W. Weathersbee take no beneficial interest in the Dickes place, whereas, he should have held that the testatrix attempted to create in them a life estate in said place, as in the other property, and that the same stood on a similar footing with the Darlington place and the home place. (5) Because his honor erred in referring the case to the master to ascertain the value of the interest which Charlice Ann Weathersbee takes, and to report a scheme for the settlement of same, it being agreed that she would take one twenty-fifth part in said estate, this being the interest which she would take as

heir at law of the said Bethaney Moore. (6) Because his honor should have held that, as the life estate devised to Charlice Ann Weathersbee by said will was in excess of the interest which she would have taken in case of intestacy, and her interest being reduced to one twenty-fifth part of said estate in consequence of her husband being one of the subscribing witnesses to the said will and codicils, this would transform the interest of Charlice Ann Weathersbee to that of a fee in said property, and would therefore, of necessity, disorganize the remainders attempted to be created by the said will and codicils."

Henderson Bros. and W. A. Holman, for appellants. Croft & Chafee, for respondents.

McIVER, C. J. The questions raised by this appeal involve the proper construction of the will of the late Mrs. Bethaney Moore, with the two codicils thereto, as affected by the provisions of the act of 1865, incorporated in the Revised Statutes of 1893 as section 1991. For a full understanding of the facts of the case, about which there is no dispute, and of the questions presented by the appeal, reference must be had to the decree of his honor, Judge Norton, and the exceptions thereto, all of which should be incorporated in the report of this case, care being taken to correct the error in the decree giving the section of the Revised Statutes referred to as section 1974 instead of 1991, and the omission in the latter part of the quotation from that section, arising doubtless, from a misprint. It will be sufficient to state here that the testatrix by her will specifically devised certain real estate to the defendants Charlice Ann Weathersbee and her husband, Floyd W. Weathersbee, for their joint lives, and to the survivors of them during the life of such survivors, with remainder to the other three defendants, Bessie, Jane, and James Moore Weathersbee; but, as it is conceded that the said Floyd W. Weathersbee was a subscribing witness to the will, as well as to the two codicils, the question is as to the effect of this conceded fact upon the provisions of the will just stated, under the provisions of section 1991, Rev. St., above referred to. That section reads as follows: "No subscribing witnesses to any will, testimony, or codicil shall be held incompetent to attest or prove the same by reason of any devise, legacy or bequest therein in favor of such witness, or the husband or wife of such witness, or by reason of any appointment therein of such witness, or the husband or wife of such witness, or to any office, trust or duty; and such devise, legacy or bequest shall be valid and effectual, if otherwise so, except so far as the property estate or interest so devised or bequeathed shall exceed in value any property, estate or interest to which such witness, or the husband

or the wife of such witness, would be entitled upon the failure to establish such will, testimony or codicil, but to the extent of such excess, the said devise, legacy or bequest, shall be null and void, and such appointment shall be valid, if otherwise so, but the person or persons so appointed shall not, in such case, be entitled by law to take or receive any commissions or other compensation on account thereof." The circuit judge held that the effect of this statutory provision was to destroy or forfeit all the interest that Floyd W. Weathersbee would otherwise have taken under the will, and to cut down the interest of Charice Ann to an amount not exceeding in value the interest which she would have taken as heir at law, if there had been no will, which, it is conceded, would have been  $\frac{1}{25}$  part of the estate; and he further held that this did not destroy the interest in remainder intended for the children of Charice Ann, but that the effect was simply to accelerate the remainders, which, therefore, took effect at once. The appellants, on the other hand, contend that, the precedent life estate having been destroyed, the remainders were defeated, and the estate of the testatrix became divisible among the heirs at law as intestate property; and the main question in the case is, which of these two views is correct?

Before proceeding to the consideration of that question, it may not be amiss to say, simply to avoid committing the court upon the point, that it may, possibly, be open to question whether the circuit judge was right in holding that the effect of the statute was to destroy all of the interest of the husband, Floyd W. Weathersbee, in the estate intended to be devised for him, inasmuch as the language of the statute is not that a devise to a witness shall be void to the extent of its excess in value over the interest which "such witness" would take had there been no will, but the language is, "to which such witness, or the husband or wife of such witness, would be entitled upon the failure to establish such will." Now, as the wife of the witness Floyd W. Weathersbee would confessedly be entitled, upon the failure to establish the will, to  $\frac{1}{25}$  of the whole estate, it is at least open to question whether the interest intended to be given to Floyd W. Weathersbee by the will is entirely defeated by the statute, or only to the extent of its excess in value over the  $\frac{1}{25}$  part of the estate. But, as there is no exception to the ruling of the circuit judge as to this particular point, and as it is not really necessary, or even important, to the solution of the question which we are called upon to decide, we do not wish to be regarded as deciding, or even expressing any opinion distinctly upon, that question. Recurring, then, to the main question, we think it is satisfactorily determined in favor of the view taken by the circuit judge by the case of *Jull v. Jacobs*, 3 Ch. Div. 709, cited

both by the judge and the counsel for respondents. That case is not distinguishable from the present, for in that case the testator devised both real and personal property to his daughter, "during her lifetime, and after her decease the property to be equally divided between her children on their coming of age"; and it was held that, in respect to the real estate, the gift to the children was strictly a vested remainder; that the construction as to the personality followed the rule as to the realty, and the gift to the daughter being void, on account of her having attested the will, the gift to the children was accelerated, and took effect immediately. *Malins, V. C.*, in delivering the opinion of the court, after showing that the clause of the will above recited created a vested remainder in the children, proceeded as follows: "But then comes the question whether the wills act, by taking away the life estate of the daughter, causes an intestacy during her life so as to carry her property to the heir at law, or accelerates the remainder. It is perfectly clear, in the first place, that the children are postponed to the mother simply because the mother is to have the property for her life; but, if the mother cannot have the property for her life, why are the children to be postponed? The reason of their postponement altogether ceases. They are not to have it until after her death, because the testator assumed that she would have it during her life. But he was ignorant of the law that, if he called in his daughter to be an attesting witness, the very gift he made her would absolutely fail. Now, he has postponed his grandchildren—that is, his daughter's children—to the daughter solely because the daughter was to take for life, and if he had known that she could not take for life he would not have postponed the children until after her death. He would not have left her and her family destitute in the meantime. It is a mere accident that the daughter cannot take the life estate, and I am of opinion that the children are postponed to the daughter simply that she may have the property for life; and, if she could not have it for life, the children would have had it immediately. That would be the conclusion I should come to from the reason of the thing without the decisions. But the decisions are all the same way." And the learned vice chancellor proceeds to cite the cases to that effect. That case is so exactly in point, and the reasoning employed is so directly applicable to the case under consideration, that it would seem to be unnecessary to say more. It is true that, so far as we are informed, we have no case in this state directly on the point. But we do find cases, cited by respondents' counsel, which, by analogy, support our conclusion. In *Lesly v. Collier*, 3 Rich. Eq., at page 128, it is said by Dargan, Ch., that: "If there be a legacy to one for life, with remainder to another, which remainder, on the death of the testator, would be direct and vested, and not

contingent, and the person intended to be the tenant for life dies in the lifetime of the testator, I think it cannot be doubted that in such a case the legacy does not lapse, but, on the death of the testator, goes at once to him who, in the scheme of the legacy, was intended to be only a remainder-man." The same doctrine is laid down by Desaussure, Ch., in *Dunlap v. Dunlap*, 4 Desaus. Eq., at page 314. To the same effect, see *Bell v. Towell*, 18 S. O. 101. Now, as a will speaks at the death of the testator, it is clear that in these cases no precedent life estate was ever really created, inasmuch as the proposed life tenant was dead at the time the will took effect, for a devise or bequest to a person deceased at the time is void ab initio (*Pegues v. Pegues*, 11 Rich. Eq. 554), except in the case specially provided for by the act of 1789; and hence the position so strenuously urged by counsel for appellants, that it is only in a case where a precedent life estate has been created, which has subsequently been defeated or destroyed, that the doctrine of the acceleration of the remainder can be applied, cannot be sustained. Besides, in the case of *Lomas v. Wright*, 2 Mylne & K., 778, cited by the counsel for respondents, it seems to have been held that where a limitation is void, being to a monk for life, who was regarded as civilly dead, the estate will not revert to the grantor, but the next limitation in remainder will take effect. And in *Avelyn v. Ward*, 1 Ves. Sr. 420, recognized in *Doe v. Scott*, 3 Maule & S. 300, as well as by our own court in *Witherspoon v. Watts*, 18 S. C., at page 411, Lord Hardwicke said "that he knew of no case of a remainder or conditional limitation over of a real estate, whether by way of a particular estate, so as leave a proper remainder, or to defeat an absolute fee before, by a conditional limitation; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place." See, also, 2 Jarm. Wills (Perkins' Ed.) 702, where it is said, in effect, that where an estate is given to a person for life, with a vested remainder in another, such remainder "takes effect in possession whenever the prior gift ceases or falls, in whatever manner." We are therefore of opinion that there was no error on the part of the circuit judge in the view which he took of the main question in the case. This disposes of the first, second, third, and sixth exceptions.

As to the fourth exception, we do not see what interest the appellants have in the question there raised, under the conclusion which we have adopted. But, at all events, we may say that we concur with the circuit judge in the view which he has taken. We do not see that the testatrix intended that Charlice Ann and Floyd W. Weathersbee were to take any beneficial interest whatever in the Dickes place. By the fifth clause of the will all of the rents and profits which accrued from that place between the date of the death of the testatrix and the death of the survivor of

Floyd W. and Charlice Ann Weathersbee were given to their three children, Bessie, Jane B., and James Moore Weathersbee, and by the first codicil the place itself is to go to James Moore Weathersbee upon the death of the survivor of Floyd W. and Charlice Ann Weathersbee, when the right of the three children to share equally in the rents and profits of the Dickes place ceases. We do not see what possible beneficial interest either Floyd W. Weathersbee or his wife can have in that place. The utmost that could be said is that they were to act as trustees for their children, and to hold the Dickes place, and pay over the rents and profits thereof to their children, until the death of the survivor of the parents.

It is very clear, under the view which we have taken, that the fifth exception cannot be sustained. The judgment of this court is that the judgment of the circuit court be affirmed.

(43 S. C. 403)

# POWELL v. PEARLSTINE et al.

## GARRIS v. SAME.

(Supreme Court of South Carolina. March 2, 1895.)

### NOTICE TO PRODUCE INSTRUMENT — SECONDARY EVIDENCE—ALTERATION OF INSTRUMENTS — ATTORNEY'S FEE.

1. A party who fails or refuses upon due notice to produce an instrument in his possession is precluded from thereafter introducing secondary evidence of its contents, or from introducing the instrument itself, on his own behalf, notwithstanding the case may have been referred to the master to take and report all the testimony in the case.

2. The refusal to produce the instrument before the master is not justified on the ground that the party wanted to use it afterwards in taking a deposition, in the absence of any showing that the paper was necessary on such examination, or that the court would not have permitted it to be withdrawn for that purpose upon proper representations of necessity.

3. The refusal of a party to produce an instrument on proper notice by his adversary, and his subsequent introduction thereof in his own behalf, cannot be justified on the ground that such failure to produce it was due to no fault of himself, but to the oversight of his counsel, especially where that fact appears only in argument of counsel.

4. The fraudulent alteration of a mortgage, after its execution and delivery, by inserting therein an additional tract of land, renders it void in toto.

5. The proviso in Act 1892 (21 St. 30) that attorneys' costs shall not be allowed in certain cases therein specified, but "that this shall not apply to causes now pending, or existing liquidated contracts," applies only to "existing liquidated contracts" upon which an action was pending at the passage of the act, and not to an action afterwards brought to have a mortgage canceled as having been fraudulently altered.

Appeal from common pleas circuit court of Colleton county; J. J. Norton, Case Judge; D. A. Townsend, Order Judge.

Actions by Archibald C. Powell and others against I. M. Pearlstine & Sons to enjoin the sale of lands under a power contained in a mortgage thereof, and to have the mortgage

declared void as having been fraudulently altered. From a judgment for plaintiffs, defendants appeal. Affirmed.

Mordecai & Gadsden and F. D. Edwards (Howell, Murphy & Farrow, of counsel), for appellants. Fishburne & Gruber, for respondents.

McIVER, C. J. These two cases, depending upon the same facts, substantially, and governed by the same principles of law, were and will be considered together. It seems that on the 30th January, 1891, the said Powell executed a mortgage to one J. Berkman on a tract of land described in the complaint, containing 60 acres, which mortgage was duly recorded on the 7th of August, 1891, when it purported to cover another tract of land, containing 35 acres, which, it is alleged, was fraudulently inserted in the mortgage after it was examined, either by the original mortgagee or by the defendants to whom it had been assigned. It further appears that subsequent to the execution of the mortgage the said Powell sold and conveyed to the said Garriss, the plaintiff in the second case above stated, the 35-acre tract; and this is the only practical difference between the two cases. Subsequently, to wit, on the 21st of July, 1893, the defendants, Pearlstine & Sons, as assignees of the mortgage, advertised both tracts of land for sale on the 17th of August, 1893, under an alleged power of sale contained in the mortgage. Thereupon these actions were commenced on the 9th of August, 1893, for the purpose of enjoining said sale, and having the said mortgage declared void, on account of the fraudulent alteration of said mortgage, and the same delivered up and canceled. By consent an order was passed on the 30th of October, 1893, directing the master of Colleton county to take and report the testimony. Due notice was given to the defendants that, "on the call of these cases before the master," they would be required to produce the mortgage described in the pleadings; but when the mortgage was called for before the master the same was not produced, "nor was any excuse given for the failure to produce the same." Thereupon the plaintiffs introduced secondary evidence of its contents, together with testimony to establish the allegations of the complaint, which the circuit judge found, as matter of fact, was sufficient to establish the fraudulent alteration of the mortgage. The defendants offered testimony before the master, which was objected to upon the ground that the defendants, being in possession of the original mortgage, could not themselves introduce secondary evidence of its contents, which testimony was taken down and reported, subject to the objection. At a subsequent period the defendants examined several witnesses *de bene esse*, under the act of 1883 (sections 2345, 2347, Rev. St. 1893), before a notary public in the city

of Charleston, and at the same time produced the mortgage, and submitted it, together with the testimony so taken. The circuit judge says in his decree: "Upon the trial of the cause before me, many objections were urged against the introduction of the testimony taken before the notary public in Charleston, as well as that introduced by the defendants before the master. But, under the view I take of the matter, it will be unnecessary to pass upon but one of them. The defendants, being in possession of the mortgage, and having failed to produce the same in response to the notice served upon them, could not themselves introduce secondary evidence of its contents; nor should they be allowed at a later period to introduce the mortgage on their own behalf." Accordingly, judgment was rendered granting the relief prayed for by the plaintiffs. From this judgment defendants appeal upon the several grounds set out in the record, which need not be repeated here, as counsel for appellants, in his argument here, has very properly stated that these several grounds really raise but two questions: "First, was there error in excluding entirely the mortgage from evidence? Second, even if the mortgage was altered as claimed, was there error in canceling the entire mortgage, instead of so much thereof as included the thirty-five acre tract?" The defendants also, in accordance with the practice, have given notice that they would insist that the judgment below should be sustained upon other grounds than those stated in the circuit decree, if this court should be unable to sustain said judgment upon the grounds there stated. But as we think that the conclusion reached by his honor, Judge Norton, is fully vindicated by what he has said, it will be unnecessary to state the additional grounds relied upon by respondents.

As to the first question, we think it is clear beyond dispute that the view taken by the circuit judge is fully supported, not only by the authorities which he has cited, but by reason, also. In 16 Am. & Eng. Enc. Law, 860, we find the following language: "After a party has refused to produce a paper in his possession, and his adversary has proved its contents by secondary evidence, the party will not be permitted to contradict this secondary evidence by secondary evidence, or by putting the paper itself in evidence;" and this doctrine thus laid down in the text is supported by high authority cited in the notes. Again, in 21 Am. & Eng. Enc. Law, 990, the same doctrine is again laid down in the most explicit terms. The reason is obvious: the court will not permit a party to speculate upon the chances. If a party who, upon notice, refuses to produce a paper which is in his possession, and thereby forces his adversary to resort to secondary evidence of the contents of such paper, should be permitted afterwards to introduce the paper as a part of his own evidence, he

would thus be afforded the opportunity of taking the chances whether the secondary evidence offered by his adversary should prove to be satisfactory or unsatisfactory to him. If the latter, then he would have the opportunity of correcting it by producing the paper itself, which, of course, would be the highest evidence of its contents; but, if the former, then he could, by omitting to offer the paper in evidence, suppress the best evidence of the facts in issue; and this no court charged with the administration of justice could for a moment countenance. But it is unnecessary to pursue this subject further, as it is admitted in the argument here that the general rule is as above stated, and the contention is that the rule does not apply in this case. First, it is contended that it should not be applied in this case, because here the master was required to take all the testimony in the case, and report the same to the court, hence it made no difference when the paper was produced, and the plaintiffs suffered no injury by reason of the failure or refusal to produce the paper before the master, especially as it was afterwards put in evidence by the defendants when they took their testimony *de bene esse* in Charleston before a notary public under the act of 1883. We do not think that there is any force in this position; for, in the first place, it is more than doubtful whether the act authorizes the taking of any documentary testimony in the manner there provided, unless, perhaps, it should appear, as it does not in this case, that the witnesses to be examined under that act were examined to prove the execution of the document or paper. In the second place, the fact still remains that it was left to the option of the defendants to introduce the paper called for in evidence, or suppress the same, as they might see fit; and that is one of the very things which the rule is designed to prevent. The fact that the defendants did, after the plaintiffs had closed their case, offer the paper as a part of their own evidence, cannot affect the principle upon which the rule rests. The case of *Marshall v. Marshall* (S. C.) 20 S. E. 298, cited by appellants, manifestly has no application to the present case. There the question was as to the contents of a lost will, and it was held that the fact that the clerk, in taking the testimony, did not pursue the prescribed order,—first offering evidence of the existence and loss of the paper, and then proof of its contents,—did not constitute reversible error, inasmuch as all these facts did appear in the testimony as taken by the clerk. That, therefore, was a very different case from this. Here the defendants, after notice, refused to produce a paper in their possession, which it was alleged had been fraudulently tampered with, and never did produce the same until after the plaintiffs had been forced to resort to secondary evidence of the contents of such paper, when

they attempted to offer the same as part of their own evidence. Again, it is insisted that the defendants had good reason for declining to produce the paper when called for, because they wanted to use it afterwards in taking their own testimony in Charleston, and if they had produced it before the master they would have lost the opportunity of doing so. In this connection a very significant fact appears in the decree of the circuit judge, for he says that, when the paper was called for, it "was not produced, nor was any excuse given for the failure to produce the same." This was well calculated to excite the suspicion, at least, that the reason now given was an afterthought. But, passing that by, it is sufficient for us to say that the reason now given for not then producing the paper is altogether insufficient, for two reasons: (1) It does not appear how the continued possession of the paper was necessary to the proper examination of the defendants' witnesses in Charleston, as it does not appear that they were subscribing witnesses to the execution of the mortgage. (2) But, even assuming that the possession of the mortgage was necessary to the proper examination of defendants' witnesses in Charleston, we cannot doubt that, even if the mortgage had been offered in evidence before the master, the court would, upon proper representations of such necessity, have allowed the defendants the use of the mortgage for a full examination of their witnesses. Finally, it is urged that the failure to produce the mortgage when called for was not the fault of the defendants, but of their counsel, and that the defendants ought not to be made to suffer by reason of what is termed a "technical error" on the part of their counsel. The fundamental difficulty in maintaining this position is the fact that it nowhere appears in the case that the refusal to produce the mortgage was due to the fault of the counsel for defendants. The bare statement of that fact, or of any other fact, appearing only in the argument of counsel, this court has often held, cannot be accepted as one of the facts of which this court has power to take cognizance. In addition to this, we would be very slow to believe that reputable counsel, after having been fully instructed by clients as to the real facts of their case, would advise a course which the law condemns as an attempt to suppress evidence. But even assuming that the refusal to produce the paper when it was called for was advised by counsel, through some mistaken view of the law, or some want of full information as to the fact, and not to any improper motive, which, of course, is not charged or even intimated in this case, we do not see how that can help the defendants. If the defendants, whether acting under the advice of counsel or not, saw fit, by refusing to produce a paper alleged to have been fraudulently tampered with, to shut themselves off from afterwards in-

troducing the paper as a part of their own evidence, under a wise and salutary rule of law, which, so far from being technical in its character, is founded upon fundamental principles of justice, they must take the consequences of their own act.

Coming, then, to the second general question presented by this appeal, as to whether there was error in declaring the entire mortgage void, it might be sufficient to say that it does not appear that this point was ever raised before the circuit judge, as it is not alluded to in his decree, and first appears in one of the exceptions. But, as this exception was not raised by respondents' counsel, we will not decline to consider the question. It seems to us that the proposition that the fraudulent alteration of any instrument in writing renders the whole instrument void is so well settled by authority that little need be said upon the subject. We need not go outside of our own state for authority. In addition to the cases of *Mills v. Starr*, 2 Bailey, 359, and *Burton v. Pressly*, Cheves, Eq. 1, cited by respondents' counsel, see *Vaughan v. Fowler*, 14 S. C. 355; *Kennedy v. Moore*, 17 S. C. 404; *Plyler v. Elliott*, 19 S. C. 257,—all of which sustain the above proposition.

What effect the conclusion reached in this case may have upon the liability of the plaintiff Powell on the debt intended to be secured by the mortgage is not a question presented in this case, and cannot, therefore, be considered. It does not follow necessarily that, because the mortgage is now a nullity, the debt intended to be secured thereby is extinguished. But, as we have said, that question is not before us, and therefore is not intended to be decided. The judgment of this court is that the judgment of Judge Norton in both of the cases above stated be affirmed.

There is, however, another appeal in these cases, taken by the plaintiffs from an order of his honor, Judge Townsend, disallowing the costs of the plaintiffs' attorneys taxed by the clerk in these cases. These actions having been commenced since the passage of the act of 1892 (21 St. 30), it is quite clear that no such costs can be allowed, unless these cases can be brought within the terms of a proviso to the act, which reads as follows: "That this shall not apply to causes now pending, or existing liquidated contracts." We do not think that these cases fall within the terms of that proviso. While the phraseology of the proviso is not as clear as it might be, it seems to us that, inasmuch as costs can only be taxed in a case where an action has been brought, the words "existing liquidated contracts," in the proviso, must necessarily be construed to mean actions upon existing liquidated contracts; for no statute ever did allow costs upon an existing liquidated contract unless there was an action on such contract. Now, as these actions were not brought upon any contract,

either liquidated or unliquidated, but, on the contrary, were brought on the equity side of the court simply for the purpose of having a mortgage canceled, upon the ground of a fraudulent alteration thereof, and as it is conceded that these actions were not pending at the time of the passage of the act of 1892, we agree with Judge Townsend that, under the provisions of that act, no attorneys' costs can be allowed. The judgment of this court is that the order of the circuit court disallowing the attorneys' costs in these cases be affirmed.

(43 S. C. 443)

GUCKENHEIMER et al. v. DRYFUS et al.

BENHEIM et al. v. SAME.

(Supreme Court of South Carolina. April 1, 1895.)

ATTACHMENT—BOND.

Where the bond required by section 251, Code Civ. Proc., in attachment, is signed by only part of the plaintiffs in the action, a writ issued under it will be set aside.

Appeal from common pleas circuit court of Barnwell county; James F. Izlar, Judge.

Action by Simon Guckenheimer, Abe S. Guckenheimer, and Moses S. Guckenheimer, copartners in trade and doing business under the firm name of S. Guckenheimer & Sons, against Benjamin H. Dryfus and J. M. Rich, copartners in trade, doing business under the firm name of Dryfus & Rich, and I. Rich; also, action by Adolphus H. Benheim, Myer Benheim, and Henry Benheim, copartners in trade, doing business under the firm name of Benheim, Bro. & Co., against the same defendants. The two actions were combined and heard together. Judgment for plaintiffs, and defendants appeal. Reversed.

S. G. Mayfield and Patterson & Holman, for appellants. L. T. Izlar, for respondents.

POPE, J. These two separate actions, involving identical issues, have, by the consent of all the parties in each cause, been heard together. It is admitted that S. Guckenheimer & Sons are a firm located and doing business as merchants in the city of Savannah, in the state of Georgia, while Benheim, Bro. & Co. are a firm located and doing business as merchants in the city of New York, in the state of New York. The defendants Dryfus & Rich are a firm located and doing business as merchants in the city of Savannah, in the state of Georgia. The defendant I. Rich is a merchant located and doing business as such in the town of Denmark, in the county of Barnwell, in the state of South Carolina. The plaintiffs in each action, holding large claims for goods sold to the defendants Dryfus & Rich, ascertained that this last-named firm was insolvent, and believing that such last-named firm, in view of such insolvency, and within a few weeks of the date at which the insolvency of Dry-



fus & Rich was known, had shipped some of their firm property from the city of Savannah to the defendant I. Rich, who was a brother of J. M. Rich, of the firm of Dryfus & Rich, in the said town of Denmark, in the state of South Carolina, to be held by said I. Rich as the property of the firm of Dryfus & Rich, commenced an action, respectively, against the defendants Dryfus & Rich and I. Rich in the court of common pleas of Barnwell county, state of South Carolina, wherein they alleged the foregoing facts, and demanded judgment against the defendants Dryfus & Rich for the amount due and owing the plaintiffs, and for an attachment of the goods of Dryfus & Rich in the possession of I. Rich, which they alleged were worth about \$1,000. These actions were by summons and complaint, and were begun on the 23d day of September, 1893. On the same day the plaintiffs applied to W. Gilmore Simms, Esq., as clerk of the court of common pleas for Barnwell county, in the state of South Carolina, for a warrant of attachment. Mr. Simms, as said clerk, granted the writ on the same day. Under this writ of attachment the sheriff of Barnwell county, I. W. Lancaster, Esq., seized the personal property that had been shipped by Dryfus & Rich to I. Rich, and now holds the same. On the 28th day of September, 1893, W. Gilmore Simms, Esq., as said clerk, granted an order to serve the defendants Dryfus & Rich with the summons in such case by publication thereof in a newspaper published in Barnwell county once a week for six successive weeks, and that copies of the summons and complaint be sent by mail, postage paid, to said Dryfus & Rich at Savannah, in the state of Georgia. Thereafter the defendants Dryfus & Rich made an appearance in each of said actions, and made answer thereto on the merits. At the fall term, 1893, of the court of common pleas for Barnwell county, in this state, the defendants made a motion in each case in such court to dissolve the writs of attachment on the grounds—First, because the court had no jurisdiction to issue such writs of attachment; second, because the bond to obtain the warrant was and is insufficient; and, third, because the affidavits are defective, and do not make out a case to support the granting of said writs of attachment. This motion came on to be heard before his honor, Judge Izlar, who in a short order dated 7th February, 1894, refused the motion on each of the grounds upon which the motion was based. From this order of Judge Izlar the defendants in each case now appeal, on these grounds, to wit: (1) Because his honor erred in not dissolving the attachment issued by the clerk herein upon the ground that the court had no jurisdiction over the parties or the subject of the action in which said attachment was granted. (2) Because his honor erred to not dissolving the attachment upon the

ground that no undertaking had been given by the plaintiffs, as required by the attachment laws of this state, the same only being signed by one of the plaintiffs in the action. (3) Because his honor erred in not dissolving the attachment for that the affidavits upon which the same were obtained are insufficient and defective in form and substance, and would not authorize the granting of an attachment by the said clerk.

It seems to us that if no undertaking, as required by the attachment laws of this state, was executed, prior to the issuance by the clerk of the writs of attachment, by the plaintiffs in each case, it was a fundamental defect in each proceeding, which, when made manifest to the circuit judge, would require an order vacating such writs of attachment. The language of our Code of Civil Procedure is as follows: "Section 251. Before issuing the warrant, the judge, clerk or trial justice shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, *or the attachment be set aside by order of the court* [italics ours], the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars, except in case of a warrant issued by a trial justice, when it shall be at least twenty-five dollars." Now, in the case at bar the following undertaking was executed: "The State of South Carolina, County of Barnwell. Court of Common Pleas. Know all men by these presents, that of the directions of the fourth clause of the act of the legislature of this state passed the 24th day of September, A. D. 1868, entitled an 'Act to regulate attachments,' we, S. Guckenheimer & Sons, by their agent, S. S. Freedleim, and Ansley D. Cohen, held and firmly bound unto Benjamin H. Dryfus and J. N. Rich, as copartners under the firm name of Dryfus & Rich, and I. Rich, in the full and just sum of five hundred dollars," etc. "Whereas, S. Guckenheimer, Abe Guckenheimer, and Moses Guckenheimer, as copartners under the firm name of S. Guckenheimer & Sons, [are] about to issue and sue out of the court of common pleas for the county of Barnwell, aforesaid, a warrant of attachment," etc.; "and whereas, under and by virtue of the clause aforesaid to the legislature above mentioned, it is directed and prescribed that before issuing the warrant the judge, justice of the peace, or clerk shall require a written undertaking on the part of the plaintiff, with sufficient surety," etc. "S. Guckenheimer [L. S.], by S. S. Freedleim. Ansley D. Cohen [L. S.], by Henry Benheim." Thus it is manifest that, although it is recited in the undertaking that S. Guckenheimer & Sons are the plaintiffs in the one action, and



Benheim & Co. are the plaintiffs in the other action, in each of which writs of attachment are sought to be issued, and although it is stipulated therein that S. S. Freedleim, in the one instance, and Benheim, in the other, are the attorneys in fact authorized by such firms to sign the firm names to such undertakings, yet the name of S. Guck-enheimer in the one case and Adolph D. Benheim in the other is signed as the maker or obligor to said undertaking by S. S. Freedleim in the one case, and H. Benheim in the other. Now this court has held that the undertaking must be signed by the plaintiff or plaintiffs, as the case may be, before the writ is issued, or the attachment will be set aside. *Bank v. Stelling*, 31 S. C. 360, 9 S. E. 1028; *Wagener v. Booker*, 31 S. C. 375, 9 S. E. 1055. Mr. Chief Justice McIver rendered, as the organ of this court, judgment in the first case cited, in a most carefully prepared opinion. His judgment was subsequently affirmed in the case of *Wagener v. Booker*, *supra*. Since that time the view of this statutory requirement has been repeatedly acted on. Such being the decisions of this court, it was error in the circuit judge to refuse to vacate these attachments. Having reached this conclusion, we deem it unnecessary to discuss the other points raised.

It is the judgment of this court that the order appealed from in each of the cases here considered be reversed, and that each of the causes be remanded to the circuit court, with direction to such court to issue an order in each of these actions vacating the writs of attachment.

(43 S. C. 474)

#### GLEATON *v.* TYLER.

(Supreme Court of South Carolina. April 4, 1895.)

##### AUTHORITY OF HUSBAND—PAYMENT OF WIFE'S MONEY.

A husband, acting as the general agent of his wife, cannot direct payments which he makes with her money to be applied to his debts.

Appeal from common pleas circuit court of Aiken county; D. A. Townsend, Judge.

Action by M. L. Gleaton against Rosa A. Tyler. From a judgment for plaintiff, defendant appeals. Modified.

O. C. Jordan and Croft & Chafee, for appellant. Henderson Bros., for respondent.

POPE, J. The plaintiff in his complaint embodied two causes of action,—one the breach of the condition of a mortgage of certain real estate in Aiken county, in this state, which was executed to the plaintiff by the defendant to secure indebtedness of \$625, with interest at 10 per cent. per annum; and the second for the breach of the condition of another mortgage, on a separate parcel of land in Aiken county, in this state, which was executed to the plaintiff by the defendant to secure an in-

debtedness of \$75, with interest at 10 per cent. per annum. The defendant in her answer alleged that she was a married woman when the two mortgages were executed and the debts secured by them were contracted, and that they were not for the benefit of two separate estates, and then that, if it was her duty to pay the debts secured by the mortgages, she had fully paid the same. Testimony was taken before the master for Aiken county. The action then came on to be tried by his honor, Judge Townsend, who rendered his decree overruling the defenses, and ordering judgment for the foreclosure of both mortgages to pay the debts which said mortgages respectively were to secure. The first debt was ascertained to be \$738.46. The second debt was ascertained to be \$103.33. From this decree the defendant appealed as to both debts and mortgages, but finally she has abandoned all her grounds of appeal except as to the \$738.46. This sum she claims should be reduced by the sum of \$66.24, paid on the 20th February, 1889, and the further credits of \$45, paid on 5th November, 1888; \$38.67, paid on the 1st December, 1888; \$47.75, paid on 18th October, 1889; \$47, paid on 12th November, 1889; \$56.17, paid on December 4, 1889; and \$46.60, paid on 20th September, 1890,—in addition to the credits the plaintiff has already admitted, to wit, \$153.50, paid on 15th September, 1891, and \$172.65, paid on 22d October, 1891, leaving only the sum of \$105.93 due on the first cause of action on 27th August, 1894.

We have carefully examined the testimony, and have concluded that the two payments of \$45, paid on 5th November, 1888, and \$38.67, paid on 1st December, 1888, cannot be allowed the defendant as credits, for it seems to us that the plaintiff had contracted, through her husband, with her tenant, Jackson, say on 1st January, 1888, quite six months before she made the first mortgage, and therefore her rents for that year need not be said to have been contracted to be paid on this mortgage. But, on the other hand, we are satisfied the circuit judge erred in refusing the defendant the other credits upon a misapprehension of the law governing agents in transactions for their principals. We may grant the proposition that the defendant made her husband her general agent, but we cannot concede that a general agent, without a special power to do so, can direct the money of his principal so as to appropriate the same to the payment of his own debts. Such a doctrine, if recognized as law, might lead to the most pernicious results. We do not think our views could be better illustrated than is done in the case of *Stewart v. Woodward*, 28 Am. Rep. 488. In that case Powers, J., said: "The report of the auditor shows that Carrier was the general agent of the plaintiffs in the conduct of their business at Montpelier. His authority thus empowered him to do all things usual and useful to conduct the business of a merchant tailor. A general agency is, however, a restricted service.

The agent cannot go outside the practical scope of his principal's business. So far as the business of his principal is concerned, he may do all that his principal could do. He cannot steal his principal's goods, nor appropriate them to his own use. He can only appropriate them to the use and profit of the principal. Persons dealing with a general agent are bound to measure the scope of his authority, or if they are dealing with a special agent, although the compass of authority in the one case is wider than the other, still it is to be understood that it has its limits. *It is to be understood that it is an agent, and not a principal, who acts.*" (Italics ours.) As to a husband's agency for the wife, see Mechem, Ag. § 63; McLaren v. Hally, 26 Iowa, 305. The observations of Chief Justice McIver, at page 535, 39 S. C., and page 125, 18 S. E., in Martin v. Suber, are very pertinent in the matter of the agency of the husband for the wife. It follows, therefore, that the defendant is entitled to have placed on her note for \$625, due on 1st October, 1888, with interest according to the tenor of the note, the following credits, to wit: \$66.24, on the 26th February, 1889; \$47.75, on the 18th October, 1889; \$47, on the 12th November, 1889; \$56.17, on the 4th December, 1889; \$46.60, on the 20th September, 1890,—together with the conceded credits of \$153.50 on the 15th September, 1891, and \$172.65 on the 22d October, 1891,—and, when these modifications are made, that the decree be affirmed. It is the judgment of this court that the judgment of the circuit court be modified as herein required, and thereafter that the same be affirmed; and it is ordered that the cause be remanded to the circuit court to enforce this judgment.

(43 S. C. 477)

In re WELLS et al.

LATIMER v. LATIMER et al.

(Supreme Court of South Carolina. April 4, 1895.)

RIGHTS OF ASSIGNEE OF JUDGMENT — SET-OFF OF JUDGMENTS.

1. Where an assignment of part of a judgment was entered upon the entry of the judgment, and thereafter the judgment was set off against another without notice to the assignee, it was proper to reopen the matter, and grant the assignee a hearing.

2. The objection that the petitioner in an ex parte proceeding should have asserted his right in an action, or under a rule, cannot be raised for the first time on appeal.

3. The right to set off judgments is an equitable right, to be enforced in the discretion of the court.

4. Where an attorney took a case with the agreement that he should have 10 per cent. of the amount recovered, knowing that the party against whom he was to proceed had a judgment against his client in excess of his client's claim, and upon his obtaining judgment an assignment to him of a 10 per cent. interest therein was entered, the court will not enforce the right of set-off between the judgments, against the attorney's interest.

Appeal from common pleas circuit court of Greenville county; I. D. Witherspoon, Judge.

Ex parte proceeding by G. G. Wells and James L. Orr, late partners in the practice of law under the firm name of Wells & Orr, in the matter of Ex parte Joseph P. and John H. Latimer, as executors of the will of Hewlett Sullivan deceased, in the matter of Hewlett Sullivan against C. A. Parkins and others, and James H. Latimer against Joseph P. and John H. Latimer, as executors, for the modification of an order setting off the judgments in such actions. From a judgment for petitioners, the executors appeal. Affirmed.

Earle & Mooney, for appellants. Cothran, Ansel & Cothran, for respondents.

POPE, J. It seems that Hewlett Sullivan, as plaintiff, recovered a judgment in the court of common pleas for Greenville county, in this state, for \$2,121.05 and costs, against C. A. Parkins, P. D. Huff, John H. Latimer, and James P. Latimer, as defendants. Subsequently, the said Hewlett Sullivan departed this life testate, and Joseph P. Latimer and John H. Latimer qualified as the executors of his will. Thereafter, James H. Latimer, as plaintiff, brought his action against the said Joseph P. Latimer and John H. Latimer, as executors of the will of Hewlett Sullivan, deceased, to recover what was due him for services rendered to said Hewlett Sullivan, in his lifetime, in the court of common pleas for Greenville county, in this state. The said plaintiff, James H. Latimer, employed the law firm of Wells & Orr, composed of George G. Wells and James L. Orr, as his attorneys to institute and maintain his said suit; paying them a small retainer, and agreeing to give them 10 per cent. of his recovery in said suit, as their compensation as his attorneys. James H. Latimer, as said plaintiff, recovered a judgment against the said Joseph P. Latimer and John H. Latimer, as executors as aforesaid, for the sum of \$1,825.03 and costs. The said attorneys, Wells & Orr, knew of the said judgment in the case of Hewlett Sullivan against C. A. Parkins et al. As soon as judgment was entered up and execution issued in the case of James H. Latimer against Joseph P. and John H. Latimer for the \$1,825.03 and costs, the said James H. Latimer entered an assignment of 10 per cent. of said recovery to said Wells & Orr, on the execution lodged in the sheriff's office. The said Joseph P. Latimer and John H. Latimer, as said executors, intervened by petition to have the judgment of James H. Latimer against them, as executors of Hewlett Sullivan, deceased, for \$1,825.03 and costs, paid by operation of law, by setting off against such judgment the judgment for \$2,121.05 and costs recovered by their testator against James H. Latimer along with C. A. Parkins and others. On their motion a rule was issued by Judge Izlar, and served upon the said James H. Latimer, requiring him to show cause why one judgment should

not be set off against the other, but no notice was given to Wells & Orr of such proceedings. Judge Izlar, by an order dated 15th July, 1893, passed an order containing this provision, among others: "It is therefore ordered and adjudged that so much of the judgment entitled *Hewlett Sullivan v. James H. Latimer* and others, for the sum of \$2,121.05 and costs, as will satisfy the judgment of *James H. Latimer v. Jos. P. and John H. Latimer*, as executors of the will of *Hewlett Sullivan*, deceased, be set off against the latter, and that the former judgment be satisfied pro tanto." Thereafter, about the 14th March, 1894, Wells and Orr each made affidavits setting forth substantially the foregoing facts, and caused the following notice to be served upon Joseph P. Latimer and John H. Latimer, as executors of *Hewlett Sullivan*, deceased: "Please to take notice that on the annexed affidavits [affidavits of George G. Wells and James L. Orr], and all the records and proceedings in the above-entitled cause, we will move the court, on the fourth day after service upon you, exclusive of the day of service, or as soon thereafter as counsel can be heard, for an order modifying the order of his honor, Judge Izlar, of date July 15, 1893, setting off the two judgments named in the caption [the same as is set out in the caption to this opinion], so far as the same affects the interest of ten per cent. on said last-named judgment [\$1,825.03 and costs], previously assigned to Wells & Orr, and also the costs of said last-named judgment, and for such other relief as may be just." The petition of Wells & Orr came on to be heard before his honor, Judge Wither- spoon, at the spring (1894) term of the court of common pleas for Greenville county; and, after hearing arguments on both sides of the controversy, he decided, in effect, that Judge Izlar's order should be so modified that the 10 per cent. of the recovery on the judgment for \$1,825.03, and all the costs, should be excepted from the operation of Judge Izlar's order dated the 15th day of July, 1893. From this order, Joseph P. Latimer and John H. Latimer, as executors of last will of *Hewlett Sullivan*, deceased, now appeal, on the following grounds: (1) Because his honor erred in reversing the order of Judge Izlar, and in modifying the same. (2) Because his honor erred in modifying the order of Judge Izlar without having the report of the master and the accompanying testimony before him, upon which said order was based. (3) Because his honor erred, after final order, in opening the same,—changing the terms thereof,—on motion of petitioners, who are strangers to the record, and in not holding that the rights, if any, of the petitioners, should be enforced by a direct action. (4) Because, if his honor had jurisdiction to open and modify the order of Judge Izlar, the motion for that purpose should have been predicated upon a rule duly issued, and served upon the respondents, to

show cause against it. (5) Because his honor erred in not holding that the assignees of a judgment take it subject to all equities in favor of the judgment debtor, including the right to set off one against the other. (6) Because his honor erred in not holding that Wells & Orr, having taken the assignment of the judgment of *James H. Latimer v. J. P. and J. H. Latimer*, as executors of *Hewlett Sullivan*, deceased, with full notice of the judgment of *Hewlett Sullivan v. C. A. Parkins* and others, hold the same subject to the rights of the respondents to set off the latter judgment against the former. (7) Because his honor erred in not holding that an assignment of a part of a judgment without the consent of the judgment debtor cannot affect him, and in not holding that the assignee of a part of a judgment will not be permitted to obtain the process or order of the court for its collection.

1. We do not see that the circuit judge erred in the matter embodied in the first exception. When it is considered that Judge Izlar, by his order, disposed of property duly assigned to Wells & Orr, without giving them an opportunity to be heard, it was practically closing the door of the court of justice upon them. It does not help Wells & Orr that this was unintentional on Judge Izlar's part; that no one called his attention in any way to the assignment by *James H. Latimer* to them of one-tenth interest in that judgment. The fact that ignoring the rights of Wells & Orr was unintentional on the part of Judge Izlar seems to us to strengthen their claims to the relief they seek. It is very evident that appellants rely upon what is generally true,—that one circuit judge has no revisory power over the acts of other circuit judges. As it is frequently expressed, you cannot appeal from one circuit judge to another circuit judge. Unquestionably, no one who was a party to the controversy as it was presented to Judge Izlar could obtain any reconsideration of any action by Judge Izlar before another circuit judge. Such, however, is not the fact in the petition at bar. Wells & Orr were not before Judge Izlar at all. This is one of their grievances,—that they were not summoned to be there; that they had no notice of their rights being interfered with. This exception is overruled.

2. Nor do we see any force in the second ground of appeal, for the very notice served upon the appellants called their attention to the fact that the pleadings and proceedings would be relied on, in addition to the affidavit.

3. We cannot say that any one who has been assigned an interest in a judgment, notice whereof is spread upon the records, need be classed among strangers to such record. It is true that they were not parties to the record during the progress of the litigation which culminated in a judgment; but, as soon as the judgment is entered of record,

at once thereafter the fact is spread upon the record that Wells & Orr own one-tenth thereof, by the owner thereof,—James H. Latimer. When this was done, it became necessary, in all proceedings thereafter, to recognize them, or to get rid of that claim in some legal way. Failing in this, it is the right of Wells & Orr to assert their rights in court against any and all comers, no matter if an *ex parte* order has been passed, without notice to them, prejudicial to their rights. The glory of the law is that no one is condemned without an opportunity to be heard, nor property rights interfered with without giving the defendant "his day in court." But appellants insist that, if Wells & Orr had the right to be heard, they have pursued an erroneous practice to assert that right; in other words, that they should have pursued their right by an action instituted by them for that purpose, wherein the appellants should have been made defendants,—or, as is insisted in the fourth ground of appeal, that the petitioners, Wells & Orr, should have asserted their right under a rule, instead of a notice accompanied by affidavits. Neither one of these questions appears to have been presented to the circuit judge, or passed upon by him, as shown by the case here presented. Under the well-settled rule this court will not entertain such questions under such circumstances. Thereupon, these exceptions (3 and 4) are overruled.

The fifth, sixth, and seventh exceptions present a very nice question to this court for its decision, viz. whether, when James H. Latimer obtained his judgment, there being already a judgment against him, in effect, in favor of the very parties against whom his judgment was obtained, the right of set-off of one judgment against the other did not exist in the law governing judgments, and that this right of set-off could not be arrested by the assignment of such judgment by James H. Latimer. This is a serious question, and demands patient investigation. It must be admitted that the law places contracts under seal on a different plane to that occupied by obligations not under seal, passed away before maturity. In contracts under seal, an assignee thereof must hold the same subject to the same rights of set-off that exist in the obligee against the obligor or assignor. Not so as to contracts under seal, passed before maturity. And it may be admitted that judgments, being debts of record, belong to the former class. It may be that, if Wells & Orr owed all their rights to a transaction between themselves and James H. Latimer after his judgment had been recovered, they would have experienced a great difficulty in successfully asserting their rights to be regarded as the legal owners of the one-tenth part of this judgment. But it must be borne in mind that their contract with James H. Latimer was be-

fore his judgment was obtained, and that the assignment of one-tenth interest in the judgment was only the carrying out by James H. Latimer of his previous contract. This would be delicate ground upon which we are now treading, however, if set-off was recognized as a legal right; and it may be that we had better state that we do not rest our decision upon the consideration here presented, pertaining to and governing legal rights in judgments. It has been suggested by respondents' attorneys that this right to set off one judgment against another, in whole or in part, is not a legal right, but an equity that the circumstances of each particular case must regulate. Take this case: A. obtains a judgment against B. After that judgment was obtained, A. employs B. to labor for him, but never having paid B. for such labor. A. dies, leaving a will, of which D. is executor. By operation of law, D., as executor, owns the judgment held by A., his testator, against B. Then B. demands payment of the debt for services rendered A. in his lifetime, but D., as executor, refuses to recognize such debt. B., being very poor, goes to C., an attorney, and presents his case, whereupon C., as an attorney, agrees to bring suit against D., as the executor of A., to recover such debt, if allowed 10 per cent. of recovery as compensation. B. accepts the proposition. The debt is put into judgment against D., as executor, and B., like an honest man, assigns one-tenth of the judgment to C., as his compensation. Now, the respondents insist that this right of set-off between the judgments, being an equity depending for its enforcement upon equity and good conscience, will not be so enforced in a court of equity as to deprive the laborer of his hire, but that the circuit judge, sitting as a chancellor, will protect the assignment of the attorney. We are not left in doubt on this subject in this state, for Chief Justice McIver, in delivering judgment in the case of *Simmons v. Reid*, 31 S. C. 392, 9 S. E. 1058, thus stated this matter: "Yet it is undoubtedly true that an attorney has an equitable claim to be paid for his services out of the judgment he has recovered for his client; and the court, in a proper case,—especially in a matter addressed to its discretion,—will always recognize such a claim, as is said in the case *Puett v. Beard*, 86 Ind. 172. The right to set off one judgment against another is purely equitable, and only allowed when good conscience requires it; and good conscience is far from requiring that an attorney's claim for services rendered in securing the judgment should yield to the claim of those holding rights adverse to their client." "It appears to have been made [the assignment of the judgment to the attorney] in pursuance of an agreement entered into at the time the action was commenced, and was doubtless the means, and possibly the only means, by

which the plaintiff obtained the services of an attorney which have proved effective." Again, in this same case, the chief justice remarks: "The jurisdiction for this purpose [setting one judgment against another] is purely equitable in its nature, and the application is addressed to the sound discretion of the court. \* \* \* in which last-cited case it is said that the court, in exercising this jurisdiction, will always regard the equitable rights of persons not parties to the suit." And to the same effect were the words of that eminent jurist, Chief Justice O'Neal, in *Tolbert v. Harrison*, 1 Bailey, 600, when he declared: "The question is whether this court is bound by legal rules to set off judgments in all cases where they are in the same right. It is clear that it is not. The authority of the court is not derived from the statutes of set-off, but depends upon the general jurisdiction of the court over the suitors in it. It is an equitable part of their jurisdiction, and has been frequently exercised. \* \* \* In *Williams v. Evans*, 2 McCord, 203, Judge Nott, after quoting the above remark of Lord Kenyon, said: 'If it constitute a part of the equitable jurisdiction of the court, it ought to be so exercised as to do equity, and not to sanction fraud.' All applications of this kind, founded, as they are, on no positive statute or any fixed rule which compels the court to grant them, are addressed to the discretion of the court; and in the exercise of that discretion, even where the set-off might be legally made, yet if the court sees that injustice will be done by granting the order of set-off, it is uniformly refused." These views may be reinforced by the cases of *Ely v. Cooke*, 28 N. Y. 385; *Perry v. Chester*, 53 N. Y. 240; *Zogbaum v. Parker*, 55 N. Y. 120; *Diehl v. Friester*, 37 Ohio St. 477; *Ames v. Bates*, 119 Mass. 399; *Herman v. Miller*, 17 Kan. 330.

It must be understood, however, that this court by no means intends to lend its sanction to any transactions between lawyers and their clients which are in themselves inequitable. When any application such as that now at bar is made to the court, to respect the rights of attorneys or other persons to whom a partial assignment of a judgment has been made which may form a subject of legitimate set-off by another judgment, such assignees must always be prepared to justify such assignments as fair, bona fide, and just claims. A little reflection will show that this decision in no way infringes upon the previous decisions of this court in the matter of attorney and client. Here there is an executed contract between lawyer and client, which is not contested as between them, but which is sought to be invalidated by third parties. These exceptions must be overruled. It is the judgment of this court that the order of the circuit court, appealed from, be affirmed, and the cause is remanded to the circuit court.

v.21s.E.nc.6—22

(43 S. C. 461)

# HILL v. GEORGIA, C. & N. R. CO.

(Supreme Court of South Carolina. April 2, 1895.)

ACTION AGAINST CARRIER—INJURY TO SHIPMENT—CONNECTING LINES—EVIDENCE—EXAMINATION OF WITNESS—LEADING QUESTIONS—VARIANCE.

1. Plaintiff cannot object to the admission in evidence of a paper which defendant has made a part of the record by attaching a copy to his answer.

2. Where a complaint in an action against a common carrier alleged a contract to "carry and deliver" the goods, the bill of lading, showing a contract to carry and deliver such goods upon certain conditions named, cannot be excluded as being a different contract from that set out in the complaint.

3. In an action against a common carrier, it was not error to admit a waybill of the goods shipped, although not relevant to the issue.

4. A general interrogatory addressed to a witness whose deposition is being taken, "If you know anything else that will benefit the plaintiff, state same fully," is not objectionable as leading, or as depriving defendant of the right to cross-examine such witness relative to matters brought out by the question.

5. In an action by a shipper against a carrier for damage to goods consigned to a factor, evidence that drafts drawn by the plaintiff for more than the value of the goods had been accepted and paid by the consignee was properly excluded.

6. A railroad company received goods to be shipped over its own and connecting lines from A. to C. under a bill of lading containing the stipulation that, "in case of any loss or damage done to or sustained by any goods herein receipted for" during transportation, "the company alone shall be held responsible therefor in whose actual custody the goods may be at the time of the happening of such loss or damage." *Held*, that the receiving company was not liable for damage received while the goods were in the hands of a connecting line.

7. In an action against a common carrier who has taken goods for shipment upon the condition that he shall not be liable for damage occurring to the goods while in charge of a connecting carrier, a charge that section 1720, Rev. St., providing that in such cases the corporation first receiving the goods shall be liable for the damage, but may discharge itself from such liability by the production of a receipt from the corporation to which it was its duty to deliver the goods, had no application to the case, was improper.

Appeal from common pleas circuit court of Abbeville county; Ernest Gary, Judge.

Action by R. M. Hill against the Georgia, Carolina & Northern Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

The charge of the trial court was as follows:

"This is a suit on the part of R. M. Hill, plaintiff, to recover from the defendant railroad company damages for the failure on the part of the railroad company to deliver to the consignees a certain lot of cotton delivered to the railroad company by Mr. Hill to be shipped to Charleston, and there deliver to his factors, James M. Seignous & Son. It is claimed on the part of the plaintiff that the railroad did not carry out their part of the contract, and on account of that failure certain damages resulted. It is alleged that

a bill of lading was given for the cotton; that is, a receipt and a contract setting forth the conditions on which the railroad promised to do, and I will read a portion of it to you: 'And it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for, during transportation, whereby any legal liability may be incurred by the terms of this contract, that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage.' I charge you, as a matter of law, that under that contract it was incumbent upon the defendant company to deliver at Charleston to James M. Seignous & Son this cotton in a reasonable time, in as good condition as it was at the time that they received it; and if the cotton was not in that condition at the time that it was delivered, or ought to have been delivered, then there was a failure on the part of the railroad company, and it is liable. Now, the next question is, was the cotton delivered in a reasonable time? If you find that it was not delivered at a reasonable time, at the time that it was delivered then in what condition was it then? If it was not in as good condition as when the railroad company received it, then to what extent was it damaged? And, if you so find that, the measure of the damages shall be as follows: If you find that the cotton was not delivered to the consignees in a reasonable time, and that in consequence the cotton has been damaged, then I charge you that the measure of damages cannot exceed the value of the cotton at the time that delivery should have been made, with interest to the time of delivery, less the value of the cotton at the time of delivery.

"Now, I have been requested to charge you in behalf of the defense as follows: (2) 'That in this state a common carrier may or may not take goods to be delivered beyond its own line. If it does so, it may limit liability.' Court: I so charge you. You demand a railroad company to deliver cotton at any point not on its line of road, but they have no right to refuse to take goods to deliver on its line of road. In other words, if the city of Charleston is not on its line of road, the plaintiff cannot force them to deliver it there, but they can take a contract to deliver in Charleston, and they would be bound by it. (4) 'That the bill of lading is the contract between the parties, if accepted without objection by shipper, and it controls as to the liability of the C. O.' Court: That I charge you to be the law that the bill of lading introduced in evidence is the contract of the parties. (6) 'That it was the duty of the terminal company to deliver the goods upon the presentation of the bill of lading to the consignee named in the bill, unless it appears that the shipper has assigned the bill to another party (subject to the right of stopping in transitu in cases of insolvency).' Court:

I charge you that that is the law. That was the duty of the railroad company to deliver the cotton to the consignees. But, if Mr. Hill had changed the consignees, it was the duty of the railroad company to deliver to the party named in the bill of lading. (7) 'That the carrier is under no obligation to deliver the goods except upon the presentation of the bill of lading by the consignees named therein.' Court: That I charge you as the law. (8) 'That, if the bill of lading and waybill differ in terms, the bill of lading must control.' Court: I charge you that to be the law.

"Now, with reference to the liability of connecting roads. That does not apply in a case of this kind. For instance, if it was the desire on the part of the plaintiff to ship that cotton, he would have a right to ship it to any point on defendant's line. He could require defendant to deliver it to any connecting line, and, when this road took the receipt of any connecting line, that would relieve this road of responsibility then for loss. But in this case it is not so, for the reason that this road has contracted to deliver this cotton in the city of Charleston, and it cannot relieve itself from the obligation by saying that some other road has not performed its contract. It is obligatory on this road to deliver that cotton at Charleston to the consignee in as good order as it was received here. Now, you are here to hold the scales of justice. You are simply to find the facts from the evidence as you have heard it here, and apply those facts to the law, which I have endeavored to give you."

L. W. Perrin and T. P. Cothran, for appellant. Graydon & Graydon, for respondent.

McIVER, C. J. This action was brought by the plaintiff to recover damages to a lot of cotton shipped by him, over the railroad of defendant company, under a contract to deliver the same to Seignous & Son, at Charleston, as he alleged, a considerable portion of which was not delivered to said Seignous & Son until after a considerable lapse of time, whereby the cotton was greatly damaged by exposure to the weather. There are certain undisputed facts in the case, which may be stated substantially as follows: On the 17th of October, 1891, the cotton was received at Abbeville for shipment, and consigned to Seignous & Son under a contract evidenced by a bill of lading, a copy of which is set out in the case, the terms of which will be hereinafter more particularly referred to. Inasmuch as defendant's line of railroad does not extend to Charleston, the arrangement seems to have been that the cotton should be transported to Clinton over defendant's road, where the same connected with the Columbia, Newberry & Laurens Railroad, and thence transported by that road to Columbia, where the last-named road connected

with the South Carolina Railway, and from thence carried by said railway to Charleston. By that route the cotton was carried to Charleston, reaching there on or about the 20th of October, 1891, in good condition. The South Carolina Railway Company refused to deliver the cotton when called for by the consignees, Seignous & Son, on account of some discrepancy between the way-bill and the bill of lading. This discrepancy having been explained by the defendant company as soon as it was brought to the attention of that company, to wit, on the 5th of December, 1891, the South Carolina Railway Company tendered the cotton to the consignees a few days thereafter, who refused to receive the same unless the South Carolina Railway Company would pledge itself that all losses arising from the delay in delivering the cotton should be paid. This said railway company refused to do, and the consignees declined to receive the cotton. Finally, the consignees, on the 19th of August, 1892, accepted the cotton "under protest." In the meantime the cotton remained in the custody of the South Carolina Railway Company; and was suffered to lie in its yard, exposed to the weather; and, of course, when it was delivered to the consignees, it was very considerably damaged by such exposure.

In its answer, the defendant sets up several defenses: First. A general denial of all the allegations in the complaint, except such as were subsequently admitted or modified. Second. That the cotton was delivered to it under a special contract, evidenced by a bill of lading, filed as an exhibit to the answer, the terms of which will hereinafter be more particularly stated. Third. That the South Carolina Railway Company was not the agent of defendant, in no way under its control or accountable to it for its action in the premises, except to account for defendant's share of the through freight. On the contrary, the said railway company was simply one of the connecting lines over the route by which the cotton was to be transported. Fourth. That the cotton was delivered promptly to the Columbia, Newberry & Laurens Railroad Company, at Clinton, the next connecting line over the route by which the cotton was to be transported to Charleston, and whatever damage was done to the cotton was done after the defendant company had delivered the same to the next connecting line, and was due to the negligence of the consignees in not presenting promptly the bill of lading which had been forwarded to them, by the plaintiff, as well as to the negligence or fault of the South Carolina Railway Company in not promptly delivering the cotton to the consignees, and, on the contrary, permitting the cotton to remain in its yard for a length of time, exposed to the weather. Fifth. That said Seignous & Son having accepted and paid drafts to an amount equal to or exceeding the value

of the cotton, drawn on them by the plaintiff, with the understanding that the proceeds of the sale of the cotton should be applied to the payment of such drafts, the said Seignous & Son thereby became the owners of the cotton, and, as such, they, and not the plaintiff, were the proper parties to bring this action.

The case came on for a trial before his honor, Judge Ernest Gary, and a jury; and, after the close of the testimony and argument of counsel, the jury were charged as set out in the case, a copy of which charge should be incorporated in the report of the case. The jury having rendered a verdict in favor of the plaintiff, and judgment having been entered thereon, defendant appeals upon numerous grounds which appear in the record; but as we do not propose to consider these grounds seriatim, but, following the example of both counsel for appellant, take up the several questions which they present, these grounds need not be set out here. There are, first, several exceptions to the competency of some of the testimony, which we will now proceed to consider.

1. As to the bill of lading: Inasmuch as the defendant had filed with its answer, as an exhibit thereto, a copy of the bill of lading, thereby making it a part of the record, it seems to us that this objection came too late. The defendant, by its own act, had made that paper a part of the record, and as such it was necessarily before the court, and, if the objection was ever maintainable at all, the objection came too late. Besides, the ground upon which this objection was based was that the bill of lading showed a different contract from that set out in the complaint. Now, the contract, as alleged in the complaint, was to carry the cotton to Charleston, and there deliver the same to the said Seignous & Son, without setting out the conditions upon which such contract was entered into; while the contract evidenced by the bill of lading was to transport the cotton to Charleston, and there deliver the same to Seignous & Son, upon certain conditions specifically mentioned in the bill of lading. So that the difference was, not in what was contracted to be done, but rather in the completeness of statement of all the conditions,—one was fuller than the other. So that the case of *Dunbar v. Railway Co.*, 36 S. C. 110, 15 S. E. 357, relied upon by counsel for appellant to support this objection, is not in point for two reasons: (1) Because in that case it does not appear, as it does here, that the bill of lading was made a part of the record by the pleadings; (2) because in that case the contract, as alleged in the complaint, was substantially different from that evidenced by the bill of lading, for in the complaint the contract was alleged to be a contract "to ship, transport, and carry" the goods there in question to the point of destination, while that set forth in the bill of lading was that defendant received

the goods to be forwarded in accordance "with the provisions, stipulations, and exceptions of the general rules and regulations and freight tariffs of the company." And the court held, upon the authorities there cited, that there was a great difference between a contract to transport and a contract to forward goods. We do not think, therefore, that there was any error in receiving the bill of lading in evidence.

2. Was there any error in receiving the waybill of the defendant company in evidence? As it is well settled that the waybill constituted no evidence of the contract between the shipper and the carrier, but is simply a memorandum intended for the guidance of the agents and servants of the carrier, which the shipper is not supposed to know anything about, we do not see the relevancy of this testimony to any of the issues involved; but we cannot say that the testimony was incompetent, and hence this exception cannot be sustained.

3. The exception to the ninth interrogatory in chief to James M. Seignous seems to be based upon two grounds: (1) That it was leading; (2) because the defendant could not know what the witness would say in answer to that interrogatory, and could not, therefore, cross-examine him as to any matter referred to in his answer to such question. The interrogatory was the usual general question with which interrogatories addressed to a witness examined by commission very generally, if not invariably, conclude, and this is the first time we have ever known of any exception being taken thereto. The form of the question, "If you know anything else that will benefit the plaintiff or defendant [as the case may be], state the same fully," etc., effectually precludes the objection that it is a leading question, for nothing could be more general, and it certainly does not suggest the answer. It does not deprive the adverse party of the right of cross-examination, for it must be assumed that the witness has been previously interrogated as to the particular points to which it is desired to direct the attention of the witness, and the general question is only designed to enable the witness to speak of matters that may have been overlooked, and, according to our experience, is very generally met by the stereotype answer, "I know of nothing else," etc. This exception must be overruled.

4. As to the ruling of the circuit judge in excluding the answers to the cross interrogatories, addressed to J. M. Seignous, numbered from 1 to 7, inclusive, we agree with the circuit judge that these questions were not pertinent to any of the issues in this case, and, furthermore, might and probably would have involved the necessity of taking an account between the plaintiff and Seignous & Son. These questions were designed to elicit from the witness a statement that the plaintiff was indebted to Seignous & Son at the time the cotton was shipped to them, by reason of the

fact that plaintiff had drawn drafts upon them to an amount equal to or exceeding the value of the cotton which had been accepted and paid by Seignous & Son, and that it was the express understanding, or implied from the usage and custom of their business, that the proceeds of the sale of the cotton should be applied to the payment of plaintiff's indebtedness to Seignous & Son. All this might be safely admitted, and yet we do not see how such testimony could be pertinent to the issues in this objection. Its purpose, doubtless, was, as indicated by the defendant's fifth defense, to show that Seignous & Son were the real owners of the cotton, and as such the proper parties to bring this action. It seems to us that it would be a dangerous doctrine, for factors especially, to hold that, because a factor accepts and pays drafts drawn on him by his customers to an amount equal to or exceeding the value of a shipment of cotton, he thereby becomes the owner of such cotton; for, if the cotton should be lost before it reaches the factor, such loss, under such view, would fall on him, and that never was and cannot be the law. The most that can be said is that he may have a lien on the cotton, but not a title to it.

We will next proceed to consider whether there was any error in the judge's charge, or in refusing any of the requests to charge. For this purpose it will be necessary to lay down certain general propositions which we think are well settled by authority. In *Piedmont Manuf'g Co. v. Columbia & G. R. Co.*, 19 S. C. 353, it was held that a company chartered and organized for railroad transportation is a common carrier over its own line, but it is not so beyond its terminal and over connecting lines, unless it has become so by usage, character of business, or contract; and the duty or obligation to carry goods beyond its own line of road, and deliver them at a point beyond its own line, is not imposed by law, but depends upon the contract between the shipper and the company. It was further held in that case that the bill of lading is the contract between the shipper and the company, by which the company agrees to transport and deliver beyond its own line, and the terms and conditions of the contract regulate and determine the duties and obligations of the contracting parties. These principles are fully recognized by the highest authority. See *Insurance Co. v. Railroad Co.*, 104 U. S., at page 157, where Mr. Justice Harlan, in delivering the opinion of the court, after saying that this rule had received the sanction of the supreme court of the United States, and been adopted in most of the courts of this country, lays down the rule in the following terms: "That the carrier, in the absence of a special contract expressed or implied, is only bound to safely carry to the end of its line, and there deliver to the next carrier in the route." To the same effect, see *Myrick v. Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. 425, and *North Pennsylvania R. Co. v.*



Commercial Nat. Bank, 123 U. S. 727, 8 Sup. Ct. 266, where the preceding case of Myrick was expressly recognized, as well as many of the other cases cited in those cases. These doctrines have also been recently recognized in this court in *Dunbar v. Railway Co.*, supra. The same view seems to have received the approval of the legislature, for by section 1720 of the Revised Statutes of 1893 (formerly section 1518 of the General Statutes of 1882) it is provided as follows: "In the case of the loss of, or damage to any article or articles delivered to any railroad corporation for transportation over its own and connecting roads the initial corporation first receiving the same shall in every case, be liable for such loss or damage, but may discharge itself from such liability by the production of a receipt in writing for the said article or articles from the corporation to whom it was its duty to deliver such article or articles in the regular course of transportation. In which event the said connecting road or roads shall be severally so liable, but may in succession, and in like manner discharge themselves respectively therefrom; but if any such corporation shall willfully fail or refuse upon reasonable demand being made to it by any party interested in the production of such receipt to produce the same then it shall not be entitled to claim the benefit of such exemption, in any action against the said railroad corporation to render it liable for such loss or damage." From the terms of this section it seems that the legislature recognized the law to be that, where goods are received by a railroad company for transportation over its own and connecting lines, the initial corporation will be discharged from liability by showing that the goods had been safely delivered to the next connecting line; and the object in the interest of the shipper was to provide, not only that the proof of such delivery should be in writing (receipt), but also to require the initial corporation, upon reasonable demand, to produce such receipt, in order that the shipper might know in advance which one of the several corporations to sue,—that is, which one of the several corporations was the party really in default.

The first question which we propose to consider is, what was the contract between these parties? It seems to be conceded, and properly conceded, that the bill of lading evidenced the terms of the contract. The practical inquiry, therefore, is, what is the proper construction of the terms of that paper? Was it an absolute and unconditional contract on the part of the defendant to carry the cotton to Charleston, and there deliver it to Selgnous & Son, as the circuit judge seems to have construed it to be, or was it to carry the cotton to Charleston, and there deliver it to the consignees, upon certain conditions stated in the paper? If the contract was absolute and unconditional, then it is clear, under the case of *Kyle v. Railroad*

Co., 10 Rich. Law, 382, the defendant would be liable; but if, on the other hand, the contract to deliver was upon conditions, one of which was that the company in whose custody the cotton was at the time the loss or damage occurred should alone be responsible for such loss or damage, then it is equally clear that the defendant should not be liable, for there is no pretense that any loss of or damage to the cotton occurred while the same was in the custody of the defendant company. The terms of the contract, as embodied in the bill of lading, or at least so much thereof as are in any way pertinent to this inquiry, are as follows: "Received of R. M. Hill, by the G., C. & N. Railroad Company, thirty-two bales of cotton, \* \* \* to be transported by the railroad receiving this cotton (with liberty to compress) unto James M. Selgnous & Son, at Charleston, upon payment of the freight specified, and upon the following conditions," one of which is stated in the following words: "And it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation, whereby any legal liability may be incurred by the terms of this contract, that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage." And this bill of lading is signed: "S. M. Rigsbee, for the Parties in Interest, Separately, but not Jointly." Now, as the defendant company was not a common carrier beyond its own line, it was entirely competent for it to annex any conditions, not unlawful in themselves, that it pleased, to its contract to deliver the cotton in Charleston. For example, it might have said to plaintiff, when asked to transport his cotton: "You know my line does not extend to Charleston, and I am not bound, therefore, to transport your cotton to that point; but if you desire your cotton transported to Charleston, and there delivered to your factors, Selgnous & Son, I will do so, provided or upon condition that you agree that, in case of any damage to the cotton while on the route, which you know is composed of my road and the two connecting roads, the company in whose custody the cotton may be at the time the damage occurs shall be responsible for such damage." This is practically what the parties agreed to, as evidenced by the terms used in the bill of lading; and under those terms the defendant company cannot be held liable for damages sustained after the cotton had left defendant's line, and was in the actual custody of the South Carolina Railway Company, one of the connecting lines, which, by the express terms of the contract, was alone responsible. This case differs widely from the case of *Kyle v. Railroad Co.*, supra, for there the contract to deliver in Charleston was absolute and unconditional; and, if the defendant company in that case found it

necessary to employ other agents to carry out its own absolute and unconditional contract, it was, of course, liable for any default of its agents. The case now under consideration is much more like the case of *Piedmont Manuf'g Co. v. Columbia & G. R. Co.*, supra, for these contracts, as evidenced by the bills of lading, were to deliver one of the shipments to certain designated consignees in the city of New York, and the other to certain designated consignees in the city of Baltimore; but there, as here, the contracts were not absolute and unconditional, but contained a stipulation, practically identical with that found in the contract here under consideration, that, in case of loss or damage, that company alone in whose custody the goods were at the time should be responsible; and in that case it was held that, under such a contract, the defendant could not be held liable, as it was conceded that the loss occurred after the goods had left the line of the defendant company.

The next point to be considered is whether there was error on the part of the circuit judge in instructing the jury that the provisions of section 1720 of the Revised Statutes had no application to this case. If the circuit judge was in error in construing the contract between the parties as an absolute and unconditional contract to deliver the cotton in Charleston, as we have seen that he was, then it is a matter of little practical importance what his ruling as to the effect of the statute was; for, if the contract properly construed was a conditional contract, then the defendant company would be relieved of all responsibility by the express terms of such conditions, and the statutory provision would become unnecessary for the protection of the defendant. But we are not prepared to admit that, even if the contract was absolute and unconditional, the statutory provision would have no application. The terms of the statute are very broad: "In case of the loss of, or damage to any article or articles delivered to any railroad corporation for transportation *over its own and connecting roads*, the initial corporation or corporations first receiving the same shall, *in every case*, be liable for such loss or damage [italics ours], but may discharge itself from such liability by the production of the receipt from the corporation to whom it was its duty to deliver the articles shipped." Now, if, as we have seen, a railroad corporation cannot be regarded as a common carrier beyond its own line, and can only become so by a special contract to that effect, and if, as the statute plainly declares, a railroad company to which goods are delivered for transportation over its own and connecting roads shall in every case become liable for any loss of or damage to such goods, unless it produces the receipt of the connecting roads for such goods, we are not prepared to hold that this statute has no application to this case.

The next point made by appellant's counsel in their argument here is as to the question of damages. So far as this question relates to the measure of damages, this court has often held that no such question can arise until the plaintiff has shown himself entitled to recover some damages, which we do not think the plaintiff has done. So far as this point raises the question as to whether the allegations of the complaint are sufficient to warrant the admission of testimony of special damages, and so far as the exceptions on this point purport to raise the questions as to whether the damages claimed were the remote or proximate result of the acts complained of, we think, under the views we have announced, these questions become immaterial. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

(21 Va. 193)

**NORFOLK & W. R. CO. v. NUCKOLS'**  
**ADM'R.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. March 21, 1895.)

**INJURY TO EMPLOYE — NEGLIGENCE OF FELLOW SERVANT—LIABILITY OF EMPLOYER.**

1. A person entering the service of another assumes all risks naturally incident to that employment, including the danger of injury by the fault or negligence of a fellow servant.

2. The above liability does not depend upon the fact that the servant injured may be in a different department of the service from the wrongdoer. The test is, were the departments so far separated from each other as to exclude the probability of contact, and of danger from the negligent performance of their duties by employes of the different departments. If they were so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow servant in such other department.

3. The liability of injury by a fellow servant, assumed by one entering another's service, does not depend upon gradations in employment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice principal.

4. It is the duty of an employer to furnish suitable and safe appliances, machinery, structure, and roadway.

5. It is the duty of an employer to exercise reasonable care to ascertain the character, habits, and fitness of his employes for the discharge of their duties, and, by proper supervision, to keep himself so informed.

6. Where injury to a servant has been caused by the default of a fellow servant, concurring with the negligence of the master, the latter is liable.

7. A track repairer and engineman, though in different departments, are, by the very nature of their employment, brought into frequent contact, and the risk of negligence by the one must therefore be considered to have been in contemplation of the other when he accepted service.

Error to corporation court of Buena Vista; J. O. Shepherd, Judge.

Action by George W. Nuckols' adminis-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

trator against the Norfolk & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. & E. M. Pendleton and W. H. Travers, for plaintiff in error. Frank T. Glasgow and H. A. White, for defendant in error.

KEITH, P. This is a writ of error to a judgment in an action of trespass on the case brought in the corporation court of Buena Vista by the administrator of George W. Nuckols against the Norfolk & Western Railroad Company, to recover damages, for the death of his intestate, alleged to have been occasioned by the negligence of the defendant company. It appears that George W. Nuckols was employed as a track hand by the defendant company, and, upon the morning of the accident which resulted in his death, was engaged, along with others, in placing a rail upon the track of the defendant company, in the city of Buena Vista, when he was struck by a passing engine drawing one of the trains of the defendant, and died in a short time from the injuries thus received. Without undertaking to review all of the evidence, it is sufficient to say that it is proved to our satisfaction that the accident was caused by the negligence of the engineman in charge of the engine. The only question which requires any particular consideration by this court is presented in the defendant's instruction No. 7, which the trial court refused to give, and which is in the following words: "The court instructs the jury that the deceased, Nuckols, assumed all the risks incident to his employment when he entered the service of the defendant,—among them, the injuries caused by the carelessness of fellow servants; and if they believe from the evidence that the death of the said Nuckols was caused by the negligence of the engineman of train No. 30, which inflicted said injury, such negligence cannot be imputed to the defendant, the said engineman and the said Nuckols being fellow servants in the service of the said company."

This brings up a subject upon which there has been endless diversity of opinion, upon which the courts of the several states have been divided, upon which the decisions of the same courts have not always been harmonious, and as to which it has seemed almost impossible to formulate a rule which will meet the exigencies of all cases, do justice to the employer and to the employé and promote the efficiency and safety of the railway service. One of the first cases in which the liability of the master to a servant for an injury occasioned by the act of a fellow servant came under review by the courts was that of *Farwell v. Railroad Co.*, 4 Metc. (Mass.) 49. Chief Justice Shaw delivered the judgment of the court, in a most luminous opinion, in which he says "that he who engages in the employment of another, for

the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others." This view of the law has been accepted in very many of the states of this Union. It has recently been reviewed by the supreme court of the United States in *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983; and Mr. Justice Brown, in that case, says "that upon this subject the authorities are hopelessly divided; that it is useless to attempt an analysis of the cases which have arisen in the courts of the several states, since they are wholly irreconcilable in principle, and too numerous even to justify citation." He does, however, cite decisions from Massachusetts, New York, Michigan, Indiana, Maryland, Pennsylvania, and many other states, which recognize and follow *Farwell v. Railroad Co.*, while he says that in Illinois, Missouri, Virginia, Ohio, and Kentucky the rule is apparently the other way. It appears that the supreme court itself has not been altogether free from the uncertainty which attends the consideration of this much-vexed subject, and that its decisions, while they have not been numerous, have not been "altogether harmonious." *Railroad Co. v. Hambly*, 154 U. S., at page 356, 14 Sup. Ct. 983. It may be well, therefore, for us to examine with some care into the principles upon which this rule is founded, and to consider the cases in this court in which it has been referred to, and endeavor to ascertain to what extent it has been accepted in this state.

Judge Shaw, in the case above cited from 4 Metc., rests the exemption of the employer from liability to its servant occasioned by the negligence of a fellow servant upon implied contract. The controlling reason of that decision is that a person entering the employment of another assumes all risks incident to that employment, including the danger of injury by the fault or negligence of a fellow servant. This proposition has been time and again asserted in this court. The difficulty which has been experienced does not grow out of any doubt or dissatisfaction as to the soundness and wisdom of the proposition, but is found in its application to particular cases, in determining who are and who are not fellow servants, within the terms and meaning of the rule.

In the case of *Donnelly's Adm'r v. Railroad Co.*, 88 Va. 853, 14 S. E. 692,—one of

the most recent cases in which this court has dealt with the subject,—Judge Lacy declares "that it is well settled that when a servant enters upon an employment he accepts the service subject to the risks that are incident to it"; and he cites with approval 7 Am. & Eng. Enc. Law, p. 821, where it is said "that the general rule resulting from considerations, as well of justice as of policy, is that he who engages in the employment of another, for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services. The perils arising from the carelessness and negligence of those who are in the same employment are not exceptions to this rule; and when a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for the injury received by him in consequence of the carelessness of another while both are engaged in the same service." It would seem, therefore, that the general doctrine is fully and broadly accepted by this court, for in the case last cited the court was unanimous. The case of *Railroad Co. v. Hambly* is very similar to the one under consideration. In that case a laborer in the employ of a railway company, who was engaged in work upon a culvert on the line of the company's road, was injured by the negligence of the conductor and engineer employed in moving a passing train. The supreme court held that he was a fellow servant with the engineer and conductor, and that the railroad company was exempt from liability for the injury so inflicted. In that case the negligence of the engineer and conductor were conceded, and it was not contended that the unfortunate victim of their negligence was at all in fault, yet the court held that he was not entitled to recover. In the case before us the party injured was at work upon the track of the defendant company, making certain necessary changes. There is evidence to prove, and it may be conceded, that the injury he sustained was caused by the negligence of the engineman upon a passenger train, who, unmindful of his duty to observe and watch the track over which he was moving, was at the time of the accident diverted from the performance of this plain and obvious duty, and was engaged in exchanging salutations with the engineman of a train of the Chesapeake & Ohio Railroad Company, passing in an opposite direction upon the track of that company, which at that point approached very near to the roadway of the defendant company.

The principles of law heretofore adverted to as governing the relations existing between a railroad company and its employés in this state, as recognized in many cases, and most recently in the unanimous judg-

ment of the court in the case of *Donnelly's Adm'r v. Railroad Co.*, above cited, would seem to be conclusive of the case at bar, unless it can be shown to come within some one of the exceptions which have been ingrafted upon the rule, and which are to some extent, at least, recognized as proper modifications thereof by decisions of this and other courts. One of the earliest of these is *Moon's Adm'r v. Railroad Co.*, 78 Va. 745. That was a case in which the rear brakeman of a train was injured by the negligence of the section master, who was making repairs upon the track, upon which the dirt had not been filled in and firmly rammed, but only "tamped," and who failed to signal the approaching train, which, in passing over the track in its unsafe condition, was derailed, and the brakeman was caught under the wreck, and died from the injuries thus received. The court held that his administrator was entitled to recover, and in its opinion says that *Herdon*, the section master, was not a fellow servant of the brakeman, and that the defendant company was liable for the injury occasioned to the brakeman by *Herdon's* negligence. It seems, however, that the true ground upon which to rest the case of *Moon's Adm'r v. Railroad Co.* is that it was the duty of the defendant to have safe appliances, to keep its track in good repair, and to use, with respect thereto, all necessary precautions for the safety of its employés; and while the consequences of the defective condition of the track might have been avoided, had the section master given the proper signals, and the failure to do so upon his part was negligence, and one of the proximate causes of the injury sustained, yet that the company itself had also been negligent, and the case is one of "concurrence of independent concurring causes." The negligence of the section master and of the defendant company were each of them proximate causes, without the concurrence of which the injury would not have been sustained; and it is well settled that, if the employé is injured by an accident resulting from the concurrent negligence of a fellow servant and of the employer, the latter is liable as though it were the sole offender. The case of *Torians v. Railway Co.*, 84 Va. 192, 4 S. E. 339, arose out of the same state of facts considered in the case of *Moon's Adm'r v. Same Defendant*; and in that case the defendant's liability is made to rest upon the proposition that the immediate cause of the injury was the running of the train, suddenly accelerated by additional steam, over a track left in an uneven and weakened condition by other employés of the company, who were employed to repair the track, and who failed to give warning of its condition. Here it appears very distinctly that the uneven and weakened condition of the track was at least one of the proximate causes of the injury sustained, and the liability might, for this cause, have been fastened upon the railroad

company. The court, however, does go on to say "that the defendant company is liable for the negligence of its employes whose duty it was to repair the road and give notice of its condition, and those employes were not fellow servants of the plaintiff's interstate." At page 196, 84 Va., and page 339, 4 S. E., the court says: "It was the duty of the defendant company to have maintained good and safe machinery, structures, and roadway; and it was its duty to each of its employes to use care and caution in the exercise of its privileges and powers, in selecting its agents and servants, and to use all reasonable precaution, including necessary signals, for moving trains, essential to the protection of the lives and limbs, not only of employes, but to the protection of all persons lawfully on its road." In the case of Railroad Co. v. Norment, 84 Va. 167, 4 S. E. 211, it appears that Norment was employed by the defendant company, at its depot yards in Richmond, as an "overhauler,"—to assist in fixing up cars needing repairs. On the day he received the injury, he was required to put a drawbar spring into the end of a certain car which stood on a "branch track." It became necessary for Norment to get under the damaged car, and while so situated another car was shifted on the branch track, and driven against the car which was in front of the car upon which he and his assistant were at work, by which it, in turn, was driven against the car upon which Norment was at work, and his hand was caught and greatly injured. It appears that there was no repair track in the company's yard; that such repair track was necessary; that the company knew it to be necessary, and had them elsewhere; that it not only failed to provide a repair track, but failed also to provide signal flags. The court held that Norment was not of the same grade, or in the same line of duty, as Tiller, the engineer, or Robinson, the conductor, of the shifting engine, nor was he under the orders of either of them, and that the case was controlled by that of Moon's Adm'r v. Railroad Co., 78 Va. 745, and the liability of the railroad company was again asserted; the exact point decided being that an overhauler engaged in the repair of the company's cars is not a fellow servant with the conductor and engineer in the employment of the same company, engaged in the moving of cars in the same depot yard, by the negligent performance of whose duties the accident was sustained. The decision in this case was perfectly correct, but there are expressions in the opinion which we do not consider to have been at all necessary to the conclusion reached by the court, and to which we cannot give our approval. It will be observed that the court lays much stress upon the fact that the defendant company had failed to provide suitable appliances for the protection of its workmen, in that it had not furnished a repair track and signal flags. To

consider how far the absence of these appliances, obvious to the employe, could or should have influenced the determination of the court, would lead to a discussion involving the doctrine of contributory negligence, and would be a vain attempt to elucidate one difficult subject by the discussion of another equally doubtful and difficult. There is a case in 81 Va. 71 (Railroad Co. v. McKenzie), which is sometimes cited as bearing upon this subject. It decides that in that case the question whether or not the "negligent employe was a coemploye of the party injured, or was the representative of the defendant company, was a question of mixed law and fact, to be decided by the jury under suitable instructions from the court, and that it was not proper to instruct the jury that the plaintiff and the negligent servant were coemployes and did not stand in the relation of subordinate and superior, which principle, however correct it may have been in that case, can have no application here, where the inquiry proceeds upon admitted facts, and the only question is to ascertain the law applicable to them. In Hamby's Case, 154 U. S. 349, 14 Sup. Ct. 983, Justice Brown says that as a "laborer upon a railroad track, engaged either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow servant should not apply. In this view, it is not difficult to reconcile the numerous cases which hold that persons whose duty it is to keep railroad cars in good order and repair are not engaged in a common employment with those who run or operate them."

A person entering the service of the company to assist in building or repairing cars and engines would not be held to have contemplated the possibility of injury by the negligence of those engaged in moving trains, and hence they would not be fellow servants, while a person entering the service of a railway company as track repairer is constantly brought into contact with, or at least in close proximity to, those operating trains, and therefore must be held to have contracted with reference to the danger resulting from the negligence of those thus engaged. In a sense, the car builder and repairer, and the track maker and repairer may be classed as belonging to the construction department of the railway company, but the liability is not determined by that consideration. The rail-

road company would be held liable to a car repairer for the negligence of its servants engaged in running trains, and exempt from liability to the track repairer for the negligence of employes upon the passing train, because the latter would be deemed to have contemplated this risk upon entering the employment of the company, while the former could not, by any reasonable intendment, be presumed to have contemplated a risk so remote.

As I have before said, the rule under consideration is nowhere more thoroughly recognized than in this state. It was originally adopted because it fixed the liability where it could best be borne. It was intended, by placing this responsibility upon the employes, to introduce a safeguard beneficial alike to the servant and the master and to the public, by invoking the self-interest of the employes to see that each carefully and faithfully discharged the duties of his position, while imposing upon the master the duty of care and discretion in the selection of his servants. That the rule, in the main, is a wise one, has been demonstrated by long experience. The case so often cited, in which Chief Justice Shaw—in this country, at least—first unfolded the principles upon which it rests, was decided more than half a century ago. That decision has extended its influence until it is now law for more than half the states of this Union. It is sustained by an overwhelming preponderance of authority, and it must be deemed a just measure of the relative rights and duties growing out of the relation of master and servant. It has, too, been criticised and objected to, and efforts have been made, in various jurisdictions, to limit and confine it. In some states, what is called the doctrine of "superior and subordinate" has been recognized; in others, the "separate department" doctrine has been adopted,—and of these the supreme court says: "Of both classes of cases the same observation may be made, viz. that to hold the principal liable whenever there are gradations of rank between the persons receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train, or two seamen of equal rank in the same ship, are comparatively rare. In a large majority of cases there is some distinction, either in respect to grade and service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent,—as, for example, the superintendent of a factory or railway,—and the employments were so far different that, although paid by the same master, the two

servants were brought no further in contact with each other than if they had been employed by different principals." Hambley's Case, 154 U. S. 349, 14 Sup. Ct. 983. It has been felt that the general rule did not accomplish exact justice in all cases. No general rule does. The difficulty of applying the most favored classes of exceptions which make the liability rest upon the idea of subordination or of employment in separate departments is shown by the quotation just given. There is as much diversity of opinion as to the so-called exceptions to the rule as to the rule itself. The result, therefore, has been to add to the uncertainty and confusion, to embarrass the administration of justice, and to increase litigation. The effort of courts should be to render the law, so far as it falls to them to declare it, certain and plain, so that all men may know their rights and their duties. The object here sought is a plain rule regulating and controlling some, at least, of the more important relations between railway companies and their employes. There are interested in the solution of this problem the employes, as a class,—and not merely those who have been or may be injured,—the employer, and the public. That the particular rule is, in its application, always invoked by the employer to defeat the demands of the injured employe does not at all prove that the employes, as a class, are not greatly benefited by it. The number of those injured by the negligence of their fellow servants is, unhappily, very great, but the proportion they bear to the whole number of employes is very small. If the rule, while operating to the disadvantage of the injured few, promotes the safety of the far greater number of those who sustain no injuries by introducing a salutary superintendence over each other among the servants of the company, then the rule, while beneficial to the employer, is not less so to the employe, for that which promotes immunity from danger is more to be desired than the pecuniary compensation for the injury could be, and being promotive also of the efficiency of the service, is obviously in the interest of the public. It is to be considered also in connection with other rules applicable to the relation of master and servant. The duty is imposed upon the master to exercise caution and discretion in the selection of the servants who are to be "fellows," and mutually responsible to each other, and he must not retain in his service any one found to be unfitted to discharge the duties assigned him. In the due performance of this duty by the master, the employes, as a class, and the public at large, are deeply interested; and the effect of the rule is to make it to the interest of the employes to keep the employer advised as to the habits, character, and qualifications of the fellow servants.

It appears that *Donnelly's Adm'r v. Railroad Co.*, 88 Va. 853, 14 S. E. 692, repudiates the exceptions, and evinces a disposition to

return to the simple terms of the rule stated by Chief Justice Shaw. It throws aside the doctrine of "inferior and superior," of gradations in employment, and of "separate departments," and states forcibly and clearly that all serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, are fellow servants, and take the risk of each other's negligence." Neither *Farwell's Case*, in 4 Metc. (Mass.) 49, nor *Hambly's Case*, in 154 U. S. 349, 14 Sup. Ct. 983, among the first and the last of the reported cases upon this subject, states the proposition more tersely and succinctly than in the above quotation. Indeed, to my mind, *Donnelly's Case* lays down a less plastic and more inflexible rule than either of the cases just cited.

I shall not try to do what so many eminent judges have refrained from attempting. I shall not undertake to draw a hard and fast line delimiting the liability of the employer, but shall content myself with the following propositions, which are, I think, fully warranted by the great weight of authority in this state and elsewhere:

1. A person entering the service of another assumes all risks naturally incident to that employment, including the danger of injury by the fault or negligence of a fellow servant.

2. That the liability does not depend upon the fact that the servant injured may be in a different department of the service from the wrongdoer. The test is, were the departments so far separated from each other as to exclude the probability of contact, and of danger from the negligent performance of their duties by employes of the different departments? If they are so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow servant in such other department.

3. That the liability does not depend upon gradations in employment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice principal.

4. That it is the duty of the employer to furnish suitable and safe appliances, machinery, structure, and roadway.

5. That it is the duty of the employer to exercise reasonable care, prudence, and discretion in ascertaining the character, habits, and fitness of his employes for the discharge of the duties to be assigned to them, and, by proper supervision and superintendence, to keep himself informed as to the manner in which the duties intrusted to them are performed.

6. That where the injury to the servant has been occasioned by the default of a fellow servant, concurring with the negligence of the master, the latter is liable as though he only were at fault.

7. That a track repairer and engineman,

though in different departments, are, by the very nature of their employment, brought into frequent contact, and the risk of negligence by the one must therefore be considered to have been in contemplation of the other when service under the common master was accepted.

It results from what has been said that in our opinion the seventh instruction asked for by the defendant ought to have been given, and for its refusal to do so the judgment of the corporation court of Buena Vista must be reversed.

(91 Va. 226)

# REUSENS v. LAWSON et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. March 21, 1895.)

EJECTMENT—QUESTIONS AS TO BOUNDARIES—CONSTRUCTION OF SURVEY—EVIDENCE—NEIGHBORING GRANTS—DECLARATIONS OF SURVEYOR—LOST DEED—ANCIENT INSTRUMENTS.

1. In a controversy concerning the location or boundary of a tract of land, patented by the commonwealth, pursuant to a survey, the calls and descriptions of another survey, made by the same surveyor, about the same time or recently thereafter, of a neighboring tract, upon which last survey a grant issued either to a party to the controversy or to a stranger, is proper evidence as to said location, unless clearly irrelevant.

2. Courses and distances must yield to other calls, especially to natural objects, like the top of a mountain or a corner tree.

3. A surveyor's declarations are not admissible when they will contradict the official report of such surveyor, upon which the commonwealth has issued a grant.

4. Evidence aliunde is admissible in all cases where there is doubt as to the true location of a survey, or to a question as to the application of a grant to its proper subject-matter.

5. Before a tax deed from a clerk of court can be introduced in evidence, it must be shown to have been issued pursuant to authority, or that the party styling himself clerk was in fact clerk.

6. A defective tax deed may be introduced to show color of title upon which to base a claim of adversary possession.

7. In questions of boundary, natural objects called for, marked lines, and reputed boundaries, well established, should be preferred in identifying land to courses and distances.

8. The fact of notice to a landlord that a former tenant holds adversely to him need not be shown by evidence "so convincing as to preclude all doubt as to the fact of notice on the part of the landlord."

9. While a surveyor's evidence is not admissible to contradict his own report, no such restriction rests upon others whose evidence is otherwise admissible.

10. If any evidence is suspicious by reason of bias, the court's attention should be directed specially to the case, and not asked to give general instructions on the question.

11. Where the original deed and its record are destroyed, the fact that such a deed was made may be proved by secondary evidence; as for instance, admissions of the grantor in a chancery suit.

12. The statement by a grantor as to the boundary of a tract will not estop the grantee from claiming the real tract conveyed, but may

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

be introduced as an admission to be considered by the jury in determining the true boundary.

13. An outstanding title, sufficient to defeat a recovery in an action of ejectment, must be a present, subsisting, and operative legal title, upon which the owner could recover if asserting it by action; but a defendant in ejectment may rely on an outstanding title in the commonwealth.

14. The statute of limitations does not run against the commonwealth; and if land be granted by the commonwealth, and, after an adversary possession has commenced against the owner of the legal title, his land is forfeited to the commonwealth, such possession ceases to be adversary as against the commonwealth until reversed by it.

15. If an instrument 50 years old, offered in evidence, is good as a deed, except that it lacks a scroll or seal, and it purports to convey land, recognizes the seal in the body of the instrument, is attested by witnesses, acknowledged before officers, recorded by the clerk as a deed, the land and transferred on the land books for the purpose of taxation, taxes actually paid, and possession taken, the question whether it was properly sealed before delivery is for the jury.

16. Where plaintiff in ejectment introduces a deed containing an exception, the burden is on him to show that the land in question is not included within the exception.

Error to circuit court, Patrick county.

Action by G. Reusens against J. C. Lawson, guardian, and others, to recover possession of a tract of land. To a judgment in favor of defendants, the plaintiff brings error. Reversed.

P. Bouldin, Jr., and A. A. Phlegar, for plaintiff in error. Anderson & Hairston, for defendants in error.

**BUCHANAN, J.** This is a suit of error to a judgment of the circuit court of Patrick county in an action of ejectment in which the plaintiff in error was the plaintiff in that court. Upon the trial of the cause, numerous questions were raised, and five bills of exceptions were taken, by the plaintiff, all of which are made grounds of assignment of error here. The plaintiff, in making out his claim of title, had placed in evidence a grant from the commonwealth for 70,000 acres of land to Gen. Henry Lee, assignee of John Miller, for whom the land had been surveyed on the 14th day of April, 1795. In order to recover in the cause, it was, of course, necessary for him to identify the land sued for, which it was claimed lay near the northern boundary line of the 70,000-acre grant. One of the questions much controverted in the cause was the location of this line. The plaintiff attempted to locate it at one place, and the defendants at another. Between these two lines the land in controversy, or the greater part of it, lies. The plaintiff, to sustain his contention, offered in evidence a copy of the survey from the land office upon which the grant to Gen. Lee was based, along with the grant and other evidence. The defendants, to sustain their contention, offered, among other evidence, the county surveyor's book, containing a survey for John Miller for the same

70,000 acres of land as they claim. They also offered in evidence copies from the surveyor's book of two other tracts of land upon which grants had been issued,—one dated March 19, 1791, for 235 acres of land, to B. McGruder; and the other to L. McLean, for 45,000 acres, dated April 14, 1795. To the introduction of each of these surveys the plaintiff objected, but the court overruled his objections. To these rulings of the court the first and second bills of exceptions were taken by the plaintiff. As they involve, to some extent, the same questions of law, they will be considered together.

In a controversy concerning the location or boundary of a tract of land patented by the commonwealth, pursuant to a survey, the calls and descriptions of another survey made by the same surveyor, about the same time or recently thereafter, of a coterminous or neighboring tract, upon which last-mentioned survey the commonwealth issued a grant, whether to a party to the controversy or to a stranger, is proper evidence upon such question of location or boundary, unless clearly irrelevant. *Overton v. Davisson*, 1 Grat. 212, 222; *Clements v. Kyles*, 13 Grat. 475, 479. All of these surveys were made by the same surveyor. Upon the McGruder survey and the McLean survey, grants were issued by the commonwealth. The McGruder survey is dated a few years before and the McLean survey upon the same day as that of Miller. The McLean survey calls for the Miller survey, and the evidence tends to show that the McGruder survey is a neighboring, if not an adjacent, tract of land. The McGruder and McLean surveys possess, therefore, all the requirements necessary to render them admissible in evidence upon the question of location or boundary. The Miller survey, however, does not possess all the characteristics required for the admissibility of such evidence. It is true that it was made by the same surveyor, dated the same day with the McLean survey, but no grant was ever issued by the commonwealth upon it. It is not the survey upon which the Lee grant issued. That grant was issued upon a survey filed in the land office of the commonwealth; and, while there ought to have been found on the surveyor's book a survey identical with that upon which the grant was issued, the one upon the surveyor's book, and offered in evidence, is not such. It is claimed, however, that, while it is true the calls of the survey in the surveyor's book are not identical with the calls of the Lee grant, the corners, courses, and distances of the northern boundary line of the Lee grant are the same in both papers, and that the only difference between the survey and grant along that line is that the survey in the surveyor's book gives a fuller description of the corners and lines called for. This difference will be better understood by giving the calls of each along the northern boundary of the



grant. The calls of the grant are as follows: "Beginning at a poplar and persimmon on the north side of Big Dan river; thence new line N., 23° E., 1,280 poles to a chestnut tree; N., 40 E., 500 poles, to a black walnut tree; N., 40 E., 1,600 poles, to a black walnut tree and hickory near a path." The description of that line in the surveyor's book is: "Beginning at James Goins corner poplar and persimmon, on the north side of Big Dan river; thence, with McLean's line, N., 23° E., 1,280 poles, to McGruder's corner chestnut, on top of the mountain; thence new lines north, 40 degrees East, 500, X [crossing] a branch to a black walnut; N., 40 E., 1,600 poles, X [crossing] six branches to a walnut and hickory near the path that leads from the head of Mayo river to meadows of Dan." If this additional description in the surveyor's book be treated as a part of the description of the land embraced within the Lee grant, and there be any conflict between them, which is to control in the location of the land? The description in the grant or the description in the surveyor's book? In running the first line from the beginning, the call of the grant is "N., 23° E., 1,280 poles, to a chestnut." Ought the surveyor to stop at the end of the 1,280 poles, the distance called for, or ought he to run to the McGruder corner on top of the mountain, as called for in the survey on the surveyor's book, without regard to the course or distance? The general rule is that course and distance must yield to other calls, especially to natural objects like the top of a mountain or a corner tree. If that be the correct rule for locating the Lee grant, it will be located, not by its own calls, but by the calls of the survey on the surveyor's books; and in so locating it the calls and description of the grant may be disregarded, and its location determined by the descriptions in another instrument, which is no part of the grant, and upon which it is not based. Taking the grant without the surveyor's book, course and distance would govern if no corner tree was found. For what purpose, then, was the surveyor's book introduced in evidence? It was to control and counteract the legitimate construction of the grant, and cause the jury to believe that the northern boundary of the Lee grant adjoined McLean's survey, ran to the top of the mountain, and cornered on McGruder's chestnut, wherever it might be found. Whether it would or would not have that effect, it was not legal evidence. If it would not have that effect, it would be irrelevant, and for that reason improper, as it might embarrass and mislead the jury. If it would have that effect, it would control and counteract the legitimate construction of the Lee grant; and a surveyor's declarations, whether oral or written, are not admissible in evidence where they will contradict the official report of such surveyor upon which the commonwealth has issued a grant.

Overton v. Davisson, 1 Grat. 211, 219; Harri-man v. Brown, 8 Leigh, 697, 714, 715.

It is not to be understood by what I have said that the defendants did not have the right to prove that the Lee grant did adjoin the McLean survey, did corner on McGruder's chestnut corner, on the top of the mountain, and was bounded as stated in the survey on the surveyor's book. Evidence allunde is admissible in all cases where there is a doubt as to the true location of the survey or a question as to the application of a grant to its proper subject-matter. It is not a question of construction, but of location. It is a question of fact, to be determined by the jury by the aid of extrinsic evidence. But in such a case the hearsay declarations of the surveyor, whether oral or written, who made the survey upon which the grant was issued by the commonwealth, will not be allowed to go to the jury to contradict his survey which was made while acting in his official capacity and under oath. I think that the court properly admitted in evidence the McGruder and McLean surveys, but erred in admitting the Miller survey on the county surveyor's book.

The next assignment of error, and based upon the third bill of exceptions, is that the deed of A. Staples, clerk to Abram Staples and J. M. Redd, ought to have been excluded from the jury. This deed was made in 1835, and purported to be a tax deed for 5,000 acres of land, known as the "Anderson Survey," which had been forfeited and sold for delinquent taxes in the year 1832. At such sale the deed recites that Gilbert Bowman became the purchaser, and that he in the year 1834 transferred and sold all his right, title, and interest in and to the land to Staples and Redd. The grounds upon which the plaintiff claims that the deed should have been excluded from the jury are that it was a tax deed, and that no authority for the sale and conveyance was shown; that it was not made to the purchaser at the tax sale; and that the defendants did not connect themselves with it. There was no objection made to the deed when it was offered in evidence, but the plaintiff gave notice to the defendants that, unless they connected themselves with it, he would move the court to exclude it. There was no proof that the deed was made in pursuance of authority, or that the party styling himself clerk was in fact clerk. The clerk, in making such deed, was exercising a mere naked power, not coupled with an interest. In such case the law requires that every prerequisite to the exercise of such power should precede it; and, as the validity of the act done depends upon the official character of the agent, that character must be proved, and his own recital in the deed is no evidence of the fact. In the absence of such proof, the deed was clearly insufficient to show that the title of the delinquent tax-

payer had passed to the grantees in the deed. It was, however, sufficient, notwithstanding these and other defects, to show color of title, and upon which to base a claim of adversary possession; for it is immaterial whether an adversary possession under a claim or color of title be under a good or bad, a legal or equitable, title. *Shanks v. Lancaster*, 5 Grat. 110, 120; *Hutch. Land Tit.* § 392, and cases cited. See *Jones v. Lemon*, 26 W. Va. 636. As there was some evidence in the cause tending to show that the defendants were in possession of the land in controversy, claiming under it, the court did not err in refusing to withdraw the deed from the jury.

The fourth assignment of error is based upon the fourth bill of exceptions taken by the plaintiff, because of the action of the court in refusing to give certain instructions asked for by him, in giving certain instructions asked for by the defendants, and in giving an instruction upon its own motion. I will consider the instructions objected to in the order in which they are discussed in the plaintiff's petition and note of argument.

He contends that defendants' instruction No. 3 ought not to have been given. That instruction is as follows: "The court instructs the jury that, in questions of boundary, natural objects called for, marked lines, and reputed boundaries, well established, should be preferred in ascertaining the identity of a tract of land to the corners and distances of the calls of the grant." The objection to the instruction is not that it does not state the law correctly, but that it assumes facts which were not in evidence. There was some admissible evidence in the cause tending to prove the facts upon which the court based its instruction. It was therefore proper for the court to give the instruction as requested.

The plaintiff insists that it was error in the court to give defendants' instruction No. 8, and to refuse to give his instruction No. 14. The object of these instructions was to inform the jury what constituted adversary possession under color of title, and the length of time it must be so held to ripen into good title. The defendants' instruction stated the law upon that subject clearly and correctly, while the plaintiff's instruction contained a statement which is not, I think, the law in civil cases, viz. that, where the relation of landlord and tenant had once existed, the tenant could not be considered as holding adversely to his landlord until notice of that fact had been brought home to the landlord, by evidence "so convincing as to preclude all doubt as to the fact of notice on the part of the landlord." The relation of landlord and tenant is one very carefully guarded by the law, and it will not allow one who has come into the possession of land under another to set up an adverse claim to it, without full notice of his disclaimer or assertion of adverse title.

*Emerick v. Tavenner*, 9 Grat. 221, 237; *Creekmur v. Creekmur*, 75 Va. 430, 436. Stronger and clearer proof is required in some cases than in others, but I do not think the law requires in any civil case proof beyond all doubt or all reasonable doubt. Certainly, it is not required in a case like this. 1 Greenl. Ev. (15th Ed.) § 13, and note; 2 Whart. Ev. § 1246; Bert, Presumptions, § 190; *Ellis v. Buzzell*, 60 Me. 209, 211. The court did not, therefore, err in giving the defendants' nor in refusing to give the plaintiff's instruction.

The next assignment of error was that the court refused to give the plaintiff's instruction No. 9, which is as follows: "The court instructs the jury that the statements or declarations of certain persons who are dead may be used as tending to locate a corner of an old survey, but the persons who made the declaration must be such as had peculiar means of knowing the fact of which they speak, such as the surveyor or chain carrier who were engaged upon the original survey, or other persons present at such original survey, or the owner of the tract or of an adjoining tract calling for the same boundaries; the declarations of tenants, processions, and others whose duty or interest would lead them to diligent inquiry and accurate information of the fact, always excluding those declarations which are liable to suspicion of bias from interest, and those made after the controversy arose, and those in contradiction of the original surveyor's official report of such survey. Such evidence, subject to the above exceptions, is admitted to have such weight as the jury may, under all the circumstances, considered it entitled to." It is true that a surveyor's declarations are not admissible in evidence to contradict his own report, but it is not true that the declarations of other persons, otherwise admissible, are not to be considered because they contradict his report. Such declarations of the surveyor are not admissible, because the policy of the law forbids that his solemn acts, done in the discharge of his official duty, should be annulled by his subsequent declarations, as hereinbefore shown. But no such reason applies to the declarations of other persons, where admissible, as hearsay evidence. The instruction was also objectionable because it tended to confuse and mislead the jury. If there were any declarations in evidence in the cause liable to suspicion of bias from interest, as the instruction intimates, which the jury ought not to have considered, or ought to have considered only under certain circumstances, they ought to have been specially called to the attention of the court, so that it could have instructed the jury how to consider such evidence. The court, therefore, properly refused to give the instruction.

The plaintiff claims that instruction marked "B," given by the court of its own motion, was erroneous. The original grant under which the plaintiff claimed was issued, as

above stated, to Gen. Henry Lee, in 1795. The plaintiff claimed that Gen. Lee had sold and conveyed 50,000 acres, of the 70,000 granted to him, to one J. J. Maund in the year 1798, and that Maund had sold and conveyed the same land to one John Soley in the year 1799; that these deeds were recorded in the office of the general court in Richmond, and the records thereof burned in the year 1865. The plaintiff laid the foundation for proving the execution and delivery of those deeds by secondary evidence by proving that search had been made for the originals, and that the records of the general court had been destroyed. He then offered in evidence a copy of an incomplete record of a chancery suit from the clerk's office of the circuit court of Williamsburg. That suit was brought by Henry Banks against Maund and Lee, in which he claimed that he was the owner in fact of 20,000 acres of the 70,000 acres granted to Lee, charging that Lee had sold the whole 70,000 acres to Maund, who knew of his (Banks') interest therein, and asked for a specific execution of his contract. Maund and Lee both answered the bill, and each admitted Banks' right to the 20,000 acres. Lee admitted that he had sold and conveyed the other 50,000 to Maund, and Maund admitted that he had sold and conveyed the same to Soley. There is some question made as to whether the answer of Lee sufficiently appears to be his answer, as it is not signed by him, and the party who certifies that Lee made oath to it before him does not sign his certificate officially. The record, taken altogether, however, shows that it was his answer. The court admitted the copy of the record in that case, and, upon that evidence and the other evidence in the case, gave, of its motion, instruction B. This instruction treated that record as evidence of a claim of right or color of title to the 50,000 acres of land, and the jury were told, in order for it to ripen into a perfect title sufficient to supply the place of actual conveyance, they must believe that the plaintiff, or those under whom he claims, have held the land in question, under such claim or color of title, adversely for the statutory period. This, I think, was error. The admissions in the answers of Lee and Maund were that they respectively had sold and conveyed the land, and that Soley, the vendee of Maund, was the legal owner thereof, and not merely the equitable owner. The proceedings in the chancery cause were not a link in the plaintiff's chain of title, and gave him no right in the property, either legal or equitable. It contained, however, admissions of Lee and Maund, through whom plaintiff claimed, that they had conveyed their title to the land to Soley, one of the plaintiff's remote grantors. It was evidence tending to establish a fact, not a link in the chain of title. Its only value, therefore, was as evidence tending to show that the legal title to the land had passed from Lee to Soley. When the deeds

were executed and delivered, they had accomplished their whole purpose or end, as conveyances. If they, or the books in which they were recorded, were afterwards destroyed or lost, it could have no effect upon the title conveyed by them. Of course, the original deeds were valuable as evidence, and the recorded deeds valuable both as evidence and notice; but whenever the fact was established that they had been executed and delivered, by other evidence, although they had been lost, and the books in which they were recorded destroyed, the effect was the same as if the deeds had never been lost and were in evidence before the jury. To hold otherwise, as was done in the case, might result in great injustice. Lord Coke (10 Coke, 92, cited in Shep. Touch. [Preston's Ed.] p. 73) says: "But in cases of great and notorious extremity, which have occasioned the destruction of the deed, as by casualty of fire, in that case he who suffers so great a loss may be permitted on the general issue to prove the deed in evidence to the jury by witnesses, in order that affliction may not be added to affliction." The court, therefore, instead of giving the instruction it did, ought, I think, to have instructed the jury that if they believed from the evidence in the cause that Lee had conveyed to Maund, and Maund had conveyed to Soley, their conveyance passed the legal title.

The next assignment of error is that the court erred in making an addition to plaintiff's instruction No. 7. The instruction, as asked for by the plaintiff, was in these words: "That the opinion or supposition or verbal declaration of Purvis as to where his true corner or lines were cannot estop those claiming under him from claiming to the true boundaries of the Lee grant." To this instruction the court added: "Yet the jury may consider any such declaration as evidence tending to show what was the true boundary of that patent." There was evidence in the cause tending to show that Purvis, one of the parties through whom the plaintiff claims, had made statements as to the boundary lines of the Lee grant which, if established, would have shown that the land in controversy, or the greater part of it, was outside of the grant. If the jury believed that Purvis had made such statement, it would not estop the plaintiff from showing that he was mistaken, and that the grant did cover the land in controversy; but the statement, if made, was an admission which the jury had the right to consider in determining the true boundary of the Lee grant. The court properly made the addition, and the instruction, as amended, correctly states the law, and is not in conflict, as the plaintiff contends, with his instruction No. 6, which the court gave.

The next assignment of error is that the court ought not to have made the addition it did to plaintiff's instruction No. 12. That instruction stated to the jury that, where there

is a conflict between the calls of a patent and the calls of the survey from the county surveyor's book, the calls in the patent must prevail. The addition made by the court was that, if "the patent is silent as to natural objects, corner trees, or other matters of description mentioned in the survey, the jury may consider the survey as evidence tending to identify the true boundary of the land embraced in the patent." This instruction was based upon the fact that the survey of the Lee grant, as claimed by the defendants, and found upon the county surveyor's book, was in evidence; but as that survey was improperly admitted in evidence, and will not be before the jury upon the next trial, the instruction in question would not be applicable to the facts of the case. That being so, it is unnecessary to discuss the question whether, upon the evidence in the case, the instruction, without or with the addition made by the court, was correct or incorrect.

The next assignment of error is that the court erred in refusing to give plaintiff's instruction No. 1, which is as follows: "The court instructs the jury that an outstanding title in another to defeat the action of ejectment must be present, outstanding, and operative, available, legal title on which the owner could recover against either of the contending parties if asserting it by action; that a title forfeited to the commonwealth, which has not been redeemed, is not sufficient to defeat the plaintiff; that the jury may presume this outstanding legal title to be extinguished in favor of the claimant who shows long possession of the lands in himself and those through whom he claims." The instruction, I think, correctly states the law that an outstanding title, sufficient to defeat a recovery in an action of ejectment, must be a present, subsisting, and operative legal title, upon which the owner could recover if asserting it by action. 3 Wilt. Act. & Def. 109, 110; 6 Am. & Eng. Enc. Law, 245; Wilcher v. Robertson, 78 Va. 602, 620. But the other branch of the instruction is, I think, erroneous. There is no reason why a defendant in an action of ejectment should not be permitted to rely upon an outstanding legal title in the commonwealth. The plaintiff must rely upon the strength of his own title, and if it appear in the cause that the legal title is in another, whether that other be the defendant, the commonwealth, or some other person, it shows that the plaintiff has not the legal title, and it is therefore sufficient to defeat his recovery. If it appears in the cause that the title to a tract of land granted by the commonwealth has been forfeited to it for the nonpayment of taxes or other cause, and there is no evidence that it has been redeemed by the owner or resold or regranted by the commonwealth, there is no presumption that such title has been extinguished in favor of a claimant who shows long possession. On the contrary, the presumption is that the title is still outstanding in the com-

monwealth. The statute of limitations never runs against the commonwealth, unless there be an express provision in the statute to that effect; and there is no such provision in our statute. Shanks v. Lancaster, 5 Grat. 110, 119; Koerner v. Rankin, 11 Grat. 420, 425. There can be neither disseisin nor adversary possession as against the commonwealth in the legal acceptance of those terms as applied between individual citizens, and therefore there can be no adverse holding against the commonwealth while the title is vested in it. If land be granted by the commonwealth, and an adversary possession has commenced against the owner of the legal title, and his land is afterwards forfeited to the commonwealth, such possession would cease to be adversary as against the commonwealth until the land is resold or regranted by it. Of course, if the adverse possession had been sufficiently long to bar the original owner's right of recovery before the forfeiture took place, the occupant's possession would not cease to be adversary, for the reason that, when the forfeiture occurred, the original owner had lost his title by adverse possession, and the commonwealth took nothing by the forfeiture. Smith v. Chapman, 10 Grat. 445, 464; Usher's Heirs v. Pride, 15 Grat. 190, 201; Hall v. Webb, 21 W. Va. 318, 322; Hutch. Land Tit. pp. 238, 239.

The plaintiff, in making out his claim of title, offered to read in evidence a copy of a writing purporting to be a deed from John M. Russell, of Cambridge, Mass., to Henry O. Middleton, of Fredericksburg, Va., dated July 27th, in the year 1838, for the conveyance of the 50,000 acres of land hereinbefore referred to. The defendants objected to it, but the court overruled the objection, and permitted it to be read to the jury; and afterwards, upon motion of the defendants, gave the jury this instruction: "The court instructs the jury that the paper purporting to be a deed of conveyance from J. Miller Russell to H. O. Middleton, dated July 27, 1838, offered in evidence by the plaintiff, did not convey the legal title to the land therein mentioned, but only an equitable interest in said land,—the said paper having no seal or scroll attached to the grantor's name, but said paper is sufficient basis upon which to found a claim or color of title; and if the jury believe that the plaintiffs, or those under whom they claim, held said land, under that paper as a color of title, by adverse possession for the length of time required by law, then the plaintiffs' right and title is as good as it would have been had that paper been a deed properly executed." The plaintiff objected to the instruction, and excepted to the action of the court in giving it. The correctness of this instruction depends upon the fact whether or not the original paper, a copy of which was read in evidence, was under seal. If it was under seal, it operated to convey all the title of the grantor, for it possessed all the other requisites of a good deed.

The copy of the paper does not disclose anything, by way of trace, scroll, or device, to show that the original was sealed. There is, however, a recognition of the seal in the body of the instrument, in this language: "In witness whereof, the said John Miller Russell hath hereunto set his hand and seal," the day and year aforesaid. There are two attesting witnesses, and they declare that the alleged deed was "signed, sealed, and delivered in their presence." The certificate of the two justices who took the acknowledgment states that the grantor acknowledged "the same to be his act and deed." The clerk of the supreme judicial court of Massachusetts certifies that the persons who took the acknowledgment were justices of the peace "at the time of taking the acknowledgment of the grantor in the above deed." The clerk of the county court of Patrick county, who admitted the paper to record on the 25th day of January, in the year 1840, certifies that "this deed, from John Miller Russell to Henry O. Middleton, with the certificate of acknowledgment, thereon indorsed (authenticated according to the act of congress), was presented in the clerk's office aforesaid and admitted to record." The land books of Patrick county show that the 50,000 acres of land, except certain small tracts sold off, were charged to John M. Russell for the purposes of taxation from the years 1818 to 1839, inclusive. It also appeared in 1840 (the year the alleged deed was admitted to record) that the land was transferred on the land books for the purposes of taxation from Russell to Middleton, and continued to be so charged until the year 1850, when it was transferred to J. J. Purvis, to whom Middleton conveyed the land, and was charged to Purvis from that time until 1888, when it was transferred on the land books to the plaintiff. The evidence further tends to show that Middleton, or those who claim under him, exercised acts of ownership over the land, and were in possession of some part of it as early as the year 1853.

The precise point here presented has not been decided in this state, and none of the Virginia decisions referred to by counsel have any direct bearing upon the subject. It is said by text writers that at common law, even though no impression appear upon the parchment or paper, still, if the instrument purports to be a deed, and on proper stamps, and be stated in the attestation of the witnesses to have been duly sealed and delivered, it will, in the absence of proof to the contrary, and especially if it be an ancient instrument, be presumed to have been sealed. *Tayl. Ev.* § 149 (Old Ed. § 128); 1 *Sugd. Powers*, 282, 283; 1 *Phil. Ev.* side p. 610, note. Such seems to be the rule in England and in those states where the common-law rule remains unchanged. In the case of *Parks v. Hewlett*, 9 *Leigh*, 511, 517, 518, Judge Parker quotes with approval the rule as above stated. Mr. *Sugden*, he says, upon the authority of Lord *Eldon*, states the doctrine to be as follows:

"If, in the attestation of an instrument, it is stated to have been sealed, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper." In the absence of other facts, I do not think such a paper as Judge Parker describes could be held in this state to be a sealed instrument. If however, an original instrument, more than 50 years old, was offered in evidence, and was a good deed in form and substance, except that it lacked the wax, wafer, scroll, or other mark of a seal upon it, purported to convey land, recognized the seal in the body of the instrument, was attested by witnesses who declared that it was signed, sealed, and delivered in their presence, was acknowledged as a deed before the officers taking the acknowledgment, was stated by the clerk (who certified to the official character of the officers who took the acknowledgment) to be the acknowledgment of a deed, was admitted to record as a deed, the land conveyed by it at once transferred on the land books for the purposes of taxation from the vendor to the vendee (which could not be legally done unless it was a conveyance of the land,—chapter 183, § 30, *Rev. Code* 1819), with evidence tending to show the payment of taxes thereon, acts of ownership exercised over and possession taken of part of the land, I think the question whether or not it had been properly sealed before its delivery, clearly, ought to be submitted to the jury. And if, under such circumstances, it would be proper to submit the question to the jury where the original is offered in evidence, is there any good reason, when the original is lost, and a copy offered in evidence, under the same circumstances, why the question of sealing should not also be submitted to the jury? I find but little discussion of the subject, and the views presented are not in accord. Some of the cases hold that, since it was the duty of the clerk recording such instrument to have made a true copy of it on his records, the presumption is that he did so. In the case of *Switzer v. Knapps*, 10 *Iowa*, 72, which is the leading as well as one of the few cases taking that view, the court said that, where the record of a deed does not show a copy of the seal, as such copies are usually made on the records, the presumption is that there was no seal on the original. In the absence of other facts, such as appear in this cause, I think that this is a correct statement of the law.

In the case of *Williams v. Bass*, 22 *Vt.* 352, "the plaintiff, to prove his title to land, offered in evidence an office copy of a deed in his chain of title, which contained no appearance on its face that the original was sealed by the grantor, and it did not appear that possession had ever been taken of the land under the deed. It was held in that case that such copy was not competent evidence. The antiquity alone of the deed, apparently defective, was not sufficient to justify the presumption of its due execution, neither could

such presumption be raised from the fact that the deed was acknowledged and recorded, the record showing only an imperfect deed." But the court said: "Had the deed of French [the grantor] been followed by possession, it would seem, from the authorities, there could be no doubt but that the presumption of its due execution would be fully warranted. \* \* \* Neither the grantor, French, nor those claiming under him, were ever in the actual possession of the land, nor is there any evidence in the case upon which to base the presumption that the deed contained a seal but its antiquity; and this, we think, the current of authority upon the subject will hardly justify." The deed referred to in that case was dated in 1795, and the trial of the case was in 1849.

There is another class of cases, which hold that the presumption that the original was sealed is more just and natural where the original instrument is lost, and resort is had to secondary evidence of its contents. Mr. Justice Field in the case of *Le Franc v. Richmond*, 5 Sawy. 601, 603, Fed. Cas. No. 8,209, takes that view, after quoting with approval the doctrine laid down by Sugden on Powers, as cited above. In the case of *Flowery Min. Co. v. North Bonanza Min. Co.*, 18 Nev. 302, it was held that the recording of the seal to a deed is not absolutely essential. If the original instrument cannot be produced, and the record thereof is offered in evidence, the existence of the seal will be presumed from the statement in the deed that the grantor did set his hand and affix his seal thereto, and from the attestation clause that it was signed, sealed, and delivered in the presence of witnesses. In the case of *Starkweather v. Martin*, 28 Mich. 471, the court, of which Judges Cooley and Christlancy were members, decided that where an instrument is recorded by the proper officer, and in the appropriate place for recording deeds, under a law permitting the registry of sealed instruments only, and the instrument is in the form of a warranty deed, purporting to be acknowledged and dated at a time when it was the common and lawful course to seal conveyances, and contrary to official duty to take the acknowledgment unless the instrument was sealed, and where the conclusion, attestation clause, and certificate of acknowledgment of the instrument all speak of it as under seal, it will be presumed that the original was sealed. And it further held that the presumption in such a case that the instrument itself was sealed will not be overcome by the omission of the register of deeds to put something of his own upon the record to indicate that the paper he recorded was sealed. The deed in that case was 40 years old. In many respects that case, on this point, was similar to the case at bar. See, also, *Smith v. Dall*, 13 Cal. 510; *McCoy v. Cassidy* (Mo. Sup.) 9 S. W. 926; *Aycock v. Railroad Co.*, 89 N. C. 321; *Hedden v. Overton*, 4 Bibb, 406; 1 Devl. Deeds, § 700. The

weight of authority, meager as it is, and the better reason, seem to be in favor of allowing such an instrument to go to the jury, for it to say upon all the evidence in the cause whether or not the original instrument was properly sealed. Whether such paper was a sealed or unsealed instrument was formerly treated as a matter of law, to be determined by the court, but seems now considered a question of fact, and is in all cases submitted to the jury. *Tayl. Ev.* § 149 (Old Ed. § 128), note.

I think, therefore, that instruction erroneous, and that the court ought to have submitted the question whether or not the original instrument was sealed to the jury, with the instruction that, if they believed from the evidence in the cause that it was sealed, then its effect was to convey, not only the equitable, but all, the title of the grantor, Russell, to the grantee, Middleton, in the 50,000-acre tract of land.

The plaintiff moved the trial court to set aside the verdict, and grant him a new trial, on the ground that it was contrary to the law and the evidence, and because of erroneous rulings of the court during the progress of the trial; and the refusal of the court to sustain his motion is assigned as a ground of error. As hereinbefore shown, the court erred in admitting certain evidence, and in giving and refusing certain instructions; and for such errors the verdict will have to be set aside, and a new trial ordered, unless it be true, as defendants insist, that these errors did not prejudice the plaintiff, and that a verdict in his favor could not have been rendered by the jury, or sustained by the court, upon the case as made by the plaintiff, even if no improper evidence had been admitted, and no error committed in giving or refusing instructions. The defendants base this contention upon the ground that the grant under which the plaintiff claims contains an exception of 7,000 acres of land, the title to which never passed to the plaintiff and that prior claimants under the Lee grant had sold and conveyed of the lands embraced within such grant more lands than are in controversy in this case. The defendants insist that these facts appear from the plaintiff's own evidence, and that in such a case the plaintiff must not only connect himself with the commonwealth's title, and show the exterior boundaries of the grant under which he claims, but that he must go further, and prove that the lands in controversy are not within the lands excepted in the grant, nor within the lands so sold and conveyed, and that the plaintiff, having wholly failed to do this, did not make out a *prima facie* case for recovery. It does appear from the land book and certain deeds introduced by the plaintiff that small portions of the Lee grant had been aliened by those under whom the plaintiff claims, but this fact does not appear from the papers introduced by him to make out his chain of title, but only from other papers

introduced for a different purpose. The facts as to the aliened lands, therefore, do not sustain the defendants' contention, but it does appear from the plaintiff's chain of title that 7,000 acres of land were excepted from the boundary embraced within the Lee grant, under which plaintiff claims. That grant contains the following exception or reservation: "But it is always to be understood that the survey upon which this grant is founded includes 7,000 acres (exclusive of the above quantity of 7,000 acres), all of which having a preference by law to the warrant and right upon which this grant is founded, liberty is reserved that the same shall be firm and valid, and may be carried into grant or grants, and this grant shall be no bar in law or equity to the confirmation of the title or titles to the same as before mentioned and reserved, with its appurtenances, to have and to hold the said tract or parcel of land, with its appurtenances, to the said Henry Lee (except as before excepted) and his heirs, forever." The plaintiff insists that the decision of this court in the case of *Hopkins v. Ward*, 6 Munf. 38, settles the question under consideration in his favor, and that he has made out a prima facie case for recovery. It is true that in that case this court held, in construing a similar grant, that, "under the terms of the patent exhibited in that case, the grantee was entitled to all the land contained within the metes and bounds thereof, subject, however, to the reservation in said patent contained"; and that in the action before us the appellant was entitled to recover all the said land, except such as the appellees might show themselves entitled to under the reservation aforesaid. But in the next case which came before the court (*Nichols v. Covey*, 4 Rand. [Va.] 365) that view did not prevail; and it was unanimously held that the land embraced in such exception or reservation did not pass at all to the grantees, and that, if the first equitable claimant does not perfect his right to the excepted land, any other person may enter the same as waste or unappropriated, and obtain a grant therefor; that the title to the excepted lands was not in any manner affected by such grant; and that it remained precisely as if no such grant had ever been issued. The construction given in *Nichols v. Covey* was followed in *Trotter v. Newton*, 30 Grat. 582, and in *Carter v. Hagan*, 75 Va. 557, and may now be regarded as the settled construction of such grants in this state. The same construction has been given to such grants by the supreme court of the United States and by the courts of last resort in the states of Kentucky and West Virginia. *Scott v. Ratliffe*, 5 Pet. 86; *Armstrong v. Morrill*, 14 Wall. 120; *Halsted v. Buster*, 140 U. S. 273, 11 Sup. Ct. 782; *Madison's Heirs v. Owens*, Litt. Sel. Cas. 281; *Bryan v. Willard*, 21 W. Va. 65; *Stockton v. Morris* (W. Va.) 19 S. E. 531.

No title having passed, therefore, by the

Lee grant to the 7,000 acres excepted, the plaintiff would not be entitled to recover the land in controversy if it lies within the excepted lands. But upon whom is the burden of proof to show the location of such lands? The defendants insist that the plaintiff must show that the land in controversy is not within the excepted lands. The plaintiff insists that the defendants must show that it is within such excepted lands if they rely upon an outstanding title to defeat his recovery. Ordinarily, the burden of proof is upon the party claiming or holding the affirmative of the issue. There are, however, some exceptions to this rule. Mr. Wharton says that he who undertakes in a court of justice to establish a claim against another must produce the proof necessary to make good his contention. This proof may be either affirmative or negative. Whatever it is, it must be produced by the party who seeks forensically to establish such claim. 1 Whart. Ev. § 356. One of the rules of pleading is that where there is an exception incorporated in the general clause, whether it be in a statute or in a private contract, unless that exception in such general clause be negated in pleading the clause, no offense or cause of action will appear in the indictment or declaration when compared with the statute or the contract; but, when the exception or provision is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated, without negating the exception or proviso, as a prima facie case is stated; and it is for the party who relies upon the matter of excuse or defense furnished by the statute or contract to bring it forward in his defense. *U. S. v. Cook*, 17 Wall. 168-173; *Land Grant Co. v. Dawson*, 151 U. S. 586-604, 14 Sup. 458. This is not always a rule of pleading, but is sometimes a rule of evidence. *Land Grant Co. v. Dawson*, supra; *Osborn v. Lovell*, 36 Mich. 246-250 (Judge Cooley).

As the pleadings in an action of ejectment in this state are very general, neither party setting out or referring to his title papers, it would seem that the party whose duty it would have been to set out such general clause together with the exception if special pleadings had been required, and to have sustained his pleadings by testimony, must, where he is not required to plead them specially, make the same proof, if he offers them in evidence, as would have been required if they had been specially pleaded. The exception of the 7,000 acres of land in the Lee grant is a part of the general conveying clause; and, as this grant was introduced in evidence by the plaintiff to make out his case, it would seem that, under this rule of law, he must, in order to show title to the land in controversy, prove that it was not within the lands excepted. Again, the plaintiff, in an action of ejectment, recovers only upon the strength of his own title, and



he must show that he has the legal title to and the right to the possession of the land in controversy. He must always, in the first instance, make out a clear and substantial possessory title to the particular land in controversy (2 Greenl. Ev. §§ 303-304; Adams, Ej. p. 319; Land Grant Co. v. Dawson, 151 U. S., at page 604, 14 Sup. 458; for possession is always *prima facie* evidence of title, and the party in possession cannot be deprived of his possession by any person but the rightful owner, who has the right to the possession (2 Greenl. Ev. § 331), except in certain cases, which do not affect the question now under discussion.

The plaintiff avers that the defendants are unlawfully withholding his land from him. The title paper upon which he relies shows that there are 7,000 acres of land within the exterior boundaries of his grant which he does not own. If he locates the exterior boundaries, and connects himself with the commonwealth's title, and does not show that the land in controversy is not within the excepted 7,000 acres, how can the jury say that the defendants are unlawfully withholding his land? Has he proved that the land in controversy is his land? How can the jury say that the defendants are not on the excepted land unless it be shown where the excepted land lies? The jury have no right to presume, because the excepted portion is but a small part of the whole boundary, that the land in controversy is most probably in the plaintiff's boundary, and therefore so find. To do this would be to violate the well-settled rule of law that no man will be presumed to have committed a trespass or to have done an unlawful act. Again, the defendants' possession is *prima facie* evidence that they are the owners of the legal title to the land in their possession, and the plaintiff's evidence does not disprove this or destroy the presumption of a rightful possession in the defendants. It is said that to require the plaintiff to assume such a burden imposes upon him a great hardship, if not an impossible task. If it does, it was self-imposed. He, or those under whom he claims, took the grant with the exception in it. There would have been little difficulty in locating the excepted lands and the grantee's own land when the grant issued. The facts upon which the exception depends were within the knowledge of the plaintiff, or those under whom he claims. If he, or those under whom he claims, have delayed ascertaining the boundaries of these excepted lands and the boundaries of his own land until the means of doing so have been lessened or lost, he cannot complain, as it is the result of his or their negligence. At least, well-settled rules of law ought not to be departed from in order that a party in possession of land may be deprived of that possession by another who does not show that he has the legal title to or the right to the possession of it. At an early day this ques-

tion came before the supreme court of Kentucky in the case of Guthrie v. Lewis, 1 T. B. Mon. 142, and that court held that where plaintiff derives title under a deed conveying the whole tract patented, except parcels thereof before conveyed to persons named, it is incumbent on him, not on the defendant who claims adversely to the patent, to show that the land in controversy is not embraced within the exception. In Madison's Heirs v. Owens, Litt. Sel. Cas. 281 (decided in 1821), the same court decided that where a grant calls to exclude entries belonging to other persons by name, and designating quantity included within the boundaries of the patent, the patentees cannot recover in ejectment without showing that the defendant is not within the bounds of the excluded claims. See Taylor v. Taylor, 3 A. K. Marsh. 18. Judge Snyder, in delivering the opinion of the court in Bryan v. Willard, 21 W. Va. 65, intimates that in such a case the burden of proof would be upon the plaintiff to show that the land in controversy was not within the excepted lands, though this expression of opinion was not necessary to the decision of the case. Afterwards the question came before that court in the case of Stockton v. Morris, reported in 19 S. E. 531. The exception in the grant in that case designated the claimants of a portion of the land excepted and its location, but as to 985 acres thereof the exception was, as in the case at bar, made up of prior claims, without designating who the claimants were or where the land was located. The court held that the burden of locating the excepted claims was upon the plaintiff, in order to make out a *prima facie* case for recovery. 19 S. E. 531. In Scott v. Ratliffe, 5 Pet. 81-86, the supreme court of the United States (Chief Justice Marshall delivering the opinion) held an instruction to be correct which directed the jury "that if the plaintiffs did not show to their satisfaction that the defendants resided within the plaintiffs' grant, and outside of the land excepted in the grant for Preston and Garrard, they ought to find for the defendants." See Hawkins v. Barney, 5 Pet. 457. In the case of Land Grant Co. v. Dawson, decided by that court at its last term, and reported in 151 U. S. 586, 14 Sup. Ct. 458, the plaintiff claimed under a deed which covered a large tract of land as a whole. The deed contained the following exception: "Excepting from the operation of this conveyance such tracts of land, part of the said estate, hereby warranted not to exceed 15,000 acres, which the parties of the first part have heretofore sold and conveyed, by deeds duly recorded, on or prior to January 25, 1870." The court said in that case that the burden was upon the plaintiff to show its title to the identical land claimed by the defendant, and as it did not take title to 15,000 acres of the Maxwell land grant, by reason of the fact that its grantors had already conveyed this amount of land, it



was incumbent upon it to show that the land it sued to recover had not been previously conveyed, and hence it had taken title to it under its deed. *Id.*, 151 U. S. 604, 14 Sup. Ct. 458.

It would seem, therefore, both upon principle and upon authority, that where the exterior boundaries of a survey upon which a grant or deed is founded include lands which have been excepted from the operation of the grant, or lands which have been aliened since the grant was issued, and which have been excepted from the operation of the deed, and the plaintiff's title papers disclose such exception or such alienation, it is not sufficient for such plaintiff, in an action of ejectment, to connect himself with the commonwealth, and show the exterior boundaries of his grant, but he must also prove that the lands in controversy are not within the excepted or aliened lands, in order to make out a case which will entitle him to recover in an action of ejectment. The plaintiff, having failed to show that the land sued for was a part of the land granted by the state to Gen. Lee, was not entitled to recover on the ground that he was the legal owner of the commonwealth's title; and the court properly overruled his motion to set aside the verdict, on the ground that it was contrary to the law and the evidence.

But the plaintiff, in his efforts to make out his case, did not rely solely upon the claim that he had traced his title from the commonwealth to the land in controversy. He introduced proof tending to show that he and those under whom he claims had been in possession of the land in controversy, under color of title, for the statutory period, claiming it as their own, and that upon this ground he was entitled to recover it. He also offered evidence tending to show that the defendants or those under whom they claim had leased the land sued for, or some part thereof, from parties under whom the plaintiff claims, and that the defendants were estopped from questioning his title unless they showed that they had disclaimed holding under such lease, and had brought notice of such disclaimer home to the plaintiff or those under whom he claims. Upon these questions, it is not clear that the evidence improperly admitted and the instructions erroneously refused and erroneously given may not have influenced the jury to the prejudice of the plaintiff. Since it is not manifest that no injury was done the plaintiff by such erroneous rulings, the verdict cannot be sustained, under the settled practice of this court. *Bank v. Waddill*, 27 Grat. 448-451; *Railway Co. v. Rogers*, 76 Va. 443-451; *Kincheloe v. Tracewells*, 11 Grat. 588, 589. I am of opinion, therefore, that the judgment of the circuit court of Patrick county should be reversed, the verdict set aside, and a new trial ordered to be had, in accordance with the views expressed in this opinion.

(91 Va. 762)

COMMONWEALTH v. BROWN.<sup>1</sup>

(Supreme Court of Appeals of Virginia. March 21, 1895.)

OYSTER LAW—TAX ON SALES—CONSTITUTIONALITY OF STATUTE—TITLE OF ACT—SUFFICIENCY.

1. Acts 1891-92, c. 363, p. 595, requires oyster-tong men to make weekly returns of the amounts of their sales, and to pay a weekly tax on such sales equal to the rate collected by the state on other property, and authorizes them to pay two dollars, and thereby be relieved of making such returns, and imposes a fine for failure to make returns if the two dollars is not paid. *Held*, that such act does not conflict with Const. art. 10, requiring taxation to be equal and uniform, merely because the value of the property is not ascertained in the same way as other property, and by the same officers, nor because the tax is to be paid weekly, while other taxes were paid yearly, nor because a penalty is imposed for failure to observe the law, which is not imposed in other tax laws.

2. The tax required by Acts 1891-92, c. 363, p. 595, to be paid by oyster-tong men on the amounts of their sales, is not an income tax, within the meaning of Const. art. 10, § 4, exempting incomes under \$600 from taxation.

3. The act does not violate Const. art. 10, § 2, authorizing a tax on the amount of sales of oysters taken from the beds by a citizen in any year at a rate not greater than that imposed on other property.

4. The title of Acts 1891-92, c. 363, "An act to amend and re-enact" certain sections "and to repeal" certain sections of Code, c. 97, "in relation to oysters, and to add independent sections thereto," sufficiently expresses the object of the act, it not being necessary to enumerate the various provisions as to registering oyster boats, arranging oyster districts, assigning and renting oyster grounds, and the tax on sales of oysters.

5. If the title of an act is sufficient to embrace matters covered by an act amendatory thereof, it is immaterial that the title of the latter act does not express the purpose of the act.

6. The title of an act amending or repealing any part of the Code need only refer to the proper chapter and section of the Code.

7. A law merely continuing an old tax is not affected by Const. art. 10, § 16, requiring every law which imposes, continues, or revives a tax to state distinctly the tax, and the object to which it is to be applied, provided the act which originally imposed the tax stated such object.

8. The title of an act, "An act for the preservation of oysters to obtain revenue for the privilege of taking them within the waters of the commonwealth," sufficiently states the object of the tax imposed thereby, as required by Const. art. 10, § 16.

Error to circuit court, Gloucester county.

Prosecution of Iverson Brown for violating the oyster law. To a judgment sustaining a demurrer to the indictment the commonwealth brings error. Reversed.

R. Taylor Scott, Atty. Gen., for the Commonwealth. J. N. Stubbs and W. C. L. Taliaferro, for defendant in error.

RIELY, J. Section 5 of the act of the general assembly approved February 25, 1892, entitled "An act to amend and re-enact sections 2131, 2133, 2134, 2135, 2137, 2148,

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

2151, 2153, and to repeal sections 2141, 2142, 2143, 2144, 2145, and 2147 of chapter 97 of the Code of Virginia in relation to oysters, and to add independent sections thereto" (Acts 1891-92, c. 363, p. 595), contains the following provision: "The inspector shall require each tong-man registered in his district to make to him, on the Saturday of each week, or within three days thereafter, during the lawful season, a true and accurate return of the amount of sales made by him during the week preceding; and the inspector shall collect from said tong-man on the aggregate amount of sales for that week an amount equal to the amount of tax that may be levied by the state on any other species of property; but if at the time of registering his boat, any tong-man shall prefer, and elect to pay, and pay to the inspector the sum of two dollars, the inspector shall give him a receipt therefor, in which he shall state that the said payment is a discharge of his obligation under this section for the entire season for which his boat is registered, so far as the weekly returns and the amount to be paid thereon is concerned.

\* \* \* If any tong-man shall fail to make such report as is provided in this section, he shall be guilty of a misdemeanor, and upon conviction thereof he shall be fined not less than ten dollars nor more than fifty dollars." Iverson Brown, the defendant in error, who was a tong-man of oysters, and had not elected, at the time of registering his boat, to pay to the inspector the sum of two dollars in discharge of his obligation for the entire season, was indicted under the said statute in the county court of Gloucester on the 5th day of October, 1893, for failing to make the return which was due from him to the inspector on the week ending September 16, 1893, or within the three days thereafter, of the amount of his sales of oysters. To the indictment the defendant demurred. The court sustained the demurrer, and gave judgment for the defendant. Upon a petition by the commonwealth to the judge of the circuit court of Gloucester county for a writ of error to the said judgment there was a pro forma refusal, in pursuance of an agreement between the attorney for the commonwealth and for the defendant, in order that the case might be promptly brought before this court. A writ of error was thereupon granted by one of the judges of this court. By an agreement in writing and filed with the record all errors and objections to the indictment, except as to the validity of the statute upon which it was based, were waived by the counsel for the defendant.

The only question, then, for our consideration is the constitutionality of the statute above quoted. It is first assailed on the ground that the tax prescribed is not equal and uniform, and that, therefore, the statute is obnoxious to section 1 of article 10, of the constitution. In support of this contention quite a number of objections to the act were

urged. Section 1 of article 10 of the constitution, prescribes that: "Taxation, except as hereinafter provided, whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value." An inspection of the statute under consideration shows that the principle of equality and uniformity was strictly observed in the imposition of the tax. The value of the oysters for taxation could not well be ascertained or fixed in a more just manner than is prescribed by the statute. It is to be ascertained by the aggregate amount of sales each week during the oyster season. It is their actual value in market, and not merely their appraised value. A more accurate mode of ascertaining the valuation for taxation of oysters subject to be taxed could not well be devised; and the rate of taxation is precisely the same as is prescribed for other property. The inspector is to collect each week from a tong-man on the aggregate amount of his sales for that week an amount equal to the amount of tax that may be levied by the state on any other species of property; no more, no less. The tax prescribed is exactly the same as that which is levied by the state on any other species of property, and the valuation is ascertained in the most accurate and just manner. There is no just ground to complain of the tax for inequality or want of uniformity.

It is objected that the valuation for taxation of oysters is not ascertained in the same way, or by the same method, that is prescribed for other property; that the valuation of other property is assessed by officers elected or appointed for the purpose; that the tax on oysters is to be assessed and paid weekly, while all other property is only assessed annually, and the tax paid annually; and that the failure of a tong-man to make weekly a return of his sales to the inspector is made a misdemeanor, and subjects him, on conviction, to the payment of a fine, while the owners of other property subject to taxation are not liable to be punished for a like delinquency. Neither one nor all of these objections affect the equality or uniformity of the tax imposed on a tong-man, nor offend against section 1 of article 10 of the constitution. Whether true or false, they do not operate to impose any greater burden on him than is borne by the owner of any other species of property of the same value. They do not add one iota to the tax he has to pay, and the statute is therefore in strict accord with both the letter and spirit of the constitution in the respect complained of. The constitution does not prescribe that the valuation of all property for taxation shall be ascertained in the

same way or manner. It is not even implied. In the nature of things, it could not be done. The many kinds or species of property with their diverse characteristics render it impossible. The valuation is to be ascertained as prescribed by law,—that is, by the legislature,—and in as just a manner as possible; and on such valuation the same rate of tax shall be imposed as on other property, so that “no species of property \* \* \* shall be taxed higher than any other species of property of equal value.” The requirement of equality and uniformity is satisfied by such regulations as will secure an equal rate and a just valuation without reference to the method of valuation, and, in order to be uniform, a tax need not be imposed and assessed upon all property by the same agency or officer. *Shenandoah Val. R. Co. v. Supervisors of Clarke Co.*, 78 Va. 269; *Kentucky Railroad Tax Cases*, 115 U. S. 337, 338, 6 Sup. Ct. 57; *Central Iowa Ry. Co. v. Board of Sup'rs*, 67 Iowa, 199, 25 N. W. 128; and *Louisville & N. A. R. Co. v. State*, 25 Ind. 177. The legislature may prescribe any method it may deem best for attaining a just and fair valuation of any species of property, and the court could not declare any such law void, unless it manifestly violated the principles required by the constitution. The fact that oysters are required to be assessed, and the tax to be paid every week, while other property is only assessed and the tax paid once a year, does not work inequality in the amount of the tax paid. The tong-man does not pay weekly on the same property. In the result he only pays on the aggregate amount of his sales during the season the regular pro rata tax that is paid on all other property. The fact that he pays the tax in weekly installments instead of one annual payment does not increase the amount of his tax one stiver. The amount to be paid to the state is precisely the same, whether paid in one single payment or in weekly installments.

It is claimed that the tax in question, being assessed on the aggregate amount of sales of oysters, is an income tax, and is, therefore, violative of section 4, art. 10, of the constitution, which exempts incomes under \$600 from taxation. It is a sufficient answer to this objection to say that the tax is assessed on sales, and not upon income, and that the section of the constitution referred to has no application to the case; and, furthermore, that the tax on the “amount of sales of oysters” taken from their natural beds is expressly authorized by section 2 of the said article of the constitution.

It is further objected that because the act subjects a tong-man to a fine of not less than \$10 nor more than \$50 if he fail to make to the inspector the required weekly return of sales, it discriminates against the tong man, as no other owner of property subject to taxation is liable to a fine for a like delinquency. If this were in fact true, it would

not be cause to declare the statute void for inequality or want of uniformity in the tax imposed on tong-men of oysters. It in no wise adds to or increases the tax. That remains fixed, and is the same that is “levied by the state on any other species of property.” If the tong men respect the law by which the valuation of oysters for assessment is to be ascertained, they will never incur the fine. A statute that is otherwise valid is not rendered invalid by having a penalty affixed for its violation. The wrong of the citizen can never make a valid law void. But the claim of discrimination is not founded in fact. Owners of other property are subject to punishment for a like delinquency. The penalty prescribed by the statute in question is for failing to make the return of sales to the inspector, who is to assess the tax. Under the general law, forms for lists of valuations are furnished by the assessor to the owners of personal property, which they are required to fill out by listing their property and affixing valuations thereof, and which, after being verified by oath, are required to be returned to the assessor or clerk of the court within 10 days thereafter; and the failure to return the same within the time required, and to make oath to its truth and fairness, subjects the offender to a forfeiture of not less than \$30 nor more than \$1,000. Code Va. §§ 491, 494, 497. Statutes imposing penalties for failure or refusal to make such returns or to return such lists are quite common, and have been uniformly upheld, *Washington v. Com.*, 2 Va. Cas. 258; *Com. v. Byrne*, 20 Grat. 165; *State v. Bell*, 1 Phil. (N. C.) 76; *Com. v. Cooke*, 50 Pa. St. 201; *City of Hartford v. Champion*, 58 Conn. 268, 20 Atl. 471; and 25 Am. & Eng. Enc. Law, 206. Nor does the statute infringe in the least on the provision of the constitution which authorizes a tax to be imposed on “the amount of sales of oysters” taken from the natural beds by any citizen “in any one year \* \* \* at a rate not exceeding the rate of taxation imposed on any other species of property.” Article 10, § 2. It imposes, as has been seen, a tax on the weekly sales of oysters equal to the amount of the tax that may be levied by the state on any other species of property; but provides that “if at the time of registering his boat any tong-man shall prefer and elect to pay, and pay to the inspector the sum of two dollars, the inspector shall give him a receipt therefor in which he shall state that the said payment is in discharge of his obligation under this section for the entire season for which his boat is registered, so far as the weekly returns and the amount to be paid thereon is concerned.” It is insisted that this is in substance and effect a license tax, and not a property tax, and is therefore obnoxious to section 2 of article 10 of the constitution. This claim is not well founded. The constitution expressly authorizes the legislature to impose a tax on the amount of sales of

oysters taken from their natural beds by any citizen in any one year, but limits the tax to the rate imposed upon any other species of property. The statute, pursuing directly the constitutional provision, requires a tong-man to make return to the inspector of the amount of his sales of oysters so taken, and the inspector to collect from the tong-man on the aggregate amount of sales an amount equal to the amount of tax levied by the state on other property. Thus the tong-man is required to pay on the amount of his sales as the constitution authorizes, and not otherwise; and only such amount as is equal to the tax imposed by the state on other property. The statute does not, therefore, offend against the constitution, and it is difficult to see how it can be so claimed. The provision that if the tong-man, at the time of registering his boat, shall prefer and elect to pay, and pay the sum of two dollars, such payment shall be a discharge of his obligation for the entire season for the tax imposed on the amount of his sales, is simply a privilege extended to him, which he may either accept or decline. He is under no compulsion whatever to avail himself of it. He is without cause of complaint on this score. Nor, unless accepted, does it affect the tax imposed in strict adherence to the constitutional provision. We have now disposed of the many objections raised to the constitutionality of the statute on the ground of inequality or want of uniformity in the tax it imposes, and the objection that it is a license, and not a property tax. It is, in my opinion, valid against such attack.

It is next contended that it is repugnant to section 15 of article 5 of the constitution, which is as follows: "No law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended with reference to its title, but the act revived, or the section amended, shall be re-enacted and published at length." The title of the act was stated at the beginning of this opinion, but for convenience in examining the objection made to its validity or sufficiency under the foregoing provision of the constitution, it will be here repeated. It is entitled: "An act to amend and re-enact sections 2181, 2133, 2134, 2135, 2137, 2148, 2151, 2153, and to repeal sections 2141, 2142, 2143, 2144, 2145, and 2147 of chapter 97 of the Code of Virginia, in relation to oysters, and to add independent sections thereto." It is claimed that the body of the statute embraces many objects, instead of one object, as required by the constitutional provision, and, further, that these many objects are not expressed in the title; that it both amends and repeals many sections of the Code, and that the independent sections have various objects, such as registering boats to be used in taking oysters from their natural beds, arranging oyster districts, surveying oyster-planting ground, assigning and renting oyster ground, tax on sales of oysters taken from

their natural beds, and other similar provisions; and it is contended that "the title should have stated and shown what subject each section as amended and re-enacted had reference to, what subject each section repealed had reference to, and that the subject-matter in the independent sections should have been clearly set forth in the title." The provision of the constitution is a wise and wholesome one. Its purpose is apparent. It was to prevent the members of the legislature and the people from being misled by the title of a law. It was intended to prevent the use of deceptive titles as a cover for vicious legislation, to prevent the practice of bringing together into one bill for corrupt purposes subjects diverse and dissimilar in their nature, and having no necessary connection with each other; and to prevent surprise or fraud in legislation by means of provisions in bills of which the titles gave no intimation. And, on the other hand, it was not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject. It was not designed to embarrass legislation by compelling the multiplication of laws by the passage of separate acts on a single general subject. Although the act or statute authorizes many things of a diverse nature to be done, the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. It is therefore to be liberally construed and treated, so as to uphold the law, if practicable. *Cooley, Const. Lim. p. 175.* All that is required by the constitutional provision is that the subjects embraced in the statute, but not specified in the title, are congruous, and have natural connection with, or are germane to, the subject expressed in the title. This has been, so far as I am aware, the construction given this provision of the constitution by this court, by the highest courts of other states whose constitutions contain the same or a similar provision, and by the supreme court of the United States. *Powell v. Supervisors*, 88 Va. 707, 14 S. E. 543; *Lescallett v. Com.*, 89 Va. 778, 17 S. E. 546; *State v. Town of Union*, 33 N. J. Law, 350; *People v. Briggs*, 50 N. Y. 553; *Johnson v. Harrison*, 47 Minn. 578, 50 N. W. 923; *Falconer v. Robinson*, 46 Ala. 847; *Carter Co. v. Sinton*, 120 U. S. 523, 7 Sup. Ct. 650; *Montclair v. Ramsdell*, 107 U. S. 155, 2 Sup. Ct. 391; *Ackley School Dist. v. Hall*, 113 U. S. 142, 5 Sup. Ct. 371; and *Unity v. Burrage*, 103 U. S. 457-459. It is very plain that the subjects of the various sections of the act under consideration are not dissimilar or discordant, but have natural connection with each other, and relate to the general subject (oysters) expressed in the title. They are all the means to an end. They are instrumentalities for the accomplishment of the general object of the act. No one interested in the subject-matter of the statute could be misled by the title, or be put off his guard by hearing it read by the title.

Under the just and fair interpretation that has been uniformly given to the provision of section 15 of article 5 of the constitution, the title to the act in question is sufficient, and it was unnecessary to set forth in it the various subjects of its different sections, which would have, indeed, made the title what the constitutional provision never intended to require, an abstract of the law or an index of its contents.

There is another view which may be urged in support of the sufficiency of the title. It will be observed that it is an amendatory act, and not the original act on the subject. In such case, if the title of the original act is sufficient to embrace the matters covered by the provisions of the act amendatory thereof, it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient. If the title of the original act is sufficient to embrace the matters contained in the amendatory act, whether that of the amendatory act is in itself sufficient is unimportant. *State v. Ranson*, 73 Mo. 78; *City of St. Louis v. Tiefel*, 42 Mo. 590; *Brandon v. State*, 16 Ind. 197; *Monford v. Unger*, 8 Iowa, 82; *State v. Algood*, 87 Tenn. 163, 10 S. W. 310; and *Improvement Co. v. Arnold*, 46 Wis. 214, 224, 49 N. W. 971. The act in question is amendatory of chapter 97 of the Code of Virginia, on "Oysters." This chapter contains and embraces the statute law on the subject of oysters enacted in Acts 1883-84, c. 254, p. 324, as revised by the revisers of that Code; and the section under which the defendant in error was indicted was in substance contained in section 8 of said act, and was incorporated in the Code as section 2142. That section of the Code is repealed by Acts 1891-92, c. 363, p. 595, and section 5 enacted in its place as an independent section. We have already set forth the said section at length. Is it germane to the subject expressed in the title of the act of 1883-84 referred to? Would it have been legitimately covered by its title? The title was as follows: "An act for the preservation of oysters and to obtain revenue for the privilege of taking them within the waters of the commonwealth." These questions can only be answered in the affirmative. Section 2142 of the Code, taken from the original act of 1883-84, and incorporated into the Code by the revisers, and the independent section under discussion, numbered 5, of the act of 1891-92, relate directly and expressly to the object expressed in the title of the original act. This cannot be questioned. And, being fully covered by it, the title of the amendatory act of 1891-92 is a sufficient compliance with the constitutional requirement. It may, however, be said that the act in question did not purport to amend the original act of 1883-84, but to amend and re-enact and repeal various sections of chapter 97 of the Code of Virginia, and add other sections to it. This is true, and it is also true that the revisers of the Code (1887) in-

corporated into it the provisions of the act of 1883-84, and that the sections so amended and re-enacted and those repealed were mainly taken by the revisers from the said act. But the fact that the act purports to amend the Code instead of the original act, so far from invalidating it, is an additional reason why it is not obnoxious to the constitution in respect to the matter of its title. The laws contained in the present Code were enacted before, and the great body of them very long before, they were incorporated into it. They were taken from previous codes and compilations of the General Laws, and from statutes passed subsequent to such codes and compilations. It is to be presumed that they were constitutionally enacted, as well as to the title as in other respects. They were collated, revised, and digested under appropriate titles and chapters, and divided into sections in pursuance of an act of the legislature, and then passed by it as one act under a proper title with the object of the act therein duly expressed: "An act to revise, arrange and consolidate into a code of the General Statutes of the commonwealth, approved May 18, 1887," in strict compliance with the constitution. It was not to amendments of General Statutes thus consolidated into a code that section 15 of article 5 of the constitution was intended to apply, but it was aimed at the separate acts in their original enactment, when the opportunity existed for the evils and the mischief to be done, which the constitutional provision was designed to prevent or defeat. It is not necessary, therefore, to do more, if so much, in amending and re-enacting or repealing any part of the Code or adding thereto, than refer to the proper chapter and section thereof to be amended or repealed or added to, and adopt and express in the title of the amendatory act the number and subject of such chapter, if the provision of such amendment by re-enactment or by additional section or sections is germane to the subject of the chapter. *Association v. Newman*, 50 Md. 62; *Lankford v. Commissioners*, 73 Md. 105, 20 Atl. 1017, and 22 Atl. 412; *Heath v. Johnson*, 36 W. Va. 782, 15 S. E. 980; *Dogge v. State*, 17 Neb. 140, 22 N. W. 348; *State v. Berka*, 20 Neb. 375, 30 N. W. 267; *People v. Howard*, 73 Mich. 10, 40 N. W. 789; and *People v. Parvin* (Cal.) 14 Pac. 783. The chapter of the Code, whose sections are affected by the act in question is numbered 97, and "Oysters" is expressed to be its subject. The act whose constitutionality is questioned refers in its title to that chapter by number, and uses its title; and, as I have previously shown, the provisions of all the sections of the act relate directly and expressly to the subject "Oysters." It is not, therefore, in conflict with the constitution.

The constitution of Maryland contains a similar provision to that of our own, and the court of appeals of that state has held that in amending its code of laws, which is di-

vided into articles, it is sufficient to refer to the number of the article. The subject of its ninety-fifth article is "Usury," under which is contained the whole legislation of the state regulating the rate of interest, declaring the penalties and forfeitures for usury, and prescribing the manner in which such forfeitures shall be enforced. The legislature of Maryland passed an act amending the said article, under the title: "An act to amend article ninety-five of the Code of Public General Laws by adding an additional section thereto." Laws 1870, p. 601. In *Association v. Newman*, supra, the act was assailed as repugnant to the constitution, but the court held that the title of the act complied with the constitutional provision requiring the subject of an act of assembly to be described in its title; and added that "it was not necessary to state in the title that the section to be added to the Code related to the subject of usury. The reference to the particular article in the Code, which relates only to the subject of usury, clearly indicated the subject of the law." The act that was drawn in question in *Heath v. Johnson*, supra, was entitled "An act to amend 'An act to amend and re-enact section 58 of chapter 45 of the Code of West Virginia.'" It was objected to on account of the insufficiency of its title, but the court held otherwise, and said: "The provision cited seems to refer rather to original acts than to those which are only amendatory; but, supposing it to apply to the latter, when the amendment in its title points not only to the chapter which is to be amended, but to the very section, it seems to us to amount to a sufficient expression of the object of the law to prevent any of the evils which the constitutional provision was intended to remedy." The title of the act which was questioned in *People v. Howard*, supra, read as follows: "An act to amend chapter 153 of the Revised Statutes of 1846, being chapter 180 of the Compiled Laws, entitled 'of offences against the lives and property of individuals.'" Laws 1867, p. 153. The amendment consisted in adding to the chapter a new section. In its opinion the court said: "It is claimed that the object of the act, which was to create a new felony, is not expressed in the title; that an amendment means a change or alteration in something already existing, and does not mean creation, or the bringing in of substantially new matter; and that the precise purpose of the act should have been clearly stated in the title. \* \* \* Acts entitled 'Acts to amend a named act' are not obnoxious to the constitution, if the amendment comes fairly within the scope of the title of the original act. Nor would the amendment of a compiler's section, if the subject-matter of the section was expressed in the title. But it is said that the chapters and sections of the Compiled Laws have no titles, the titles being placed there by the compilers, and not by

the legislature. \* \* \* When the chapters are referred to, and they are identical in sections, and the title as used by the compiler is substantially stated, and an amendment is proposed to such chapter, the public are notified that a change is proposed in the law relating to the class of offenses treated of in such chapters, and that amendments may always be made by adding a new section, as an act is amended by adding a new section."

It is further contended that the act is unconstitutional because it imposes a tax without stating the tax, or the object of it, and is therefore repugnant to section 16 of article 10 of the constitution, which provides that "every law which imposes, continues, or revives a tax, shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object." So far as I am aware, this particular provision of the constitution has not heretofore been reviewed by this court. It was not in any constitution of the state prior to 1869. It appears there for the first time. It is true that the act contains a tax. Is it distinctly stated? It is prescribed to be "an amount equal to the amount of tax that may be levied by the state on any other species of property." It is made exactly the same as that which is imposed on other property. Tong men are required to pay the same tax on the fair value of the oysters taken and sold by them that is paid by others on other property of the same value. The tax is accurately prescribed. It is not open to mistake or doubt. It is, in the sense of the constitution, distinctly stated. The act specifically and definitely fixes the amount of the tax, and in this respect complies with the letter and purpose of the constitutional provision.

Next, as to the object of the tax. It is claimed that this is new legislation, and not an amendment of a former law, but the enactment of a new section, and that, therefore, it imposes a tax. But this is a mistake. It does not impose a new tax. It simply continues a tax already existing and in force when the act was passed. The very act which prescribes the tax repeals a section of the Code taken from the act of 1883-84 (chapter 254, § 8), which fixed the same tax. It is simply the substitution by the same act of another section for the original section, both containing the same tax. The act, therefore, instead of imposing a tax, simply continues it. We have already seen, in discussing the objection to the title of the act, that where an act is amendatory of an original act, and the title of the original act is sufficient to cover the matter of the amendment, it is sufficient, and the title of the amendatory act becomes unimportant. For the same reason, where an amendatory act merely continues a tax without stating the object to which it is to be applied, it

will be a compliance with the constitutional provision if the original act which imposed the tax states the object to which it was to be applied. Under the constitution, the title is a necessary part of every statute. The tax which the act in question continues was imposed by the act of 1883-84. We have only to refer to that act to find a satisfactory answer to the constitutional objection now urged. It is entitled "An act for the preservation of oysters and to obtain revenue for the privilege of taking them within the waters of the commonwealth." The object of the tax is concisely but expressly stated. It is "to obtain revenue." What is "revenue"? It is the income which a state collects and receives into its treasury, and is appropriated for the payment of its expenses. The object of the act, then, was to raise money for the support of the government of the state. It is concisely defined by the words to "raise revenue," but by that phrase the object of the tax is as popularly understood, as if it had been declared in the title or body of the act that the object was to raise money for the current expenses of the government. While the act of 1891-92 does not purport to amend the act of 1883-84, but the Code, yet it is that act as put into the Code which is in reality amended. It cannot be necessary, in an amendment which continues a tax contained in the original act without changing the object of the tax, to repeat the object. The statement of it in the original act is sufficient. It appears from section 2135 of chapter 97 of the Code, where the act of 1883-84 was incorporated into it, that each inspector of oysters is required to pay all taxes on sales of oysters, together with all fees and fines collected by him, "into the public treasury, to the credit of the oyster fund." This section, as amended and reenacted by the act of 1891-92, uses the same language. The "oyster fund" here referred to is merely an account that shows upon the credit side the amount of taxes, rents, fees, and fines derived from oysters, and upon the debit side the expenses incurred in sustaining the means furnished by law for their preservation and obtaining revenue from them. It is simply kept for the information of the executive of the state, the general assembly, and the public, in order that it may be conveniently seen whether oysters are a source of revenue to the state, and, if so, to what extent. It has no reference to the object of the tax, and in no wise alters or affects its object as expressed in the title of the act of 1883-84, or diverts the moneys received under the tax from the payment of the ordinary and current expenses of the state. The tax is distinctly stated in the act. And there can be no misunderstanding or doubt as to the object to which it is to be applied. The law is valid.

The constitution of New York contains the same provision in the same identical words. It has been construed more than once by the courts of that state, and liberally interpreted. It came before the supreme court of New York in *People v. Supervisors of Orange Co.*, 27 Barb. 575, where the act prescribed that the money raised should be "paid into the treasury of the state, to the credit of the general fund." It was objected that this was not a sufficient statement of the object to which the tax was to be applied, as required by the constitution, but the court held otherwise, and declared the act valid. An appeal was taken to the court of appeals of New York, which affirmed the judgment of the supreme court. *Id.*, 17 N. Y. 235. It was again before the supreme court of New York in the case of *People v. National Fire Ins. Co.*, 27 Hun, 188, where the act specified that the taxes "shall be applicable to the payment of the ordinary and current expenses of the state." It was held that this sufficiently stated the object of the tax. These decisions show that under a reasonable and fair interpretation of this provision of the constitution it is sufficient to indicate generally the purpose to which the tax is to be applied; otherwise it would be necessary, after having stated the tax, and the fund to which, when collected and paid into the treasury, it is to be credited, to go further, and specify the persons to whom, and the purposes for which, it should be disbursed. It was well said by the court in one of the cases cited above that if this were necessary, "every tax bill would then be an appropriation bill also,"—a requirement that would be of infinite embarrassment to the government, and practically deprive the legislature of all power to raise money by taxation. Every law enacted by the legislature is presumed to be in conformity with the constitution, until the contrary is shown, and it devolves on him who alleges its invalidity to show it. It is a grave responsibility for a court or judge to pronounce a solemn and deliberate act of the sovereign lawmaking power unconstitutional and void. It should never be done in a doubtful case, and especially where no great principle of liberty or the security of property "enshrined in the constitution of the United States and repeated in that of the state" is involved, but only some rule of legislative action. When it is done, the conflict between the constitution and the law must be clear and palpable. To doubt is to affirm the validity of the law. The statute, which has been assailed on so many constitutional grounds, is, at least not to my mind, in plain and palpable conflict with the constitution. The result is that the judgment of the county court of Gloucester county must be reversed and annulled, and the demurrer to the indictment overruled.



(91 Va. 741)

**NICHOLAS v. COMMONWEALTH.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. March 21, 1895.)

**PROSECUTION FOR MURDER—EVIDENCE—NEW TRIAL—TERMS OF COURT—JURISDICTION—PRESUMPTIONS ON APPEAL.**

1. The fact that one term of court passed without an order in a criminal case does not show a denial of the right of accused to a speedy trial.

2. Though Code, § 3045, provides for monthly terms of the county court, as sections 3049 and 3122 contemplate the omission of a regular term, the supreme court will not presume that a term was held in a certain month, so as to exclude the record, as being incomplete, it being silent as to such term.

3. The circuit court, after acquiring jurisdiction to try defendant, by his election to be tried thereby, cannot remand the case to the county court, even on the prisoner's motion.

4. On a prosecution of one for drowning persons by boring holes in a boat, evidence that defendant possessed an auger of the size of the holes in the boat is admissible.

5. The state may show that a prisoner, at times and places other than those charged in the indictment, attempted to kill deceased.

6. The state may show that defendant stated to relatives of deceased that the latter had heart disease, and was liable to die at any time.

7. Death by criminal violence having been proven by direct evidence, or proof of death being so strong as to produce moral certainty, the criminal agency may be established by circumstantial evidence.

8. When affidavits are filed to secure a new trial on account of after-discovered evidence, the state may file counter affidavits in opposition.

9. To secure a new trial for after-discovered evidence, the evidence must be discovered after the trial, and be such that it could not have been discovered before by reasonable diligence.

10. The after-discovered evidence must be material, and such as ought to produce the opposite results, on the merits.

11. Defendant, who lived with deceased and his wife, suggested to deceased and another, who were unable to swim, a trip across a river, to take a bee tree. They crossed the river to the bee tree, but did not take it, and on their return, while the other two were sitting with their backs to defendant, the boat filled with water, and they were drowned. The boat, on being afterwards found, contained three holes, freshly bored, under defendant's seat, which answered in size to an auger owned by defendant. Defendant consented to assist in the investigation of the drowning only when threatened with arrest, and his conduct after the drowning was very suspicious. Some time before the drowning he had purchased strychnine, and deceased had exhibited signs of being poisoned after drinking with him, and defendant had remarked several times that deceased had heart failure, and would die suddenly. Defendant was criminally intimate with the wife of deceased both before and after the latter's death. *Held*, that a verdict of murder in the first degree was justified.

Error to circuit court, Henrico county.

Philip N. Nicholas was convicted of murder, and brings error. Affirmed.

D. C. Richardson and Smith & Moncure, for plaintiff in error. R. Taylor Scott, Atty. Gen., C. R. Sands, and Geo. D. Carter, for the Commonwealth.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

HARRISON, J. Philip N. Nicholas was indicted in the county court of Henrico on the 24th day of December, 1892, charged with the murder of James Mills and William Judson Wilkerson. He elected to be tried in the circuit court of Henrico county, and, after a protracted trial in that court, was, on the 11th day of October, 1893, found guilty of murder in the first degree, and on the 21st day of December, 1893, was sentenced to be hung. From this judgment of the circuit court he obtained a writ of error to this court. The numerous exceptions taken to the ruling of the circuit court are so imperfectly arranged and numbered in the record that it will be necessary to disregard this lack of order, in considering the various questions now to be disposed of.

1. There is an exception to the action of the circuit court in refusing to reject the record of the county court, upon the ground that said record was incomplete. It appears that while the case was pending in the county court, and before the prisoner had elected to be tried in the circuit court, it was continued, on motion of the commonwealth, until the next term of the county court, and fixed for trial on the 20th day of February, 1893. The record is silent as to what, if anything, was done at the February term, 1893. So far as appears, the next action in the case was at the March term, 1893, when the prisoner was arraigned, and elected to be tried in the circuit court. It is insisted that the prisoner was entitled to a speedy trial, and that the record should show on whose motion the case was continued at the February term, 1893,—whether the continuance was for good cause, or upon the motion of the commonwealth,—so that the appellate court could ascertain whether the prisoner had been denied his right to a speedy trial. In the first place, this allegation is wholly immaterial, under the circumstances disclosed in this record. The statute guarantees to the accused a speedy trial by providing for their discharge if four terms of a county court elapse without a trial, unless the record shows the case to have been continued for some one of the enumerated reasons therein set forth, but the fact that one term has passed without an order in the case is not a denial of the right of the accused to a speedy trial. Section 4047 of the Code, as amended by Acts 1893-94, p. 464. This exception may be disposed of upon this further ground: There is no mention in the record that any county court was held for Henrico county in February, 1893. Section 3045 of the Code provides that there shall be monthly terms of the county court; but sections 3049 and 3122 of the Code contemplate that a regular term of a court may not be held at all, and section 3123 provides that when the court fails to sit on any day appointed for it, or to which it may have adjourned, there shall be no discontinuance, and that all matters ready for the court to act upon, if it had been held, on any such day, shall be in the same condition, and



have the same effect, as if continued to the next court in course. It not appearing that a court was held for the county of Henrico in February, 1893, it may be that for good and sufficient reasons, contemplated by law, no February term of said court was held, and under section 3123, quoted above, the prisoner's case stood continued until the next regular term, which was in March. The prisoner suffered no loss of right to a speedy trial by reason of the court not holding a February term. There was therefore no error in the refusal of the circuit court to reject the record on the ground that it was incomplete, in being silent as to the February term, 1893.

2. Several bills of exception raise in different forms the same question,—as to the lawfulness of the county court's action at its June term, 1893. The prisoner having elected to be tried in the circuit court, his case was called for hearing at the May term, 1893, when he moved the court to remand his case to the county court because the transcript of the record sent to the circuit court did not contain the writ of *venire facias* which issued for the grand jurors who found the indictment, nor the sheriff's return thereon, the prisoner desiring to inspect said papers and to move to quash the same. This motion the circuit court sustained, and ordered that the case be remanded to the county court, and that the prisoner be remanded to jail, and taken before the county court. At the June term, 1893, the prisoner was taken before the county court, and on motion of the commonwealth's attorney an order was entered directing the *venire facias* summoning the grand jury, and the sheriff's return thereon, to be copied, and certified to the circuit court, and remanding the prisoner back to that court. It is this action of the county court that is complained of in the exceptions under consideration. When the case was called for trial, on October 5, 1893, the prisoner moved the court to quash this record of the county court, contending that after he had elected to be tried in the circuit court the county court could make no order in the case; that, if it could, it might altogether change the record, and deprive the prisoner of his rights. The court properly overruled the motion. The circuit court, having acquired jurisdiction to try the prisoner, had no power to remand the case to the county court for any purpose,—not even on the motion of the prisoner himself, as was the case here; and its order remanding said prisoner was a nullity, and the prisoner was never, after his election to be tried in the circuit court, in point of law, out of that court. If the county court had failed to certify any part of the record, the duty of the circuit court was to have the record certified up as the law directed. *Howell v. Com.*, 86 Va. 817, 11 S. E. 238.

3. There is an exception to the action of the circuit court in overruling petitioner's

motion to quash the *venire facias* issued for summoning the grand jury by which the indictment against him was found, and the return thereon. No ground has been assigned in the petition or at bar in support of this motion, and, none appearing to the court, it was properly overruled.

4. An exception is taken to the action of the court in refusing to quash the indictment against the prisoner, and overruling petitioner's demurrer to same. This exception is without merit. No sufficient reason being suggested why the motion should prevail, and the court perceiving no error in the form of the indictment, the motion was properly overruled.

5. Exception is taken to the action of the circuit court in refusing to quash the *venire facias* under which the jury was summoned for the trial of the prisoner, and the return thereon. It is insisted that the judge of the circuit court should have made up and furnished the list of jurors for the trial of the prisoner. It appears from the record that the *venire facias* was issued by the clerk of the circuit court of Henrico county, and directed to the sheriff of that county, commanding him to summon before the circuit court of Henrico county, on the 2d day of October, 1893 (being the first day of the fall term of that court), 20 persons of said county, to be taken from a list to be furnished said sheriff by the court of said county, "who reside remote from the place where the felony is charged to have been committed, of which Philip N. Nicholas is accused, and who are qualified in other respects to serve as jurors, to recognize on their oaths whether the said Philip N. Nicholas be guilty of the felony aforesaid or not, and have then and there the names of said persons and this writ." The names of the 20 persons summoned are attached to the writ, and the following return of the sheriff indorsed thereon: "By virtue of the foregoing writ, I summoned the above-named persons from a list furnished me by the judge of the county court of Henrico county." Comparing this writ with the law regulating the summoning of a jury for the trial of a case of felony, and it is hard to conceive of the law being more literally complied with. Sections 4016 and 4018 of the Code of 1887 provide that the clerk of any court in which the trial of a case of felony is to be had shall, as soon as may be, issue a *venire facias* directed to the officer, requiring him to summon 20 jurors for such trial, from a list to be furnished him by the court of such county, or corporation, or the judge thereof, residing remote from the place, etc. Language could hardly be plainer that the circuit court, as in the case before us, is to issue its *venire facias*, directed to the officer of said court, who is to summon 20 persons from a list to be furnished him by the county court, or the judge thereof. This is exactly what was done, and there was no error in the court's

refusal to quash the writ and the return thereon.

6. This exception is to the action of the court in admitting evidence showing the possession by the accused of an auger corresponding in size to the holes in the boat. The prisoner is charged with having murdered James Mills and William J. Wilkerson by drowning them in James river while crossing in a boat which is afterwards found to have three holes bored in it, which, according to the prisoner's own admission, caused the water to fill the boat, and thereby drown the deceased. The object of the evidence was to connect the accused with the crime by showing that he was the owner of an auger corresponding in size to the holes in the boat. It is always pertinent to show, as one element connecting an accused person with the crime charged, that he possessed the tools and instruments by which the crime had been committed, and the court properly admitted the testimony.

7. This exception is to the action of the court in admitting the evidence showing that the prisoner had bought strychnine, and turned it over to the wife of James Mills,—one of the drowned men,—requesting her to administer it to her husband in milk or coffee, explaining that one grain would kill a man, and that about this time James Mills had three or four violent attacks of sickness suggesting poisoning by strychnine, and that at least two of these attacks were immediately after Mills had been given some dose or mixture by the prisoner. The testimony established the fact that criminal relations existed between the wife of James Mills and the prisoner, and the object of the evidence objected to was to show that the prisoner had on recent occasions, previous to the drowning, attempted to take the life of James Mills. While it is true that the state, for the purpose of showing that the defendant would be likely to commit the crime charged, cannot prove that he committed other like crimes against another person, it is nevertheless competent to show that the accused made previous attempts on the life of the same person. It shows animus and intent. It rebuts the theory of accident. Previous threats are undoubtedly admissible. Then, certainly, previous attempts upon the life of deceased by the accused are more pertinent to show his animus and intent. "In cases of homicide it has always been competent to show the conduct and the feelings of the prisoner towards his victim, and proof that he had made previous threats or attempts to kill his victim has always been received." *People v. Jones*, 90 N. Y. 667, 2 N. E. 49, citing 3 Russ. Crimes (9th Ed.) 288; *Rosc. Cr. Ev.* (7th Ed.) 18; *Whart. Hom.* (2d Ed.) § 693; 2 Colby, Cr. Law, 193. Evidence of such facts is received, not because such facts give rise to a presumption of law of guilt, but because from them, in connection with other circumstances, guilt may be in-

ferred. 1 Greenl. Ev. latter clause, §53, note b. "On the trial of an indictment for murder, former grudges and antecedent menaces are admitted to be given in evidence as proof of the prisoner's malice against the deceased." 3 Russ. Crimes (9th Ed.) 288. In the *Case of Harris* (decided by the supreme court of New York in 1893), the court, in sustaining the admission of evidence of prior acts, said, "If the depraved acts offered to be shown evidence or throw light upon motive, they become admissible." 136 N. Y. 449, 33 N. E. 65. The previous threats and attempts to take the life of James Mills were evidence tending to show that the accused had long deliberated upon the subject; that he had conceived the purpose of taking the life of deceased before the day it was taken,—and they were competent evidence both upon the question of deliberation and premeditation.

8. This exception is to the action of the trial court in admitting evidence going to show that shortly before the drowning, and about the time of the attempts at poisoning, the prisoner stated to three or four different persons in the neighborhood, and among the friends and relatives of Mills, that "Mills had heart disease, and was liable to die at any time." Such evidence as this is always admissible, under the circumstances attending its introduction into this case. Wharton, in his work on Criminal Evidence, says, in connection with such evidence as this "may be noticed false representations as to the state of another person's health, with the intention of preparing the relatives for the event of sudden death, and to diminish the surprise and alarm which attend its occurrence. It may also be noticed that persons contemplating secret assassination are apt, as part of their scheme, to throw out dark hints, spread rumors, and utter prophecies relative to the impending fate of their intended victim." *Whart. Cr. Ev.* (9th Ed.) § 754.

It is contended by counsel for prisoner that all the evidence considered under the last three exceptions, if admissible at any time, was not admissible until the corpus delicti had been clearly proven; that the commonwealth, to establish the corpus delicti, should prove, not only that the parties alleged to have been murdered were dead, but that such death was caused by the criminal agency of another. If the contention of counsel was sound, there could be no conviction upon circumstantial evidence. Where the criminal agency of the accused is to be established by circumstantial evidence, it can only be done by proving the circumstances. In every criminal prosecution there are two fundamental and essential facts to be established: First, that the party alleged to have been murdered is dead; and, second, that the death was brought about by the criminal agency of another. The corpus delicti is a material fact to be established in every criminal prosecution. In *Smith's Case*, 21 Grat. 809, this court

says: "The material fact in every criminal prosecution is the *corpus delicti*. Proof of the charge, in criminal cases, involves the proof of two distinct propositions: First, that the act itself was done; and, secondly, that it was done by the person charged. In murder the *corpus delicti* has two components,—death as the result, and the criminal agency of another as the means. It is only when the first (that is, death by criminal violence) has been proved, either by direct evidence of witnesses who have seen and identified the body, or when proof of the death is so strong and intense as to produce the full assurance of moral certainty, that the other (the criminal agency) can be established by circumstantial evidence." See, also, *Dean's Case*, 32 Grat. 912. In 3 Greenl. Ev. § 30, the author says, "The death and the identity of the body being established, it is necessary, in the next place, to prove that the deceased came to his death by the unlawful act of another person." Applying these principles to the case under consideration, we perceive no error in the introduction of the evidence objected to by the prisoner. The death and identity of the persons alleged to have been murdered were fully proven; that they came to their death by drowning was shown by abundant expert testimony; and, in the language of the learned author just quoted, it was necessary, in the next place, to prove that the deceased came to their death by the unlawful act of another person. And this the commonwealth was proceeding to do, by the introduction of the evidence objected to.

9. Exception is taken to the evidence of Mrs. Mills as to a "fuss" between her husband, James Mills, and the prisoner, on the ground that such evidence was hearsay, and therefore inadmissible. This was a trifling matter about a half day's work, and could not have been a material consideration in the case, and the evidence of Mrs. Mills on this point shows that she did hear whatever "fuss" there was. The only hearsay part of the remark was the witness' saying, "Mr. Mills told me, when he came out of the room, that they had compromised the matter." That was important for the prisoner to show that the trouble had been settled between them, and therefore the remark of Mrs. Mills that her husband said it had been compromised could not, in any possible sense, be prejudicial to the accused.

10. Exception is taken to the action of the court in refusing to give the instructions asked for by the prisoner, and in giving others in lieu thereof. It is unnecessary to comment upon the merits or demerits of the 11 instructions asked for by the prisoner, for the reason that the instructions given by the court clearly and fairly lay down the law applicable to the case; they completely cover every point proper to be guarded, and liberally expound the law as to every phase of the prisoner's rights.

11. Exception is taken to the action of the court in overruling the prisoner's motion in arrest of judgment upon affidavits introduced to show a failure of territorial jurisdiction, it being contended that the point in the river where the drowning occurred was in Goochland, and not in Henrico, county. The evidence is conclusive that the drowning occurred in Henrico county, and this motion was properly overruled.

12. Exception is taken to the action of the court in overruling the prisoner's motion in arrest of judgment on the ground of after-discovered evidence, which motion was supported by affidavits, and for receiving and considering counter affidavits filed by the commonwealth at the time appellant filed his affidavits. Motions for new trials are governed by the same rules in criminal as in civil cases. *Grayson v. Com.*, 6 Grat. 712. The application for a new trial is addressed to the sound discretion of the court, and based upon the ground that there has not been a fair trial upon the merits. I can see no good reason why counter affidavits cannot be filed for the purpose of showing that the alleged ground for a new trial has no existence. Counter affidavits may properly be received in opposition to a motion for a new trial on the ground of newly-discovered evidence. *Finch v. Green*, 16 Minn. 355 (Gil. 315). The evidence of J. T. Lewis shows that on the 10th of September, 1892, he sold the prisoner strychnine; that the prisoner objected to giving his name and having it entered on the books as required by law, but that he required him to do so; that witness made the memorandum in the book, in his own handwriting, as follows: "Price, 20 cts.; name of poison, strychnine; quantity, one drachm; for what purpose, to kill rats and dogs; age, 45; color, white; name of purchaser, P. N. Nicholas; residence, Sabot Island, Goochland Co.; by whom dispensed, J. T. Lewis." Now, the after-discovered evidence, upon which the court is asked to give a new trial, is the affidavit of Walter F. Phillips, a former clerk in this drug store, who at the time of the affidavit lived in Radford, Va., to the effect that Lewis did not sell the poison, as the memorandum shows, but that he (Phillips) sold it, and that Nicholas afterwards returned it. Messrs. D. C. Richardson and H. M. Smith, counsel for prisoner, file a joint affidavit that after they learned of this evidence they made diligent effort to find W. F. Phillips, but were unable to do so before the trial. The prisoner files the affidavit of the jailer, which shows that the prisoner told him, a month or two after he was put in jail, that they were after him about that poison, and said he had taken it back. This affidavit also says the prisoner told him at that time that he had bought the poison from J. T. Lewis, which is one of the points in dispute between Lewis and Phillips. From this affidavit it would appear that the prisoner knew for eight months before the trial that the commonwealth would introduce

the evidence about his purchase of this poison. Lewis files a counter affidavit in which he says, "There can be no mistake about my having sold the poison to P. N. Nicholas, or about the fact that it was never returned to my store after it was taken away by him." The circumstances controlling the granting of new trials upon the ground of after-discovered evidence have been so often laid down by this court that it would seem to be useless to repeat them here. They are familiar to the profession, and may be summed up thus: (1) The evidence must have been discovered since the trial; (2) it must be evidence that could not have been discovered before the trial by the exercise of reasonable diligence; (3) it must be material in its object, and such as ought, on another trial, to produce an opposite result, on the merits; (4) it must not be merely cumulative, corroborative, or collateral. 4 Minor, Inst. pt. 1, pp. 758, 759; St. John's Ex'rs v. Alderson, 32 Grat. 140, 143; Wynne v. Newman's Adm'r, 73 Va. 817; Whitehurst v. Com., 79 Va. 556, etc. Applying these well-settled axioms to this case, and it appears that the evidence was known to both the prisoner and his counsel before the trial. Without for a moment doubting that learned counsel used what they considered reasonable diligence to find W. F. Phillips, who lived in Radford, still it was not such diligence as the law requires. And, further, they could have moved the court for a continuance of this case, in order that they might have additional time in which to try and find the witness, but they did not do this. The newly-discovered evidence must be material in its object, and such as ought, on another trial, to produce an opposite result, on the merits. Would the new evidence, as disclosed by these affidavits, avail to produce an opposite result, on the merits? I think not. The most that it does is to raise a question of veracity between the druggist, Lewis, and his clerk, Phillips, as to whether the poison was returned, as alleged, with the great preponderance of evidence in favor of the accuracy of the testimony of Lewis. But, suppose the jury should believe that the poison was returned. Would that necessarily, or even probably, affect the result? Does not the important and material point established by this evidence, in any event, remain, namely, that the prisoner had this poison, or some other, at the house of the deceased, Mills, and that he produced it, and explained to Mrs. Ann A. Mills, wife of deceased, that a grain of it, in milk or coffee, would kill any man, and asked her to give it to her husband? This shows his purpose or desire to destroy the deceased, and it is a matter of very little consequence whether the poison was returned afterwards or not. The evidence offered as newly discovered is not admissible upon any of the grounds regulating the granting of new trials, and there was no error in the circuit court's refusal to grant a new trial upon the ground of after-discovered evidence.

13. Exception is taken to the action of the circuit court in refusing to set aside the verdict of the jury, as contrary to the law and the evidence. A new trial asked on the ground that the verdict is contrary to the evidence ought to be granted only in a case of plain deviation from right and justice. And this court will set aside a verdict, on such a motion, only in a case where the jury have plainly decided against the evidence, or without evidence. Blosser v. Harshbarger, 21 Grat. 214, and cases cited. See, also, section 3484 of the Code, as amended. Guided by this rule, I will briefly review the evidence upon which the verdict is founded:

On the 8th day of December, 1892, Philip Norman Nicholas, the plaintiff in error, one James Mills, and his wife, Ann A. Mills, and their three small children, were living in the upper part of Henrico county, on a farm known as the "Wickham Place," about one mile from James river. Nicholas was the renter of this farm, and cultivated it on shares. He was himself, however, chiefly engaged as a trapper, having a number of traps set along both sides of the river. He employed James Mills, with whom he lived, and one William Judson Wilkerson, as subtenants, to do the farm work, for a portion of his share of the crops. Wilkerson lived with an aged mother in a small house very near to Mills' house,—near enough to see into the windows of one house from the other. Philip N. Nicholas, the prisoner, was an unmarried man, and lived in a room of the house occupied by James Mills and his family. The evidence shows that on the night before the drowning, the prisoner, James Mills, and William J. Wilkerson were together at the house of Mrs. Wilkerson, the latter's mother, and there arranged and determined upon a trip across the river the next morning, to take a bee tree. This expedition was suggested, planned, and carried out by the prisoner. Wilkerson was very unwilling to go, and finally consented at the suggestion of his mother, who said that, as Mr. Nicholas seemed so anxious for him to go, he had better do so. Mills was unwilling to go unless Wilkerson went. Wilkerson said he would rather plow than go. The prisoner replied, "If you will go, you shall not lose anything." In the course of conversation which resulted in this expedition being agreed upon, both Mills and Wilkerson stated, in the presence of Nicholas, that they could not swim, and were very much afraid of water; that they did not like water more than knee-deep. The fact that they could not swim was generally known to their friends. It is further shown that it was the habit of Nicholas to go every morning, early, to the river, to examine his traps. And it appears from the evidence that on the morning of the day the drowning occurred he went to the river about daylight, and returned about breakfast time, and, when questioned about it, said: "I did not go to my

traps this morning. I was sick." He afterwards told Mrs. Wilkerson he did not catch anything. Everything being in readiness to carry out the plan for the day, these three men started from home about 9 o'clock in the morning, equipped with everything necessary for taking the bee tree; having with them 2 buckets holding  $2\frac{1}{2}$  to 3 gallons each for the honey, 2 axes, 1 hatchet, and a piece of netting to protect the person from the bees. The boat used belonged to one Jos. Bruhn, and on their way to the river an uncle of the owner was asked if they might use the boat, and was told they could get the key which unlocked the boat from its fastening to the bank, from Bruhn, the owner. The prisoner replied that he had a key of his own, and had often used it before without permission. It appears that they landed on the Chesterfield side of the river, at a point one mile and a half from where any one lived, and proceeded to the bee tree, which was one mile from the point of landing. Investigation showed that there were no tracks about the point of landing but those of the three men going from and returning to the boat. It further appears from the statement of the prisoner that after reaching the tree they concluded not to cut it, because it was a large tree, near the main road, and might get them into trouble, and for the further reason that the hole was small, and it might not have any honey in it anyhow. The tree was afterwards cut by order of the magistrate, and found to be full of honey. It further appears that the boat was a small one, about 10 feet long, and about  $2\frac{1}{2}$  feet wide, and that both in going over and returning the prisoner sat in the extreme rear of the boat, with his face to the front, and that Wilkerson and Mills sat in front of him, with their faces to the front and their backs to the accused. This position of the parties the prisoner admitted very reluctantly, when questioned about it. When returning, and about 50 yards from the Henrico shore, the boat suddenly filled with water, and Mills and Wilkerson were drowned, and the prisoner swam to shore. The next day the magistrate of the district was notified of the occurrence, and an investigation was set on foot. The boat was gotten out of the water, and it was found that immediately under the seat where Nicholas sat there were three holes, freshly bored with an inch and a half auger. The evidence of the owner of the boat shows that on Tuesday evening, the 6th of December, he used his boat, and it was sound. It was taken by Nicholas for this fatal trip Thursday morning, the 8th of December. Further investigation discovered fresh pine shavings corresponding to size of the holes and to the wood the boat was made of, which had been thrown into the water, but had drifted upon the shore near the point where the boat had stood fastened to the Henrico side. There were also found corn-cobs which had been cut to exactly fit the

holes in the boat, which had also drifted to the same point. It was shown that the prisoner had in his possession an auger just the size of the holes. This the prisoner at first denied, but afterwards said it must be about the place somewhere. Diligent search was made for this auger, but it was never found.

When the magistrate went, the next day after the drowning, to get the prisoner to assist in making these investigations, and to show exactly where the men were drowned, he declined to go; saying that his head, eyes, and ears were full of water, and that he was feeling badly. The magistrate returned a second time. The prisoner again declined to go, making the same statement as before about his eyes, ears, and nose being full of water; but, when told that he would be arrested if he did not go, he yielded. The prisoner stated, when returning from the Chesterfield side, that the holes burst into the boat, and it commenced filling with water rapidly; that he urged the men to remain in the boat and bail out the water with the buckets, and he would take them safely to shore; that notwithstanding this they jumped out, and the last he saw of them they were swimming very strong. He also told Mrs. Wilkerson that the last he saw of her son he was swimming finely. At another time he said he did not know whether they were swimming or not. He told Officer Hall, who arrested him nearly three days afterwards, that when he found the water was coming into the boat he holloosed to the men to jump out,—that the boat was sinking. It appears from the prisoner's statement that when he swam to the shore he climbed out with great difficulty, and lay upon the bank, in an exhausted condition, for some time. It further appears that he went home, to Mills' house, by a circuitous route, avoiding acquaintances and neighbors to whom he might have at once communicated the shocking occurrence to which he had just been an eyewitness. When he was 200 yards from the house, and before he was near enough for any one to tell his condition or to see that he was wet, he was seen by Mrs. Mills, the wife of the drowned James Mills, who commenced, in a most excited way, screaming and wringing her hands, saying: "Jimmy [meaning her husband] is drowned, is drowned! Yonder comes Mr. Nicholas." The prisoner went immediately into Mrs. Mills' house, and, according to the testimony, was wringing wet, and stood for 15 minutes without saying a word, and, when he spoke, said to Mrs. Mills, "They are drowned." Mrs. Wilkerson, alarmed as to the fate of her son, sent messages seven times to the prisoner; begging him to come to her room, that she might ask about Judson. Mrs. Wilkerson was an aged cripple, and could not get about. The prisoner, after the lapse of two hours and a half, went to Mrs. Wilkerson. She said, "Pray tell me where my boy is." He replied, "I will as soon as I can speak." And,

after a great deal of waiting, hesitating, excess of emotion, and unnatural weeping, he said: "I am afraid your dear boy is gone. The last I saw of him, he was swimming finely, about thirty yards from the bank." She asked him to telegraph her friends in Richmond. He said it was not worth while. "He will not be seen for seven or eight days, and to-morrow, if you are anxious, I will write." The dead bodies of Mills and Wilkerson were taken from the river December 15th. On the night of December 10, 1892, about 1 o'clock, the prisoner was arrested by Officers Hall and Tomlinson, of Richmond, accompanied by Mr. Rugg, the magistrate. They found the prisoner in Mrs. Mills' room. He showed no surprise, seemed to be expecting to be arrested, asked no question, and immediately commenced putting on his clothes. He asked Mrs. Mills for his money. She felt under her bedclothes, got the pocketbook out, and handed it to him. Officer Hall says that, whenever he would ask the prisoner a question, he would reply that he had lost his recollection since he got into the water; that he had been crazy nearly ever since, and his memory was all gone, from getting water into his mouth and ears.

The evidence fully establishes the fact that the prisoner had been guilty of criminal relations with Mrs. Mills for 12 months prior to the drowning, and most probably for a much longer time; that he had, on several occasions, proposed to Mrs. Mills to leave her husband and live with him; that he told Mrs. Wilkerson that Jim Mills was hard to get along with, and he thought he would get rid of him. He also told this witness that he had a difficulty with Mills about his wife, and said Mills was superstitious. It is further proved that, on the night immediately following the day of the drowning, the prisoner again told Mrs. Mills she must now live with him, and he would do all he could for her, and the next morning after the drowning he was seen in Mrs. Mills' room, in her bed. It appears from the evidence that several months before the drowning he bought strychnine from J. T. Lewis, a druggist in Richmond, took it to the house of Mills, put it in Mrs. Mills' desk, called her attention to it, explained that one grain, in milk or coffee, would kill a man, and told her to administer it to her husband. It further appears that, on several occasions about the time this poison was shown to be in the house, Mills became suddenly and violently sick, appearing to be paralyzed in the mouth; great redness over the face; complained of hurting all across his heart and limbs, foaming at the mouth, jerking, etc. These spells are described as occurring early in the morning, when the prisoner and Mills had just taken a drink together. When it was proposed to send for a doctor, on one of these occasions, the prisoner objected, saying that doctors were not what they were cracked up to be. It appears that, on repeated occa-

sions during the time James Mills was having these attacks, the prisoner stated at different times, to friends and relatives of deceased, that said James Mills had heart disease, and might die at any time. The prisoner stated, while in jail, "If this woman will hold her tongue it will help me." There are many other important, inculpatory circumstances proved, which are very significant and weighty. An attempt, however, to review them all, would extend this opinion to an unreasonable and unnecessary length. I have attempted to point out some of the salient and more important facts, as they appear in the record of this remarkable case; and, without commenting upon them, it is sufficient to say that so far from the verdict of the jury being against evidence, or without evidence to sustain it, the testimony, considered as a whole, produces upon the mind a moral certainty that the accused is guilty, beyond all reasonable doubt, of the horrible double murder with which he is charged. With an anxious regard for human life, and an earnest desire to look on every circumstance with the most favorable eye to the prisoner, I am constrained to the conclusion that upon the whole case there is no error in the judgment of the circuit court, and the same must be affirmed.

(94 Ga. 128)

## WESTERN ASSUR. CO. v. WILLIAMS.

(Supreme Court of Georgia. July 16, 1894.)

## ACTION ON INSURANCE POLICY — AMENDING DECLARATION — WAIVER OF CONDITIONS.

1. The original declaration contained enough to amend by, and there was no error in allowing the amendment.

2. The consent of a fire insurance company, given, whether in writing or in parol, by its duly-authorized agent, and acted upon by the insured, that the goods insured might be removed into another building without vitiating the policy, is, if sufficiently proved, binding upon the company, notwithstanding stipulations in the policy that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The evidence that the agent was duly authorized would, however, have to be such as to show that he had express authority in the given instance to represent the company in giving its consent otherwise than in the manner provided for in the policy, or that an implied authority so to do might rightly be inferred from some previous course of dealing in like cases by the agent with the company's knowledge and assent, manifested by ratification or otherwise.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by J. H. Williams against the Western Assurance Company of Toronto, Canada.

From a judgment overruling a demurrer to the declaration, defendant brings error. Affirmed.

The following is the official report:

The opinion states the allegations of the declaration and the terms of the policy sued on, so far as material. The grounds of demurrer were: Plaintiff sets out no cause of action, but is seeking to recover upon a contract different from that contained in the policy. He does not aver that he has complied with the conditions of the policy, or that he has made any proof of loss as required by its terms. The city court (where the suit was brought) has no jurisdiction, for if any cause of action is set out it is an equitable cause. It is not alleged that the premium was the same upon the property insured at number 313 Fifth street as it was at the storehouse to which it was removed, nor that the removal did not materially increase the risk of the company; nor that the consent to the removal was made in writing, nor that it was indorsed upon or attached to the policy, nor what was the writing claimed to have been entered on the company's books, granting permission to remove the goods; nor that the company made any contract with plaintiff to insure his goods at the storehouse where they were burned.

W. K. Milley, for plaintiff in error. C. H. Cohen, for defendant in error.

SIMMONS, J. 1. Williams held a policy of insurance from the defendant upon certain household and kitchen furniture and other personal goods situated in his dwelling house, No. 313 Fifth street, in the city of Augusta. On August 20, 1892, he called on an agent of the defendant and informed him that he was temporarily abandoning house-keeping, and desired to move his furniture, etc., covered by this insurance, to a certain storehouse in Augusta. The agent told him he could move the furniture as desired; that he would so enter it on the books of the company, and he (Williams) could consider the transfer as made, and bring his policy to him at some future time and he would make the entry thereon. On August 27th thereafter the property was entirely destroyed by fire. On the next day after the fire he called upon the agent and asked for the insurance papers to prove his loss, and was informed by the agent that the defendant denied all liability under the policy. He thereupon brought his action against the company for \$1,000, the amount of the insurance. His declaration was demurred to on various grounds, which are set out in the official report, and he amended the declaration by alleging that the agent granted him written permission to move the goods to the storehouse in which they were situated when burned; that, in performance of and in pursuance of said contract with the agent, he removed the goods; that before attempting

to remove them he received the consent of defendant, through its duly-authorized agent, to the removal; and that in performance and pursuance of the parol contract as aforesaid, and relying solely upon the consent of defendant and on the contract of defendant, he removed them. The demurrer was renewed and overruled, and the defendant excepted. There was no error in allowing the amendment. The original declaration contained sufficient allegations to authorize the amendment. It did not add a new cause of action, nor change the common-law action for damages into an equitable proceeding. The effect of the amendment was simply to allege that the contract for the removal of the goods was in writing, and that the agent was duly authorized to make it.

2. The policy stated that the insurance was upon the property described "while located and contained as described herein, and not elsewhere." It was contended on the part of the defendant that the agent had no authority to consent to the removal of the property unless such consent was indorsed upon the policy, it being stipulated in the policy that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." Although this clause of the policy excludes any inference that powers of the agent extend to the waiver of conditions contained in the policy, except in the mode prescribed therein, yet it may be shown that such authority was in fact granted, and the waiver, whether in writing or parol, when given by a duly-authorized agent, and acted upon by the insured, is, if sufficiently proved, binding upon the company, notwithstanding the stipulations above quoted. This clause puts the insured upon notice that the agent has no authority to waive a condition of the policy except in writing attached to the policy, and the insured would therefore have no right to rely upon any waiver not made in that manner, unless it could be shown that the company did in fact authorize the agent to make the waiver otherwise. To establish such authority on the part of the agent, the insured would have to show that it was expressly granted by the company in the given instance, or would have to show some previous course of dealing in similar cases by the agent with the company's consent, manifested by ratification or otherwise. The declaration in this case, as we have seen, alleges that the consent of the



company to the removal of the furniture was given through its "duly-authorized" agent. The declaration, it is true, does not explain how this authority was given, but we think the allegation of authority is sufficient. Taking all the allegations of the declaration together, we think the court did not err in overruling the demurrer. On this subject see *Richards*, Ins. pp. 81, 92-95, 194; *Biddle*, Ins. p. 1081; *May*, Ins. § 137. The ruling in *Carrugi v. Insurance Co.*, 40 Ga. 135, that a consent by the agent, which the policy required should be in writing, could be shown by parol, was based upon the assumption that the agent had authority to make the consent. There was no stipulation in that case limiting the authority of the agent, as this policy does. The stipulation which the court had under consideration related simply to the manner in which the consent should be evidenced, and did not say that agents should have no power to give such consent otherwise than in the manner provided by the policy. Judgment affirmed.

(94 Ga. 149)

SAVANNAH, F. & W. RY. CO. v. DECKER et al.

(Supreme Court of Georgia. July 16, 1894.)

AWARD AND ARBITRATION—VALIDITY OF AWARD—JUDGMENT.

1. Where it is manifest from the terms of a reference that the word "arbitrators" was applied to the umpire as well as to the two arbitrators named, an award, signed by one of the named arbitrators and the umpire, followed by a dissent therefrom, signed by the other named arbitrator, is within the terms of the reference, so far as being the award of the arbitrators is concerned.

2. The dissenting arbitrator having made no suggestion that he did not participate in the selection of the umpire, and having put his dissent upon a wholly different ground, his assent to the selection is matter of necessary implication.

3. Where a pending action was, by an agreement in writing between the parties, submitted to the judgment and award of two named persons, one of whom was chosen by the plaintiff and the other by the defendant, the submission providing that the arbitrators so chosen should have "the right, if they deem necessary, to call in an umpire," and "that when said arbitrators shall agree upon an award the same shall be by them, or either of them," returned to the court in which the action was pending, and made the judgment thereof, and afterwards an award was made and filed in court, signed by one of the arbitrators and another person, who had been selected as umpire by both arbitrators, to which there was a dissent, signed by the other arbitrator, and no exceptions to the award were made by the losing party, it was the right of the party in whose favor the award was thus given to enter up a judgment on the same; and, where this was not done at the next term of the court after the award was filed, it could be done at a subsequent term *nunc pro tunc*.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Decker & Fawcett against the Savannah, Florida & Western Railway Company. Plaintiffs had judgment, and defendant brings error. Reversed.

The following is the official report:

Decker & Fawcett sued the railway company, in the city court of Savannah, because of the failure of defendant, as alleged, to safely carry and deliver to plaintiffs certain cotton, by reason of which failure the cotton was lost to plaintiffs. The action was brought to the May term, 1891. Thereafter the parties submitted the matter in controversy to arbitration. This submission recited the pendency of the suit, and that the parties were desirous of settling the controversy without further litigation and delay. By the submission the parties agreed to submit the controversy to the judgment and award of Dancy, chosen by plaintiffs, and Warren, chosen by defendant, "said arbitrators so chosen having the right, if they deem necessary, to call in an umpire." They further agreed "that when said arbitrators shall agree upon an award" the same should be by them, or either of them, returned to the court, and made the judgment thereof, in accordance with the statute. This submission was filed in the office of the clerk of the court. After the submission was made, an award was made to this effect: "The undersigned, to whom the matters and differences between [naming the parties] was referred, having selected John C. Rowland as umpire, after having heard the evidence and argument in the case, award and judge the plaintiffs recover nothing in the case;" dated and signed by Rowland, "umpire," and Warren, "arbitrator." This was accompanied by the following: "I dissent from the above award, as I believe the bills of lading in the hands of innocent holders, even if fraudulently issued by an agent, should bind transportation companies under the laws of Georgia." Signed by Dancy, "arbitrator." This award was filed in office October 6, 1891. At the July term, 1893, of the court the defendant moved that the award be received, and an order be passed authorizing the entry of a *nunc pro tunc* judgment thereon. Plaintiffs orally resisted this motion, and objected to the validity of the award, for alleged defects appearing on the face of the record, to wit, claiming that the award should have been made the judgment of the court at the next term after it was rendered, but that the motion to make it the judgment of the court was not filed until nearly two years afterwards; and that the award was not valid, because not made by three arbitrators, but only by one arbitrator and an umpire, and that an umpire was not an arbitrator. Plaintiffs have not, since the rendition of the award, made any objections under oath to its invalidity, nor at any time filed any of the evidence produced before the arbitrators; and on the hearing of the motion to enter *nunc pro tunc* judgment did not question the validity of the award on the ground either that the submission did not state what the duties and powers of the umpire were, or on the ground that it did not expressly appear that the umpire was called in by both arbitrators. The motion of defendant was overruled. During the same term defend-



ant moved to set aside the judgment of the court overruling said motion, for the purpose of allowing the motion to be reargued, and for the further purpose of permitting it to introduce testimony to show that the arbitrators chosen by the parties selected and called in Rowland, umpire, to show what the powers and duties of the umpire were, and further to show that the decision of two arbitrators, or of one arbitrator and the umpire, or of both arbitrators and the umpire would constitute a valid and binding award, and to show that the award was in fact valid and binding upon the parties to the suit, upon the following grounds: (1) The order and judgment overruling said motion is based upon the finding of the judge of said court that the duties and powers of the umpire are not stated, and that it does not expressly appear that the umpire was called in by both arbitrators; (2) that it does not appear that this point was relied upon or urged by counsel on either side at any time during the argument or since; (3) that the award is valid and binding upon the parties; (4) that to set aside said order and judgment and to grant this motion would be in furtherance of justice and equity. This motion also was overruled. Movant excepted, alleging that the court erred in overruling each of said two motions.

Erwin, Du Bignon & Chisholm, for plaintiff in error. Garrard, Meldrim & Newman, for defendants in error.

**SIMMONS, J.** 1. The plaintiffs brought their action in the city court of Savannah against the railway company for an alleged failure by the defendant to carry and deliver safely certain cotton, by reason of which failure the cotton was lost to the plaintiffs. Pending the suit the parties agreed to submit the matter in controversy to arbitration. In the submission two arbitrators were named, one chosen by the plaintiffs and the other by the defendant, who were empowered to choose an umpire; and it was agreed that when the arbitrators should agree upon an award it should be returned by them, or either of them, to the city court of Savannah, and made the judgment thereof, in accordance with the statute in such cases made and provided. It is clear to our minds from the terms of this submission that the word "arbitrator" was applied to the umpire as well as the two arbitrators named. There was no use for an umpire if the submission required the two arbitrators named by the parties to agree. It contemplated, by the power given the arbitrators to select an umpire, that if the two persons selected should disagree, one of them and the umpire should make the award; and, in our opinion, when one of the arbitrators and the umpire agreed and signed the award, and the other arbitrator dissented, the award was within the terms of the reference, so far as being the award of the arbitrators was concerned.

2. It was insisted, however, that nothing appeared to show that the dissenting arbitrator

had ever agreed to the selection of the umpire, and therefore the award was void. The dissenting arbitrator made no suggestion in his dissent that he did not participate in the selection of the umpire, but put his dissent upon a wholly different ground. Having participated in the hearing of the controversy, and making no dissent on the ground that the umpire had not been properly selected, his assent to the selection will be inferred.

3. Under the facts stated above and others to be found in the official report, the award made by one arbitrator and the umpire was legal, and when it was filed in court, and no exceptions were made by the losing party, it was the right of the party in whose favor the award was made to enter up judgment upon the same; and, where this was not done at the next term of the court after the award was filed, it could be done at a subsequent term *nunc pro tunc*. Judgment reversed.

(94 Ga. 153)

RENFROE et al. v. SHUMAN.

(Supreme Court of Georgia. July 16, 1894.)

ACTION—MISJOINDER OF CAUSES AND PARTIES—  
CONTRACT OF GUARANTY.

The declaration, together with the amendment, showing that one of the two defendants (a nonresident of the county in which the action was brought) was indebted to the plaintiff for materials furnished and work done under a written contract between this defendant and the plaintiff, and that the other defendant (a foreign corporation having an office in that county) had, by a written contract with the plaintiff subsequently made, and to which the first-named defendant was not a party, agreed to pay for the materials and work mentioned in the first contract, as approved by the first defendant, a joint action against both defendants for the money due on these respective contracts was not maintainable, and the court in which the action was brought had, under the facts alleged, no jurisdiction of the first defendant. Nor could the action be sustained against the defendant corporation on its separate contract, there being no allegation that the material furnished and work done by the plaintiff had been approved by the first defendant, as the terms of that contract required.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by H. A. Shuman against J. W. Renfroe and the Southern Supply Company. There was judgment for plaintiff, and defendants bring error. Reversed.

The following is the official report:

Shuman filed his petition in the city court of Savannah, alleging: That Renfroe, as principal, and the Southern Supply Company, a corporation of the state of Florida, as surety, were indebted to him \$2,345.21, for that on June 22, 1893, he entered with Renfroe into a contract for building portions of the railroad of the Florida Southern Railroad Company and the Florida Central & Peninsula Railroad Company, in the counties of Chatham and Bryan, Ga., a copy of which is attached. That by this contract petitioner, for doing the work set out therein, was to

receive from Renfroe certain sums at certain times; that is to say, Renfroe, being a subcontractor of the Southern Supply Company, which was under contract with said railroad company to build their railway, in course of construction between points mentioned, was to pay petitioner, for the work done, 90 per cent. of the amounts found to be due upon an estimate made by the chief engineer of said railroad companies, when the Southern Supply Company paid him (Renfroe). That during July petitioner did certain work and furnished certain material in the construction of the railroad, for which he should have received from Renfroe about \$1,500, but was furnished with a statement giving him credit for only \$520.18. That Renfroe admitted the incorrectness of this statement, and promised petitioner to have it corrected. That, though petitioner did not receive a correct statement of the amount due him, yet Renfroe had been paid by the supply company for the full amount of work done and timber delivered by petitioner. That, in addition to said written contract, Renfroe, from time to time, promised to pay petitioner, at an agreed price, for all timber delivered, whether or not actually placed in structure in the railroad, as soon as the same had been estimated by the engineer of the railroad companies. That on August 7, 1893, the supply company, by its agent duly authorized, entered into the following contract of suretyship: "Savannah, Georgia, August 7, 1893. This is to certify that we will pay for all timber delivered and work done on the line of the Savannah Extension, F. C. & P. R. R., by H. S. Shuman, under contract with J. W. Renfroe, as returned by the engineer in charge of the work, and O. K. by J. W. Renfroe. The Southern Supply Co., by R. C. Strother, Agent for the Southern Supply Co." That the letter "S." in petitioner's name, in this contract, is a mistake, having been intended to be "A." That petitioner is now entitled to receive from Renfroe \$2,345.21, but Renfroe has positively refused to pay him anything, or to O. K. any statement showing the work done by him. That the contract of suretyship was to pay the amount due by Renfroe to petitioner; the term "O. K. by Renfroe, and returned by the engineer in charge," being simply intended as evidence to the supply company that the work had been done. That the supply company is well aware that the amount sued for is due by Renfroe to petitioner, but refuses to pay petitioner the amount so due. That, by the nonperformance and absolute disregard of the duty imposed upon him by the contract, Renfroe placed petitioner in a position that he was unable to carry out his (petitioner's) part of the contract; thus, on September 8th, forcing petitioner to abandon the contract. And that petitioner attaches a statement of his account with Renfroe, showing the amount now due by Renfroe, as principal, and the supply company, as surety. Serv-

ice in the cause was made on Renfroe, personally, by the deputy sheriff of the court, and upon the supply company by Strother, whom the officer, in his return of service, alleged to be the agent of the company in its office in Savannah. At the first term Renfroe demurred to the declaration on the following grounds: (1) The declaration is not sufficient in law. (2) It appears on its face that the court is without jurisdiction of the parties. (3) It does not appear that either of defendants is a resident of Chatham county. (4) It is nowhere stated in the declaration that the chief engineer of the railroad company, or his assistant, had made any measurements or classification which entitled plaintiff to the sum sued for, or to any sum. (5) It nowhere appears that Renfroe agreed or promised to pay any sum in lieu of the \$520.18 mentioned in the declaration. (6) Misjoinder of parties defendant. Thereafter, during the same term, the supply company demurred generally; and on the same day plaintiff moved to amend his declaration by alleging that the work for which the amounts sued for are due had been measured, approved, and passed by the engineer of the railroad company, mentioned in the declaration, at the time of the commencement of the suit, where the contract between the parties required approval and measurement before payment, and that this fact was well known to defendants. To this amendment the supply company objected: (1) The amendment, if allowed, with the second amendment, did not constitute a good cause of action against the supply company. (2) The amendment, with the second amendment, constituted a new and distinct liability and cause of action against the supply company. At the same time, plaintiff moved to amend further as follows: The supply company had, when the suit was instituted, an office in Savannah, within the jurisdiction of the court, in the charge and management of officers and agents. Although plaintiff, in his declaration, has described the supply company as surety, yet in law and fact, by entering into the agreement of August 7, 1893, it became a joint obligor and promisor with Renfroe; and plaintiff desires now, and at all times, to treat it as such. All the sums for which suit is entered were due and payable, or became so after it entered upon said joint obligation, and the amounts then due were well known to it; and it was to the benefit of both it and Renfroe that plaintiff should perform the work stipulated in the contract, copy of which is attached to the petition. The consideration inducing the supply company to become a joint promisor and obligor with Renfroe was a valid and valuable one, in that it was necessary to the performance by the supply company of its contract with the railroad companies, as set out in the declaration, that the work contracted for by plaintiff should be performed, and plaintiff, at all times after the execution of the agree-

ment of August 7th, understood that he was to look, and did look, to both Renfroe and the supply company for payment of the amounts stipulated in the contract to be paid. Although it might appear from said contract that, when the time by which plaintiff was to complete the work had expired, the same was not so completed, yet, by subsequent verbal and written agreement, both said obligors and promisors extended the time of petitioner; and at the time he was forced by their acts, as alleged in the declaration, to abandon his contract, he was well up in his work. To this amendment the supply company objected upon the same grounds as it had urged as objections to the first amendment. At the same term, the cause coming on to be heard, Renfroe demurred orally to the declaration and amendments upon the ground that they did not show that Renfroe and the supply company were joint promisors upon any promise or obligation by reason whereof the action could be maintained against Renfroe in the city court of Savannah. The court allowed both amendments, overruled the written demurrer and the oral demurrer of Renfroe, and overruled the demurrer of the supply company. To which rulings defendants excepted.

C. N. West and Barrow & Osborne, for plaintiffs in error. W. C. Hartridge, for defendant in error.

LUMPKIN, J. Shuman brought an action in the city court of Savannah against Renfroe, as principal, and the Southern Supply Company, a Florida corporation, as surety. At the appearance term, both defendants filed written demurrers to the plaintiff's declaration. Two amendments to the declaration were allowed, over objections made by the supply company; and Renfroe demurred orally to the declaration and amendments as allowed, on the ground that they did not show that he and the supply company were joint promisors upon any promise or obligation by reason whereof the action could be maintained against Renfroe in the city court of Savannah. The reporter's statement sets forth, in substance, the contents of the plaintiff's declaration, the amendments thereto, the written demurrers filed by the defendants, and the objections to the amendments made by the supply company. An examination of the record thus exhibited will show that Renfroe, who was conceded to be a nonresident of Chatham county, was indebted to the plaintiff, Shuman, for materials furnished and work done under a written contract between Renfroe and Shuman; that after this contract had been entered into the Southern Supply Company (a foreign corporation having an office in the city of Savannah) had, by its separate and independent written contract with Shuman, to which Renfroe was not a party, and by which he was in no way whatever bound, agreed to pay Shuman for

the material and work mentioned in the contract he had originally made with Renfroe, "as returned by the engineer in charge of the work, and O. K. by J. W. Renfroe." We are at a loss to perceive upon what principle a joint action could be maintained in the court mentioned against both defendants for the money due on these respective contracts. There was no privity whatever between the defendants with reference to their respective undertakings with the plaintiff, and, as alleged in the oral demurrer of Renfroe, they were not joint promisors upon any promise or obligation which would authorize the bringing of the action against Renfroe in the city court of Savannah. That court had no jurisdiction whatever over him; and, conceding its jurisdiction over the foreign corporation, Renfroe was in no way jointly bound with that corporation, so as to authorize the plaintiff to join him with it in the action brought.

We are also of the opinion that the demurrer of the supply company ought to have been sustained, even after the allowance of the amendments to the plaintiff's declaration, because the written contract of the supply company, in effect, stipulated that it would be bound to pay Shuman for timber delivered and work done only as returned by the engineer in charge, and "O. K. by Renfroe"; meaning that the reports made by the engineer must be approved by Renfroe before the supply company would be liable,—and the declaration fails to allege any such approval. It is true, the first amendment does aver that the amount sued for had been measured, approved, and finally passed upon by the engineer of the railroad company at the time of the commencement of the plaintiff's suit, where the contract between the parties required approval and measurement before payment; but this amendment fails to allege any approval by Renfroe, which, under the express terms of the supply company's contract, was essential to the plaintiff's right to receive payment, and therefore essential to be alleged. Judgment reversed.

(94 Ga. 187)

SOUTHERN HOME BUILDING & LOAN  
ASS'N v. HOME INS. CO. OF  
NEW ORLEANS.

(Supreme Court of Georgia. July 16, 1894.)

INSURANCE—"MORTGAGEE CLAUSE"—PROOFS OF  
LOSS.

The so-called "New York Standard Mortgage Clause" in a policy of fire insurance, which declares, in substance, that no act or neglect of the mortgagor shall defeat the insurance as to the interest of the mortgagee, does not dispense with making the proof of loss stipulated for in the policy, and within the time stipulated. If the mortgagee would not have the right in all cases to furnish the proof, he certainly would have it in a case in which the mortgagor refused; but in every case, unless waived by the underwriter, it must be furnished by one or the other.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by the Southern Home Building & Loan Association against the Home Insurance Company of New Orleans on a policy of insurance. From a judgment sustaining a demurrer to the declaration, plaintiff brings error. Affirmed.

R. L. Sibley and G. B. Whatley, for plaintiff in error. Denmark & Adams, for defendant in error.

**SIMMONS, J.** The Southern Home Building & Loan Association sued the Home Insurance Company upon a policy of insurance issued by the defendant insuring Rosa Tutty upon certain property for one year from December 17, 1892, to an amount not exceeding \$1,000, "loss, if any, payable to the Southern Home Building & Loan Association, as their interest may appear." Attached to the policy was what is called the "New York Standard Mortgagee Clause," in which it was stated that loss under the policy should be payable to the Southern Home Building & Loan Association, as mortgagee, as its interest might appear, and that the insurance, as to the interest of the mortgagee only therein, should not be invalidated by any act or neglect of the mortgagor or owner of the property. The declaration alleged that while this policy was in force, on June 4, 1893, a fire occurred in the premises covered by the policy, by which the property insured was entirely destroyed; that immediately after the fire occurred notice was given the insurance company of the loss, and afterwards, during August, the usual "proof of loss" was made out by Prileau, adjuster of the defendant, showing the premises insured under the policy to be of the value of \$1,948.80, but, failing to obtain the signature of the assured, Rosa Tutty, to the proof of loss, the defendant refused in consequence to pay over the loss to petitioner; that petitioner demanded payment of the loss as required by the policy, but the defendant refused to pay, etc. The defendant demurred to the declaration on the ground that it did not set forth any cause of action against defendant. In the argument upon the demurrer the defendant urged that the demurrer should be sustained, because the declaration did not aver that any proof of loss had been submitted to defendant, as required by the contract or policy of insurance, or that any effort had been made by plaintiff to make such proof, or comply in any way with this requirement of the policy. The demurrer was sustained, and the plaintiff excepted. The policy, a copy of which was attached to the declaration, contained a stipulation that if fire occurred the insured should give immediate notice of any loss thereby in writing to the insurance company, and should render a statement to the company, signed and sworn to by the insured, stating the knowledge and belief of the insured

as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon, etc. Under this stipulation, it was a condition precedent to the payment of the loss that the proof of loss stipulated for should be made out and submitted to the insurance company, and within the time stipulated. If the mortgagor failed or refused to comply with this condition, it was incumbent upon the mortgagee to comply with it. If the mortgagee would not have the right in all cases to furnish the proof, he would certainly have that right in a case in which the mortgagor refused to do so. In every case, unless waived by the insurance company, it must be furnished by one or the other. See Richards, Ins. § 158, and cases cited. It was contended that, so far as the mortgagee was concerned, this requirement was dispensed with by the stipulation in the "mortgagee clause" that the insurance, as to the interest of the mortgagee, should not be invalidated by any act or neglect of the mortgagor or owner of the property. We do not think so. We think this refers to acts or neglect in connection with the property while the risk is subsisting, and which, under the terms of the policy, would invalidate the insurance, such as conduct increasing the hazard, and not the omission, after a fire has occurred, to comply with provisions designed to secure evidence as to the nature and extent of the loss. It is apparent from a reading of this clause, which, in addition to the stipulation referred to, contains others enumerating various acts which shall not invalidate the insurance as to the mortgagee, that the object of the clause was to afford protection to mortgagees against conduct beyond their control on the part of the mortgagor or others which, under the terms of the policy, would invalidate the insurance. We see no reason for holding that it was intended also to relieve a mortgagee, where loss occurred, from proving the loss as a condition precedent to collecting his claim against the insurance company,—a condition which, as we have shown, the policy required the mortgagee himself to comply with, unless the mortgagor should do so. The declaration failing to show that the insured or the mortgagee complied or attempted to comply with this condition, or that there was any waiver thereof on the part of the insurance company, the court below was right in sustaining the demurrer. The allegation that the adjuster of the company made out a proof of loss does not of itself show a waiver on the part of the company. If he made it out in behalf of the insured, it does not appear that she authorized or adopted it, for it is alleged that he failed to obtain her signature thereto. We affirm the judgment of the court below, with direction that the plaintiff may, if it can, make good its declaration by alleging the facts necessary to show its interest as mort-

gauge, and the amount thereof, and by alleging also that the proof of loss was waived, and how and when waived, or else that it was made within due time, and how and when made; these amendments to be filed not later than the time of entering in the court below the remittitur from this court.

(91 Ga. 159)

**KAUFMAN v. EHRLICH et al.**

(Supreme Court of Georgia. July 16, 1894.)

**DEED—CONSTRUCTION—DELIVERY.**

The paper attached as an exhibit to the plaintiff's petition was, as to the specific lands therein mentioned, a deed, and not testamentary, and there was sufficient evidence to warrant the finding that said deed was duly delivered to the grantee in his lifetime. The evidence, as a whole, though not pointing with absolute certainty to the conclusion reached by the presiding judge, who tried the case without the intervention of a jury, authorized a general judgment in favor of the defendants, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Chatham county; Robert Falligant, Judge.

Action by Jackson S. Kaufman against Ambrose Ehrlich, guardian, and Mildred Dillon. There was a judgment for defendants, and plaintiff brings error. Affirmed.

The following is the official report:

Kaufman brought his petition against A. Ehrlich, as the guardian of Mildred Dillon, a minor, and against said minor, who was duly made a party. The petition alleged, in brief: Virginia, the mother of Mildred Dillon, married petitioner in Chatham county, Ga., January 25, 1888, and died in New York December 1, 1890, his wife; leaving, as her sole heirs, petitioner and Mildred. Said Virginia having, previous to her marriage, made a will which was revoked by such marriage, and having thus died intestate, petitioner and Mildred are entitled to her estate in equal shares. September 6, 1876, B. R. Dillon, then a resident of Chatham county, conveyed to said Virginia certain real property in Chatham county, described as follows: "That tract of land purchased by me from Bryan, Hartridge & Neff, situate in Chatham county, about five and one-half miles from the city of Savannah, and recorded in Book E, pages 116 and 120; bounded north by lands of Kollock, south by Ogeechee crossroad, and east by the White Bluff road. Also, my interest in lot number 10, bounded north by Anderson street, west by a continuation of Montgomery street, and east by Barnard street, less one hundred feet from Barnard street, south by —; this being disputed,—the southern boundary." This deed was duly recorded the day of its date. From that day, Virginia was seised and possessed of all the property referred to in the deed, in her own name and right, paid taxes on it as her property, and died seised and possessed of it, her claim of ownership being undisputed. David R. Dillon lived until Oc-

tober, 1883, when he died in New York City, leaving his last will, which was there probated, and an exemplification of it was filed in the office of the ordinary of Chatham county, and administration was had upon his estate in Chatham county, Ehrlich being his executor. Dillon never claimed said property in any way after the execution of the deed, and always recognized the ownership of said Virginia of the property covered thereby. Since Virginia's death there has appeared in the possession of Ehrlich a paper dated July 10, 1879, a copy of which is annexed, marked "Exhibit A." This paper purports to have been signed by said Virginia, and contains, among other things, the following language: "All parcels or tracts of land and premises hereinafter particularly described, situate, lying, and being in the — of —, in the county of Chatham and state of Georgia. Lot number ten, bounded north by Anderson street, south by lot number nine, west by a continuation of Montgomery street, and east by a line 100 feet from Barnard street. Also, those two tracts of land bounded south by Ogeechee crossroad, and north by land known as 'Kollock's Land.' Also, all other property, real and personal, I now own, or may own, during his natural life; after his death, to my child or children; and, should I not have any children, all the rents and profits of them to go to support of my mother during her natural life, and not subject to any debt or debts of hers; and after my mother's death for my three sisters, Heunle, Malme, and Katie Ehrlich, during their natural lives, and to their children in fee simple. And I hereby appoint David R. Dillon guardian and trustee for my child or children. This is to include all property I may own, or now own, at the time of my death." This paper was never recorded or delivered, nor possession was had or taken thereunder, and the actual status of the property remained just as if the paper had not been signed. Dillon never made any claim upon the property referred to therein, but always recognized the continued ownership and possession of Virginia. On the 5th day of —, 1881, he wrote a deed, which was signed by Virginia, in which her ownership of a portion of the property referred to in said paper is expressly recognized. On July 10, 1879, Virginia owned only the northern half of lot 10, fronting on Anderson street, and afterwards, on April 15, 1881, purchased from J. C. Rowland the southern half of lot 10. The paper dated July 10, 1879, is not a deed, is testamentary in character, and, as a will, was revoked by the subsequent marriage of said Virginia. The property is not therein described with sufficient certainty to make the paper valid as a deed. The paper was not delivered, or intended to be; it was ignored by the parties thereto; no possession was had or claimed under it; and, under the facts, it ought not to affect the status

of the property left by Virginia, or the rights of petitioner, as one of her heirs. But Ehrlich will not surrender it. It is a cloud upon the title of petitioner, and it ought to be canceled. Petitioner prayed for its cancellation; for general relief and process. The nature of the answer of Ehrlich will sufficiently appear from the findings of the court and report of the evidence, herein-after stated.

The cause was submitted to the presiding judge, to be determined on the law and facts without a jury. He found: "(1) Ehrlich is the legal guardian of Mildred Dillon. (2) Virginia Ehrlich was the mother, and D. R. Dillon the father, of Mildred. (3) Virginia married Kaufman January 25, 1888, and died in New York City December 1, 1890. (4) Virginia, previous to her marriage to Kaufman, made a will, and that said will was revoked by her marriage to Kaufman. That the said Virginia died intestate, and that the said Kaufman and the said Mildred are entitled, in equal shares and proportions, to the realty in Georgia owned by the said Virginia, she leaving no other heirs. (5) Dillon, on the 6th of September, 1876, conveyed to the said Virginia the certain real property in the county of Chatham and state of Georgia described as follows: 'That tract of land purchased by me from Bryan Hartridge and Neff, situate in Chatham county, about five and one-half miles from the city of Savannah, and recorded in Book E, pages 116 and 120, bounded north by lands of Kollock, south by Ogeechee crossroad, and east by White Bluff road. Also, my interest in lot number ten, bounded north by Anderson street, west by a continuation of Montgomery street, and east by Barnard street, less one hundred feet from Barnard street; south by lot number nine (9).' (6) Virginia was not seised and possessed of all the property referred to in said deed of September 6, 1876, and that she did not pay the taxes on the same, as her property, and that she did not die seised and possessed thereof. (7) Dillon died October 9, 1883, in New York, leaving his last will and testament, which was probated in this county, and that afterwards an exemplification thereof was filed in the court of ordinary of Chatham county, and that Ambrose Ehrlich was the executor. (8) There is no evidence that Dillon claimed the property described in the deed of September 6, 1876, unless the payment of taxes thereon by La Roche for Dillon may be considered as evidence of such claim. (9) I find no recognition by Dillon of ownership of Virginia of property covered by said deed of September 6, 1876, after the execution of the deed of 10th July, 1879; being the deed attached to the petition, and marked 'Exhibit A.' (10) The deed marked 'Exhibit A' was delivered by Virginia to the defendant, as the executor of Dillon, with other deeds and muniments of title belonging to said Dillon, immediately after Dillon's death, in

New York, in October, 1883. (11) The deed of July 10, 1879, was not recorded. (12) There had been a legal delivery of that deed to Dillon. (13) I find no evidence of change of possession of said property or change in the actual status of the property, or that Dillon made any claim, except by payment through La Roche of taxes, or that Dillon recognized ownership and possession in Virginia. (14) The paper dated 5th —, 1881, executed in the presence of John J. Leary and Henry C. De Witt, Comr., was in the handwriting of Dillon, and that the signature was that of Virginia Ehrlich. That this paper quitclaimed to Rachael Dillon a life estate in certain property, and that afterwards, in 1885, said life estate was reconveyed to Virginia. (15) On 10th July, 1879, there was a dispute as to the southern boundary of lot number ten, and that on 15 April, 1891 (?), this contention was settled by the payment of \$750, and a conveyance from John C. Rowland to Virginia. (16) The paper dated 10th July, 1879, is a deed, and not a testament. That the property—reference being had to the other deeds forming part of the title—is described therein with sufficient certainty to make said paper valid as a deed. That said deed was delivered. That it was not ignored. That there is no evidence as to change of actual possession, and that the property described in Exhibit A, to wit, 'All parcels or tracts of land and premises hereinafter described, situate, lying, and being in the — of —, in the county of Chatham and state of Georgia; lot number ten, bounded north by Anderson street, south by lot number nine, west by a continuation of Montgomery street, and east by a line 100 feet from Barnard street; also, those two tracts of land bounded south by Ogeechee crossroad and north by land known as "Kollock's Land,"'—was the property of the late David R. Dillon, and had by him been conveyed to Virginia Ehrlich. That said indenture of July, 1879, conveyed to said Dillon a life estate in said property, with remainder over to the minor, Mildred, the child of Virginia and of David R. Dillon."

Kaufman moved for a new trial, and, his motion being overruled, excepted. The motion was upon the grounds: Because the findings of the judge in favor of the defendants, with reference to the paper dated July 10, 1879, are contrary to law, and contrary to the evidence. Because the judge erred in finding and decreeing that said paper is a deed, and valid as a deed, and conveyed the two pieces of property mentioned therein to Dillon for life, with remainder over to Mildred Dillon, and erred in sustaining said paper, said finding and judgment being contrary to law and the evidence. Because the 6th, 9th, 10th, 12th, 13th and 16th findings of fact, respectively, are contrary to law and the evidence. Because the court erred in not setting aside the paper dated July 10, 1879,

as prayed for by plaintiff. Because the court erred in not giving judgment, under the facts, to plaintiff.

Upon the trial of the case, Kaufman testified: "Was married in Savannah, January 25, 1888, to Virginia, the sister of A. Ehrlich. She died in New York City December 1, 1890, where we had been living some years, leaving only one child. This child and I are the only heirs. From the time of my marriage up to the time of her death, I always understood that the property referred to in the paper of July 10, 1879, was my wife's,—that she claimed it,—and I never heard anything to the contrary. I never knew anything of this paper until Ehrlich came to me, in New York, with Mr. Meldrim, February, 1891. I had heard my wife speak of a paper in Ehrlich's hands that she had requested, but I did not know what paper it was. She always received rents and paid taxes on the property through Ehrlich. He attended to it. The property on Montgomery and Anderson was improved, and there was income from that, which she got. I had no knowledge, previous to our marriage, as to payment of taxes, or as to rents."

Ehrlich testified: "Dillon died October 9, 1883, in New York. The paper of July 10, 1879, I first heard of when I went to his funeral. The day after the funeral my sister handed me a bundle of papers, and all the deeds,—chains of title,—and I brought them to Savannah. It was quite a big bundle,—all wrapped up together. There were none of her deeds,—just a bundle of his papers, letters, and so on. I can't say whether she knew that this paper was there or not. I had nothing to do with her affairs prior to Dillon's death. After his death I took charge. Before then Dillon had charge, and La Roche was his agent here. There were no rents at that time, that I know of. There were no improvements of the Anderson street property at that time. That was improved in 1886 or 1887. During the seven years my sister lived after I got this paper of July 10, 1879, the property referred to was all in her name. I paid taxes on it in her name from 1883, and, you might say, up to the present time. She got credit for the improvements. The farm property brought nothing. After the store was put up on Anderson street property, she got the rents for that. I know that from the time that paper of September 6, 1876 [that signed by Dillon and recorded], was signed, up to the time of her death, my sister always looked upon and claimed all the property as hers. I did not think it the property of any one else. I never heard from Dillon that he had a life estate in it. I fully understood it was her property, and did not know that this paper was in existence. The body of the paper executed in New York in 1881, before Leary and De Witt, is in Dillon's handwriting. The signature is in the handwriting of my sister. [It was admitted that in

1885 his life estate was conveyed back to the grantor.] If my sister ever knew of the existence of the paper of July 10, 1879, she never mentioned it to me, and I never mentioned it to her, because I did not attach any importance to it. I suppose I must have become first intelligently aware of this paper the latter part of 1883, or early part of 1884. I paid no particular attention to it. She was alive, and I put it back with the bundle of papers. I kept it. It first occurred to me immediately after her death that it was my duty to have it passed on. I took it to Mr. Meldrim, and he said the court ought to pass on it. That was the only paper I had at the time that was of any note. Previous to that time I did not attach enough importance to it either to record it, or to call my sister's attention to it. I continued to return the property as hers, just as if this paper was not in existence. I never heard Dillon refer to it in any way, and never heard of the paper until after his death. There was no occasion to record the paper. She was alive, and after her death I brought it to Mr. Meldrim. I found this paper along with other deeds, and, after her death, commenced to look into her affairs, and brought the paper to Mr. Meldrim, who advised that its character was such that, in justice to the child, it ought to be passed upon and determined. The child is Dillon's. The property known as the 'Pear Orchard,' from July 10, 1876, was worth about \$2,000, and the Anderson street property was worth then about \$10,000. The property bought by Estill, on Whitaker street, was worth about \$7,000; and the Market Square property, about \$4,000. Mrs. Kaufman left a house in New York, but no personalty. Under the law of New York, the child gets all the real estate and two-thirds of the personalty. I am her administrator here [in Savannah], and have the property in charge, as the property of her estate. After her death I took charge of it,—the property of her estate. I knew of the existence of this paper of July 10, 1879, before the child was born. The body of the deed of April 15, 1881, between J. C. Rowland and Virginia Ehrlich, which conveys the south half of lot ten on Anderson street, is in Dillon's handwriting. There was some dispute about the land, and it was settled. Rowland, for \$750, made this conveyance. The paper in the form of a will, dated August, 1884, is substantially a correct copy of an original will that has been lost. The pencil corrections in it are by me. So far as the references to property are concerned, there is no difference. The property bounded on the north by Anderson street consisted of four and three-quarter acres; and the two pieces called the 'Farm Property,' of thirty-two and thirty-seven acres. And therefore, when seventy-five or seventy-six acres were mentioned as being in the name of Virginia Ehrlich, they must have included the property mentioned as 'Lot Ten,' bounded north

by Anderson street, and also the two tracts bounded north by Kollock's land and south by the Ogeechee crossroad." Mr. La Roche testified: "I knew Dillon, and represented him in Savannah up to his death. From July 10th to his death, I paid the taxes for him on the property known as the 'Farm' and 'Anderson Street Property' out of collections from the city property,—from all his property. Do not know in whose name this property was. I paid the taxes on all the property. I began to represent him in 1879 or 1880. I think all this property was in his name. I paid the taxes for him. I am not positive about it. I never heard him allude to this deed that he made to Miss Virginia Ehrlich. I never heard him make any allusion to the property, and never heard of her through him. I collected rents from the city property, and paid taxes for him, up to the time of his death."

It appeared: That in 1876 170 acres in Chatham county, valued at \$10,000, were returned in the name of David R. Dillon; in 1877, 720 acres in his name, valued at \$12,000; in 1878, 1879, and 1880, 800 acres in his name, valued at \$5,000. That in 1881 733 acres, valued at \$5,000, were returned in his name, and 76½ acres, valued at \$1,200, were in the name of Virginia Ehrlich. That in 1882 733 acres, valued at \$5,000, were in his name, and 74½ acres, valued at \$1,200, were in the name of Virginia Ehrlich. That in 1883 there was no property in the country, in Chatham county, in Dillon's name, and 75 acres in the name of Virginia Ehrlich, valued at \$1,200. That in 1884 the number of acres in the name of the estate of Dillon was blank, but that \$15,000 were put down as the value of land outside of the city limits in Chatham county in the name of Virginia Ehrlich, and \$12,000 as the value of her property. That in 1885 the estate of Dillon appears as owning \$15,000 of land outside of the city, in Chatham county, and \$1,000 as the value of the city property for this year. Virginia Ehrlich appears as owning \$1,200 in land outside of the city limits in Chatham county, and \$14,000 worth of city property. That for 1886 there is no return for the estate of Dillon, and in the supplement it appears that Virginia Ehrlich owned 44 acres of land outside of the city limits in the county of Chatham, valued at \$1,200, and \$5,000 worth of city property. That in 1887 there was no return for the estate of Dillon, and 35 acres outside of the city limits, valued at \$6,400, in the name of Virginia Ehrlich, and \$5,275 in city property. That in 1888 there is no return for the estate of Dillon, but a return of Mrs. Kaufman of 35 acres in Chatham county, outside of the city limits, valued at \$7,700, and \$5,200 in city property. That for 1889 there is no return for the estate of Dillon, and for Mrs. Kaufman there is a return of 69 acres in Chatham county, outside of the city limits, valued at \$21,000, and \$4,100 in city proper-

ty. That for 1890 there is no return for the estate of Dillon, but is a return for Mrs. Kaufman, of \$23,000 in land in Chatham county, outside of the city limits, and \$5,000 in city property. There is no return for the estate of Dillon in 1891, but one for the estate of Mrs. Kaufman, of \$25,000 in land in Chatham county, outside of the city limits, and \$5,500 in city property.

The following documentary evidence was introduced: The instrument of July 10, 1879. It was on a printed form for deeds. It is not recorded or backed. Also, the deed of September 6, 1876, by Dillon to Virginia Ehrlich, recorded the day of its execution. It was executed in Chatham county, and recites a consideration of five dollars. The description of the land conveyed by it has been hereinbefore stated, except that in the first part of the description, in the printed form, are the words, "all those tracts or parcels of land and premises hereinafter particularly described, situate, lying, and being in the county of Chatham and state of Georgia." Also, the paper purporting to have been executed in New York in 1881, before John J. Leary and H. C. De Witt, commissioner for Georgia, signed by Virginia Ehrlich. This deed recites that for and in consideration of the sum of \$10 to Virginia Ehrlich paid by Rachael Dillon, of the county of Chatham and state of Georgia, she releases and quitclaims unto Rachael Dillon all the right, title, and interest of the grantor in and to those two tracts of land bounded north by lands of Kollock, south by Ogeechee crossroad. "The tract purchased by me from Munnerlyn, bounded on the west by the canal, and tract purchased from Mr. Dillon, bounded on the west by White Bluff road, about seventy acres in all, and known as 'Pear Orchard Tracts.' The said two tracts or parcels of land being for the benefit and use of said Rachael Dillon during her natural life, and at her death to revert back to me, Virginia Ehrlich, and said property not subject to any debts of the said Rachael Dillon." Also, the deed of April 15, 1881, received for record the same day, and recorded April 25, 1881, from Rowland to Virginia Ehrlich. This deed, in consideration of \$750, conveys that tract of land described on the map of Savannah drawn by Hogg, corrected to July, 1868, as "Lot Number 10," fronts north on Anderson street,—all the southern half of said lot No. 10, containing about 2½ acres. Bounded north by the northern half of said lot No. 10, east by a continuation of Barnard street, and west by a continuation of Montgomery street, and south by lot No. 9. Said property purchased from S. L. Hoover by J. C. Rowland in 1863, and this sale to convey all the property purchased by him from Hoover. Also, the deed, as recorded, to be found in Book 4, A's, page 116 (referred to in the deed of September 6, 1876, above mentioned). And in this deed, as recorded, it appeared that the number of acres of the property conveyed



(outside of a street 20 feet wide which bounded the property) was  $28\frac{1}{2}$ . This deed describes the property fully and accurately. Also, the copy of a will dated August, 1884, purporting to have been made by Virginia Ehrlich at that time; being the copy produced by A. Ehrlich, and as to which he testified. In this will the property mentioned in the paper of July 10, 1879, as that bounded north by Anderson street is specifically devised. This will contains also a residuary clause. Also, the record from the courts of New York, showing that the will made by Virginia dated March 5, 1886, had been set aside. The will is short, and devises all the property of the testatrix to her daughter, Mildred. It begins as follows: "I, Virginia S. Dillon (formerly Ehrlich), of the city of New York," etc. The judgment of the New York court of appeals found that on the 5th day of March, 1886, the testatrix was the widow of one David Dillon, and on that day duly executed her last will and testament; that on the 25th day of January, 1888, the testatrix married one Jackson S. Kaufman, and in December, 1890, died, leaving her surviving husband, the said Jackson S. Kaufman, and her daughter, Mildred, as her heirs at law; and that under the laws of New York this will was revoked by her marriage to Kaufman. Also, the deed dated April 20, 1880, from David R. Dillon to Virginia Ehrlich, received for record the same day, and recorded April 24, 1880, in the office of the clerk of the superior court of Chatham county. It conveyed a tract of land purchased by the grantor from one G. M. Willett, and contained the following conditions: "The conditions of this sale are that this property shall remain in, and be the absolute property of, David R. Dillon, during his natural life; and, should David R. Dillon at any time dispose of this strip or parcel of land, then this bill of sale to be null and void, and of no effect whatever. Should said David R. Dillon not dispose of this strip or parcel of land during his natural life, then at his death this strip to be the property of said Virginia Ehrlich." The consideration of this deed was \$10. Also, a deed from David R. Dillon to Virginia Ehrlich, dated June 16, 1883, and recorded at once in the office of the clerk of the superior court of Chatham county, in which he conveys to Virginia Ehrlich, for \$50, certain real estate on Whitaker street, in the city of Savannah; and this deed contains the following proviso: "Provided, however, that while this deed conveys a present estate unto the said party of the second part, and to her heirs and assigns, in and to the foregoing property and the improvements and appurtenances, the said grantor, David R. Dillon, reserves to himself, for and during his natural life, the possession of the same, with the rents, issues, profits, and income of the same; and the said party of the second part, her heirs and assigns, though vested with the title as aforesaid, shall not

possess or control the said property, or the rents, issues, and profits thereof, so long as the said party of the first part shall be in life."

Denmark & Adams, for plaintiff in error.  
Garrard, Meldrim & Newman, for defendants in error.

**LUMPKIN, J.** The facts appear in the reporter's statement. By consent, the case was submitted to the presiding judge for determination without the intervention of a jury. The controlling legal question was whether or not the instrument dated July 10, 1879, and executed by Virginia Ehrlich, was a deed or a will. We are quite clear that, as to the specific lands therein mentioned, it was a deed, and was not testamentary in its character. As to so much of the instrument as undertook to convey property which the grantor might acquire after its execution, and of which she might be the owner at the time of her death, it may be testamentary; but this is immaterial, as no property is involved in the present controversy other than that with which this instrument deals specifically. There was sufficient evidence to warrant the judge in finding that this deed was duly delivered to the grantee, David R. Dillon, in his lifetime. We have carefully read, studied, and considered the evidence in this case. It contains many contradictions and inconsistencies, and leaves our minds in some doubt as to the real truth of many of the points in issue. As a whole, it presents a confused, rather than a clear and satisfactory, view of the various transactions to which it relates. We therefore felt justified in saying in the headnote that it does not point with absolute certainty to the conclusions reached by the presiding judge, and which were necessary to an adjudication by him in favor of the defendants. Still, we think he was authorized in so adjudging. It would be a most laborious task to discuss in detail the facts of this case. Nevertheless, we would cheerfully undertake the burden of so doing, if any good could thereby be accomplished. As this, in our opinion, would not be the case, we leave the judgment to stand, without further comment. Judgment affirmed.

(95 Ga. 222)

#### TARVER v. STATE.

(Supreme Court of Georgia. Dec. 21, 1894.)  
BURGLARY—ARRAIGNMENT AND PLEA—POSSESSION OF STOLEN PROPERTY—INSTRUCTIONS.

1. Waiver of arraignment, and the entry of this fact, together with a plea of not guilty, by the solicitor general upon the indictment, sufficiently form the issue to be tried in a criminal case. After this has been done, it is unnecessary to further call upon the defendant to plead.

2. There was no error, as against the accused, if any at all, in instructing the jury that if, upon consideration of the evidence and the

statement of the accused, all reasonable doubt of his guilt was removed, they should convict.

3. The evidence as to the breaking being amply sufficient, there was no error in refusing to charge as to the offense of larceny from the house, nor was there any error in admitting evidence of the value of the goods taken from the premises burglariously entered, although no value was alleged in the indictment. This evidence was material as a part of the description of the goods found in the possession of the accused, and bore upon the account given by him of that possession.

4. In passing upon the possession of stolen goods as evidence offered to show criminality, the time which elapsed between the theft and the possession, and the manner in which the possession was accounted for, or that it was not accounted for at all, are material matters for the consideration of the jury, to which the court, by appropriate instructions, should direct their attention. Though reference to the element of recency should never be omitted, it is not absolutely essential, if the possession was in fact very recent; but in a trial for burglary, where the evidence upon which the state mainly relied, and without which there could have been no legal conviction, consisted of proof showing possession by the accused of goods which had been stolen from the premises burglariously entered, and there was an explanation by him of that possession which, if true, was consistent with his innocence, an entire failure by the court to submit to the jury the question whether or not that explanation was reasonable and satisfactory is cause for a new trial; it appearing that the court did, in substance, instruct the jury that the fact of the possession of the stolen goods might, in connection with the other facts in evidence, authorize a conviction.

5. Except as indicated in the preceding note, no error was committed at the trial.

(Syllabus by the Court.)

Error from superior court, Jones county; W. F. Jenkins, Judge.

Robert Tarver was convicted of burglary, and brings error. Reversed.

John R. Cooper, for plaintiff in error. H. G. Lewis, Sol. Gen. (Felder & Davis, of counsel), for the State.

LUMPKIN, J. 1. The object of arraigning a prisoner is to give him an opportunity to plead to the indictment. If he waives arraignment, there is no further occasion to call upon him to plead; and certainly where, after the arraignment has been waived, the solicitor general enters upon the indictment a plea of not guilty, no possible harm is done to the accused, and the issue between him and the state is duly made up. The point raised by the accused in this case, with which we have thus summarily dealt, is absolutely without merit.

2. In arriving at a conclusion in a criminal case, it is the duty of the jury to consider the evidence and the statement of the accused, giving to the latter just such weight as they see proper. After doing this, they must be satisfied beyond a reasonable doubt of the guilt of the accused, before they can legally convict. Instructions to the jury conforming to the propositions just announced, if not absolutely proper and correct, certainly are not erroneous, as against the accused.

3. The evidence showed with sufficient clearness that the house was broken. Accordingly, there was no error in refusing to charge upon the offense of larceny from the house. The accused could not, under the facts, possibly be guilty of the latter offense without also being guilty of the burglary, and therefore, no conviction of the lesser offense would have been lawful. In cases of larceny the value of the goods stolen must be alleged and proved, but in an indictment for burglary, alleging that the accused broke and entered the house in question with intent to commit a larceny of certain described goods therein, it is unnecessary to allege their value; and, although the value is not alleged, it may be proved at the trial as a part of the description of the goods which had been in the house, and which were afterwards found in the possession of the accused. In this case, proof of value also bore materially upon the account given by the accused of his possession of the goods. It tended to show that this account was false. Because, according to what he said, he obtained them at so much less than their real value, his statement that he purchased them might well be doubted.

4. Nevertheless, that statement, if true, was consistent with his innocence, and he was entitled to have the jury pass upon the explanation given by him of his possession. It was for them to determine whether or not that explanation was reasonable and satisfactory. The court, in substance, instructed the jury that the fact of the possession of the stolen goods might, in connection with the other facts in evidence, authorize a conviction. A careful examination of the record before us shows that the evidence upon which the state mainly relied, and without which there could have been no legal conviction, consisted of proof of possession by the accused of the goods which had been stolen from the broken house. Under these circumstances, the merits of his explanation ought to have been submitted to, and passed upon by, the jury. In charging with reference to the possession of stolen goods as evidence of criminality, the question as to how much time had elapsed between the theft and the possession ought also to be considered. As stated in *Young v. State* (decided Oct. 15, 1894) 20 S. E. 270, the court, in charging in this connection, should use the word "recent," though it was there held that the omission to do so was not cause for a new trial where it affirmatively and unequivocally appeared that the possession in question was in fact a recent one. Still, we do not think that in cases of this kind the court should ever neglect to refer to the element of recency, and in such cases the charge should conform to the rules stated in the fourth headnote, which are sufficiently plain without further comment. We grant a new trial in this case because of the error therein indicated.

5. Some other minor questions were presented by the motion for a new trial, but none of them are of sufficient importance to require discussion. Judgment reversed.

(96 Ga. 27)

**AMERICAN SUGAR-REFINING CO. v. MCGHEE et al.**

(Supreme Court of Georgia. March 11, 1895.)

**CARRIERS — REFUSAL OF GOODS BY CONSIGNEE — DELIVERY TO BROKER—BROKER'S AUTHORITY.**

1. Where goods were shipped over the lines of connecting railways to a consignee designated in the bill of lading, and on arrival at destination the receivers of the railway company which completed the transportation tendered delivery to that consignee, and he declined to receive the goods, the liability of the receivers as common carriers thereupon ceased, and they became liable as warehousemen only, and as such were chargeable with the duty of notifying the consignor of the consignee's refusal to accept the goods, and with the further duty of holding the same subject to the order of the consignor.

2. The action being by the consignor against the receivers to recover the goods or their value, and the only defense set up and relied upon by the defendants being, in substance, that they had delivered the goods as directed by a broker of the plaintiff, and that he was the duly-authorized agent of the plaintiff to direct such delivery, and there being no sufficient evidence to warrant a finding that he was in fact such an agent of the plaintiff, the judge below, who tried the case without a jury, erred in adjudging that the defendants were not liable.

3. The broker, under his general powers as such, had no authority either to receive the goods or to direct to whom they should be delivered; nor could such authority be conferred upon him, so as to bind his principal, the consignor, by any local custom or usage, the latter having no knowledge thereof, and consequently not contracting with reference thereto in making the shipment.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by the American Sugar-Refining Company against C. M. McGhee and others, receivers. Defendants had judgment, and plaintiff brings error. Reversed.

Ellis & Jordan and S. A. Reid, for plaintiff in error. Hill, Harris & Birch, for defendants in error.

**LUMPKIN, J.** The American Sugar-Refining Company brought an action against the receivers of the East Tennessee, Virginia & Georgia Railway Company for the recovery of 100 barrels of sugar, or the value of the same. The material allegations of the declaration are as follows: On January 24, 1893, the plaintiff delivered the sugar to the N. O. & N. E. Railroad Company, to be transported over its line to its terminus, and thence over the line of the East Tennessee, Virginia & Georgia Railway, of which the defendants were in charge as receivers, to Macon, Ga., the shipment having been made under a bill of lading by the terms of which the sugar was consigned to Rogers, Jones & Moore, of the city last named; and the defendants received the sugar for transporta-

tion and delivery under that bill of lading. The plaintiff was really the owner of the sugar when the defendants received it, the shipment having been made upon a fraudulent order given by a broker without authority from the consignees, who did not order nor buy the sugar, nor consent to its shipment to them, and who disclaimed any right or title to or interest in it, and refused to receive it, which facts were not known to the plaintiff till afterwards. It was the duty of the defendants, upon the refusal of the consignees to receive the goods, to notify the plaintiff of this fact, and redeliver to it, or to its order. The defendants failed to observe this duty, but, on the contrary, converted and appropriated the sugar to their own use as receivers, to the plaintiff's damage in the sum of \$1,640.35, which was the value of the consignment.

In order that the nature of the defense may be clearly understood, we will now set forth in full those portions of the defendants' pleas upon which they relied. They are as follows: "And, for further answer in this behalf, these defendants show that the waybills or shipping directions which accompanied the freight in question required these defendants to turn over and deliver said goods to Rogers, Jones & Moore, of the city of Macon; that upon the receipt of said goods in the warehouse of the East Tennessee, Virginia and Georgia Railway Company at Macon, Ga., these defendants, through their agent at said point, tendered the said goods to the consignees, Rogers, Jones & Moore, as by the shipping directions required to do; that immediately said Rogers, Jones & Moore declined to receive said goods, alleging that they were not willing to receive the same, and directing the agent of these defendants to consult with John Farrar, agent or broker of the plaintiffs in this city; that thereupon the said agent notified the said John Farrar, broker, as aforesaid, upon whose order the said goods had been purchased, that the goods were ready to be delivered, and that Rogers, Jones & Moore, the consignees, declined to receive the goods, and had directed these defendants to consult with him; thereupon the said John Farrar immediately directed these defendants to deliver the goods to H. D. Adams & Co., a responsible firm of this city; that pursuant to such instruction, and having often been instructed before in similar cases by the said John Farrar, these defendants, through their agents, delivered over the goods to the said H. D. Adams & Co., for the account of the plaintiffs, as directed by the plaintiffs' broker so to do. These defendants, having notified the consignors through their agent, as aforesaid, and having been by him directed as to the disposition of the goods, followed his instructions to the letter, and delivered them over to the persons designated by the said broker. Wherefore these defendants show that they have fully discharged their duty in

and about said matter, and that there is no liability upon them to account for any matter or thing connected with the subsequent disposition of said merchandise. And, for further answer in this behalf, these defendants show that they were cognizant, from a long course of dealing through their agents at Macon, of the fact that said Macon Brokerage Company, or John Farrar & Company, or both, of which John Farrar was one of the partners or principal agent, had been for a long time the agent of the plaintiffs in placing their orders and the sale of products of the plaintiffs in this city; that when the said Rogers, Jones & Moore, the consignees of said goods, refused to receive them, and directed the defendants to consult with the said John Farrar, as a member of the said Macon Brokerage Company or John Farrar & Company, these defendants immediately did so, in accordance with the custom that had heretofore prevailed with reference to similar shipments, and the said John Farrar, for the said Macon Brokerage Company or John Farrar & Company, having directed these defendants to turn over the said goods to H. D. Adams & Co., a responsible firm, fully solvent, and fully able to pay for the same, these defendants obeyed such instructions. The said John Farrar had been placing orders for the consignors for a long series of years, and was known to this defendant as the agent and broker of the said plaintiffs in this city. He had authority, both by custom and by direct mandate from the plaintiffs, to place their orders in this city, and these defendants only followed the instructions that they received from him in this case, as it was known to them, from his course of dealing, that he was the authorized agent of the plaintiffs to direct the disposition of the goods, as well as to procure and place orders therefor. These defendants delivered the goods to the parties to whom they were consigned. Those parties having refused the goods, and having directed these defendants to consult with John Farrar, as aforesaid, the goods were delivered to H. D. Adams & Co., on instructions from him, as broker of the said plaintiffs."

The case, by consent, was tried by the judge without a jury. The evidence, as a whole, showed substantially the following state of facts: John Farrar, or the Macon Brokerage Company, under different firm names (John Farrar, however, always being a member), did business for the plaintiff as its broker in the city of Macon from 1890 until and including the month of January, 1893. During this period, Farrar, or the firms of which he was a member, sent large numbers of orders to the plaintiff, at the instance of various parties. He had, however, no authority to make sales for the plaintiff, but only to submit orders for its acceptance or refusal, receiving commissions on sales completed; and in no instance was he authorized to make collections for the plaintiff, but purchasers remitted to it directly. He

was not authorized to dispose of any goods for the plaintiff without instructions from it, and in the present case he was not authorized to take possession of or dispose of the sugar, or give any directions as to its delivery. The plaintiff gave him no instructions whatever concerning it. The shipment of the sugar was brought about as follows: Farrar, for a fraudulent purpose of his own, and without authority from Rogers, Jones & Moore, sent an order to the plaintiff to ship to them 100 barrels of sugar, and it did so, believing that the order was an honest one and duly authorized. Farrar informed Rogers, Jones & Moore of the sending of the order, but represented that it resulted from a mistake caused by his using the wrong cipher, and requested them to notify him of the arrival of the sugar. When it did arrive, the agent of the defendants notified Rogers, Jones & Moore of the fact, and tendered delivery to them, the agent being at the time entirely ignorant of the fraud which had been practiced by Farrar. Rogers, Jones & Moore informed the agent that the sugar was not for them, and declined to receive it, but stated that Farrar would dispose of it. They also, as the latter had requested, informed him of the arrival of the sugar, and mailed to him, without indorsement, the bill of lading which had been sent to them. He, without informing the plaintiff of the rejection of the consignment by Rogers, Jones & Moore, and without presenting to the agent of the defendants the bill of lading, simply telephoned the agent to deliver the sugar to H. D. Adams & Co.; and the agent, without having notified the plaintiff of the refusal of Rogers, Jones & Moore to receive the sugar, and without having asked of the plaintiff any directions in the matter, and also without requiring from Farrar the production of the bill of lading, delivered the sugar, as he had directed, to H. D. Adams & Co., a responsible firm, who afterwards paid Farrar for the same. He absconded without paying anything to the plaintiff, which, however, never expected nor demanded payment from him. Goods were very frequently delivered without requiring the bill of lading to be surrendered. When the plaintiff had become informed of the rejection of the consignment by Rogers, Jones & Moore, it made a demand upon the defendants' agent for the sugar, and, in reply to this demand, the attorneys of the defendants wrote the following letter, addressed to the plaintiff's attorney: "Your demands have been referred to us. In reply to yours, we beg to state that the goods in question were delivered to Messrs. H. D. Adams & Company by direction of the Macon Brokerage Company, through Mr. Farrar, of this place. This delivery was made on or about February 1, 1893. The Macon Brokerage Company claim to be acting for your client, and it was known to this company that they had been representing them in other similar transactions, and this sugar was shipped on the order of said brokerage company." There had been previously frequent dealings

between the agent of the defendants and Farrar in his capacity as broker. He often hurried up deliveries, and also gave directions about placing cars for consignees, and his instructions were carried out; but in every instance except the present his directions related to deliveries to the proper consignees. This was the first time when the defendant's agent "had to change the consignee." The value of the sugar was proved. There was also a considerable amount of evidence as to certain alleged customs in the city of Macon. It was shown that, according to the usage of trade recognized by the wholesale dealers of that city, when a merchant, for any reason, rejected a consignment shipped to him upon the order of a broker, it was customary to notify the broker of such rejection, without also communicating the fact to his principal, leaving the broker to arrange for the final disposal of the shipment. Upon such notification to the broker, it was his duty to communicate with his principal, and get instructions as to how the goods rejected should be disposed of. The broker had no power to assume possession of the goods, to make a resale of them, or to give any direction as to their delivery, save upon receiving express authority from his principal; but the railroad agents usually respected the broker's orders as to final delivery of the goods, when the broker was known to be representing the consignor, and had given the order upon which the goods were shipped, without requiring him, it would seem, to exhibit any evidence of authority from his principal to accept the consignment in the principal's behalf, or to direct delivery to a person other than the original consignee named in the bill of lading. It did not, however, appear that a delivery of this kind had ever been made to Farrar, acting as the broker of the plaintiff, or of any other principal he was known to represent. It was further shown that it was against the rules of the sugar-refining company to give the discount allowed on orders for 100 barrels of sugar, unless the whole of that amount was taken by a single firm or person. It was customary, however, through the contrivance of Farrar, for the merchants of Macon to evade this rule by several of them combining together, giving an order in the name of one only of them, and directing shipment accordingly. When the sugar arrived, Farrar would carry out the scheme by going around, in behalf of the nominal consignee, to all the other merchants interested, taking the check of each for his proportion of the price, and giving him an order on the railroad for the amount of sugar to which, under the arrangement, he was entitled. Farrar would then deliver the checks thus collected to the merchant in whose name the shipment was made, who thereupon would send to the sugar company his individual check for the price of the entire consignment. The bill of lading would be turned over to Farrar, who, upon surrendering it to the railroad company, would thus be enabled to get possession of the consignment,

and direct its distribution upon his written orders to the several parties interested therein. It was not shown that the plaintiff had any knowledge at all of the customs prevailing in Macon, whatever they were, or dealt with reference to the same. The judge rendered a judgment in favor of the defendants, and the plaintiff made a motion for a new trial, to the overruling of which it excepted.

1. We think that, under the facts stated, the receivers of the railway company had a perfect right to treat the consignment exactly as if Rogers, Jones & Moore had actually ordered the sugar. They were the consignees designated in the bill of lading, and the defendants' agent did precisely the proper thing in tendering delivery to them. This being so, when these consignees declined to take the goods, the liability of the defendants as carriers ceased, and they became liable as warehousemen only. As such, it was their duty to notify the consignor of the consignees' refusal, and also to hold the goods subject to the consignor's order. Of course, an order for the delivery of the sugar from an agent of the consignor having authority to give it would be the legal equivalent of such an order from the consignor itself. We shall assume that the propositions announced in this division of this opinion will be accepted as sound and correct, without stopping to elaborate or discuss them.

2. The case was earnestly argued in this court by counsel for the defendants in error upon the line that the conduct of Rogers, Jones & Moore amounted to such a quasi acceptance of the consignment as would justify a delivery to another upon their order or direction. It was strenuously insisted that, by referring the defendants' agent to Farrar, the consignees made him their agent to give direction as to the delivery of the sugar, and that consequently his order to deliver the same to H. D. Adams & Co. was the act of Rogers, Jones & Moore, and a disposition of the sugar, so far as the defendants were concerned, by the consignees themselves. Impressed by the earnestness and zeal of the counsel, we most carefully examined the record to ascertain if it contained anything upon which a defense of the nature just indicated could be rested; but we were unable to find any support for such a defense, either in the pleadings or in the evidence. As will have been seen, the defendants' pleas repeatedly state that Rogers, Jones & Moore refused to receive the goods, the expression used in one instance being that they "declined to receive the goods, alleging that they were not willing to receive the same." The pleas also distinctly set up that the defendants gave notice of this refusal to the consignor, through Farrar, as its agent; that he was its authorized agent to direct the disposition of the goods; and that delivery was made in accordance with his instructions, as the consignor's broker. The previous dealings between the defendants and Farrar, and

the customs prevailing in Macon, were alleged in support of the proposition that he was the general agent of the sugar-refining company, and, as such, entitled to direct what should be done with its goods. The above-quoted letter, written by the defendants' attorneys, shows that the defendants' claim from the very beginning was that the delivery to H. D. Adams & Co. was made on the order of the brokerage company, representing the sugar-refining company, and contains not even a hint that delivery was made upon any authority or direction given by Rogers, Jones & Moore, as consignees. It is true there is an expression in one of the pleas that the defendants "delivered the goods to the parties to whom they were consigned"; but this cannot be taken as meaning literally what it says. This expression is immediately followed by a recital that these parties refused the goods, and there can be no possible doubt, from the pleas as a whole and from the evidence, that the defendants never seriously claimed that there had been a delivery to Rogers, Jones & Moore, the consignees, but only that delivery was tendered to them, and they thereupon directed that Farrar be consulted, with the additional statement that he would dispose of the goods. So the real defense in this case was that delivery was made on Farrar's order; that he was the plaintiff's agent, duly authorized to give the order; and that, consequently, the delivery so made was a full and complete legal protection to the defendants against the plaintiff's demand.

In testing the merits of this defense, we will first inquire whether or not the mere fact that Farrar was the broker of the plaintiff authorized him to direct a delivery of the sugar, after the refusal of Rogers, Jones & Moore to accept it, so as to make such delivery binding upon the plaintiff. The powers of Farrar as the plaintiff's broker were clearly and distinctly shown by the evidence, from which it appears that he was simply a merchandise broker, with limited authority, and having no special or express power to do anything beyond such acts as brokers of this kind could usually do in the conduct of their business. He was a mere middleman to negotiate sales by submitting offers to his principal. He had not even the right to make a binding contract of sale in its behalf, and it is absolutely certain that he had no authority to order any disposition of its goods other than to see that they were delivered to customers who had actually purchased them. Some confusion has arisen by using the word "broker" in cases where the person referred to was really a factor. Mr. Justice Bradley, in *Slack v. Tucker*, 90 U. S. 330, says: "The difference between a factor or commission merchant and a broker is stated by all the books to be this: A factor may buy and sell in his own name, and he has the goods in his possession; while a broker, as such, cannot ordinarily buy or sell

in his own name, and has no possession of the goods sold,"—citing, in a footnote, *Story, Sales*, § 91; *Story, Ag.* § 34; 2 Kent, Comm. 622. In *Story, Ag.* § 28, it is said: "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade," etc.; and that "he is strictly, therefore, a middleman or intermediate negotiator between the parties." In the section of this work cited by Mr. Justice Bradley, it is stated that, while a factor is intrusted with the possession, management, control, and disposal of the goods to be bought or sold, a broker usually has no such possession, management, control, or disposal of the same. Again, in *Tied. Sales*, § 272, it is said that a broker is not authorized to receive payment for goods sold by him, and that he has no implied authority to rescind a sale, and, without express authority, cannot appoint subagents and turn the business over to them. In *Ewell's Evans, Ag.* \*4, we find a quotation from Chief Justice Abbott in the well-known case of *Baring v. Corrie*, 2 Barn. & Ald. 143, in which the distinction between a broker and a factor is clearly pointed out; and it is there stated that a broker is not trusted with the possession of goods the sale of which is effected through his agency. The same distinction is stated in *Mechem, Ag.* § 13, and the author adds that the broker does not ordinarily have the possession of the property which he may be employed to sell, and that his contracts are always made in the name of his employer. After an examination of numerous authorities, including those above cited, this court, in the case of *Kelly v. Kauffman Milling Co.*, 92 Ga. 105, 18 S. E. 363, reached the conclusion that the authority of a merchandise broker, under his general powers as such, was quite limited, and that he had no authority to rescind a contract of sale, receive from the purchaser of goods the bill of lading indorsed by him, and thus obtain possession of the goods from the carrier, or cause their delivery to a stranger to whom he had transferred the bill of lading. That case, in effect, rules that such a broker as Farrar had no right or power, under the facts disclosed by the record in the present case, to bind the sugar-refining company by an order to the defendants for the delivery of the sugar to H. D. Adams & Co., after its rejection by Rogers, Jones & Moore.

The only remaining question is whether or not, under the local customs or usages prevailing in the city of Macon, Farrar had authority either to receive the goods himself, or to direct to whom they should be delivered, so as to bind his principal. The truth is it would be a strain to hold that, under the evidence submitted, there was in Macon any custom from which any such authority on the part of Farrar could be derived, even if the plaintiff knew and was bound by the customs of trade in that city; but it was not

pretended that it had any knowledge whatever of any local custom or usage prevailing in Macon, or that it made contracts with reference thereto in selling goods in that market. We think it would be exceedingly unjust to hold the plaintiff bound by any custom in the city of Macon of which it was totally ignorant. Customs are quasi laws which have no extraterritorial operation. A custom prevailing in Macon would not proprio vigore, have any force in Atlanta, much less in New Orleans. This being so, no one is bound to take notice of a special custom, as he would be of a general rule of law. Therefore, actual knowledge of the existence and observance of a mere local custom is necessary to charge one who does not come directly within the scope of its operation. A merchant in New Orleans could not be presumed to know the customs of Macon, and, it not being his duty to take notice of the same, he cannot be held to have impliedly contracted with reference to such customs, unless it is affirmatively shown that he had actual knowledge of the same. The Kauffman Case, supra, is also in point upon the particular question with which we are now dealing. It appeared in that case that an effort was made to enlarge the authority of the broker under the general law by proving a local custom or usage prevailing in Atlanta, under which it was claimed that brokers were recognized as representing the persons who employed them to sell in afterwards canceling sales and taking charge of the goods themselves; and it was decided that no such custom would affect the seller unless it was known to him, so that his assent thereto could be reasonably inferred.

So, on the whole, we conclude that, under the facts, the judge erred in rendering a judgment in favor of the defendants. We, of course, recognize the correctness of the principle asserted by counsel for the defendants in error that, when the liability of the defendants became that of mere warehousemen, they were bound only to exercise ordinary diligence in making a delivery of the goods; but we are constrained to hold that they failed to observe even this degree of diligence. Granting that notice to Farrar of the rejection of the consignment by Rogers, Jones & Moore was, in law, equivalent to notice of this fact to the sugar-refining company, it by no means follows that a delivery to Farrar or to his order was authorized. On the contrary, we are decidedly of the opinion that the evidence fails to show any lawful excuse or justification for such delivery, and that ordinary diligence would have required defendants to go at least one step further, and obtain satisfactory evidence that Farrar really had authority to direct the delivery in behalf of the plaintiff, if such was the fact; and, if not, to hold the goods subject to the consignor's order. Judgment reversed.

(116 N. C. 659)

## WALLACE et al. v. DOUGLAS.

(Supreme Court of North Carolina. April 2, 1895.)

## ASSIGNMENT OF SALARIES OF DEPUTY MARSHALS—CLAIMS AGAINST UNITED STATES.

1. Assignments by United States deputy marshals of claims for their services before the amount has been placed to the marshal's credit in the treasury department are not unlawful, as being an assignment of interests in claims against the United States before their allowance, in violation of Rev. St. U. S. § 3477, as such claims are upon the marshal, and not upon the government.

2. Where a draft is accepted payable "when I receive funds to the use of" the drawer, the acceptor is liable when the moneys have been placed to his credit, though he has not taken manual possession thereof.

Appeal from superior court, Iredell county; Bynum, Judge.

Action by Wallace Bros. against R. M. Douglas. From a judgment for plaintiffs, defendant appeals. Affirmed.

For former opinions, see 9 S. E. 453, 10 S. E. 1043, and 19 S. E. 668.

R. M. Douglas, in pro. per. Armfield & Turner, for appellees.

MONTGOMERY, J. This is the fourth time this cause has been before the court. In the report of the first appeal (103 N. C. 19, 9 S. E. 453) can be seen the statement of the contention between the parties.

The referee, at the August term, 1893, of the superior court of Iredell county, made an amended report as follows: "(1) That the defendant, R. M. Douglas, was marshal of the Western district of North Carolina for the years 1878, 1879, 1880, and 1881, and that during said years he had in his employment, as deputy marshals, J. T. Patterson, Jr., W. J. Patterson, and S. P. Graham. (2) That on the 4th day of December, 1879, J. T. Patterson, Jr., drew a draft on defendant in favor of himself for \$200, and indorsed by him on the same day to Blantuo & Dryant, and subsequently purchased by the plaintiffs, who are now the owners thereof, and that on the — day of — 188—, the plaintiffs presented said draft to the defendant for payment, who accepted the same conditionally by writing across the face thereof the following: 'Accepted. Payable when I receive funds to the use of J. T. Patterson, Jr. R. M. Douglas, U. S. Marshal.' (3) That on the 16th day of November, 1881, W. J. Patterson drew a draft on defendant for \$325, payable to himself, and on said day indorsed by him, and accepted by the defendant conditionally by writing across the face thereof the following: 'Accepted. Payable when I receive funds to the use of W. J. Patterson. [Signed] R. M. Douglas, U. S. Marshal.' And that the plaintiffs are now the owners thereof. (4) That neither of the foregoing drafts have been paid, nor any part thereof. (5) That the defendant, Douglas, has had placed to his credit in the treasury depart-



ment of the United States the sum of \$460.76 on claims due him for services of J. T. Patterson, Jr., performed prior to the acceptance of his said draft, and the aforesaid sum of \$460.76 was not subject to any previous order or money advanced by the defendant to J. T. Patterson, Jr., and that the same was placed to his credit and control since the acceptance of said draft. (6) That said defendant, Douglas, has had placed to his credit and control in the treasury department in Washington, D. C., the sum of \$2,274.55, due him for service of W. J. Patterson rendered prior to the acceptance of the aforesaid draft for \$325, and that the same was not subject to any previous draft or moneys advanced by the defendant to the said W. J. Patterson, except a draft for \$100 and one for \$500; and that the aforesaid sum of \$2,274.55 was placed to the credit and control of the defendant since the acceptance of said draft. (7) That the amount of the claim which S. P. Graham traded to the plaintiffs on the 25th day of October, 1881, was \$98.82 for services rendered by said Graham as deputy marshal to the defendant, and sworn to before J. C. Anderson, United States commissioner, on the 20th day of October, 1881, and that the same was presented to defendant by the plaintiffs, which he agreed to pay; and of the aforesaid claim \$95.62 has been placed to the credit and control of the defendant in the treasury department at Washington, D. C., since the acceptance of said claim by defendant, the remainder of said claim having been allowed by the government. That the voucher so traded to the plaintiffs was for services rendered prior to said acceptance and before the same was transferred to the plaintiffs. And the further sum of \$2,858.76 was placed to the defendant's credit and control in the treasury department for services rendered by said Graham, and out of that sum the defendant has received \$900, leaving \$1,958.76 to the credit of the defendant since said acceptance. (8) The referee finds as a further fact that the aforesaid amounts, when added together, make a sum total of \$620.62. From the foregoing facts I find the following conclusions of law: (1) That the amounts of money placed to the credit and control of the defendant in the treasury department at Washington, D. C., as found above, and which are largely in excess of the plaintiffs' claims, are subject to the payment of the drafts sued on to the full amount of the same, with interest thereon at 6 per cent. from the 17th day of July, 1885, at which time this action began, till the 7th day of August, 1893, which amount to \$318.55; added to the principal, make a sum total of \$939.17, which I find as a conclusion of law that the plaintiffs are entitled to judgment against the defendant, and for costs of action. All of which, together with the evidence introduced by both parties, and the rulings as to the competency of evidence, is respectfully submitted this 7th day of August, 1893."

At May term, 1894, when the case was called for hearing, the defendant made the following motions: "That the action be dismissed, for that the complaint and evidence in the case disclose that all the drafts and accounts herein declared on were drawn on claims, or an interest in claims, against the United States, before their allowance, and are therefore null and void under the statutes of the United States. The defendant further moves that the action be dismissed, because the referee does not find that any sums of money have been paid to the defendant." The motions were overruled, and the defendant excepted. The court then proceeded to consider the case on the report and exceptions. The exceptions were not sustained, the findings of the referee were adopted and confirmed, and the following judgment was rendered:

"This action coming on for hearing before Bynum, J., at May term, 1894, of Iredell superior court, upon the report of H. Bingham, Esq., and exceptions thereto, and the decision of the supreme court, passing upon the judgment of Whitaker, J., heretofore rendered at November term, 1893, of this court, the defendant's exceptions 4, 6, 7, 9, and 12, not heretofore passed upon, are overruled, and the opinion of the supreme court overruling exceptions 1, 2, 3, and 11 is hereby adopted. The court adopts the findings of the referee upon his findings of fact, holding as matter of law the records A, B, and C. A being admitted by the supreme court as competent testimony, was sufficient to sustain the findings of fact by the referee in his findings 5, 6, 7, and 8, when plaintiffs moved for judgment against defendant because of his negligence in not collecting said sums due him as marshal for services of plaintiffs' assignors, which the referee finds had been allowed defendant, and placed to his credit and control, which motion was allowed by the court; whereupon, upon motion of plaintiffs' counsel, Messrs. Armfield and Turner, it is considered and adjudged by the court that the plaintiffs Wallace Bros. recover of the defendant R. M. Douglas the sum of \$961.50 with interest on \$620 at six per cent. per annum from May 21, 1894, till paid. It is further considered that the plaintiffs recover of the defendant their costs of this action, to be taxed by the clerk of this court, except the sum of one hundred dollars allowed to H. Bingham, Esq., for taking and stating the account in this case, which is to be divided, the plaintiffs paying \$50 and the defendant paying \$50 thereof, as heretofore adjudged."

To the judgment the defendant excepted, for the reason, as he alleges, that it shows that no funds had been received by the defendant to the use of J. T. Patterson, Jr., W. J. Patterson, or on the account of S. P. Graham, and that, therefore, the plaintiffs are not entitled to any judgment on the claim. He also excepts to the judgment on the ground "that plaintiffs cannot maintain the



action and make any recovery against defendant, for the reason that the alleged causes of action are unlawful, for that the drafts and account declared on are based upon and assign an interest in claims against the United States before the allowance of the claim by the treasury department of the United States in violation of section 3477, Rev. St. U. S." His honor properly refused to dismiss the action for the first cause assigned therefor. The matter of the compensation of the deputy marshals of the defendant is between them and the marshal, and not between them and the government, and therefore the assignment of their claims for compensation against the marshal is not in violation of section 3477 of the Revised Statutes of the United States. *Wallace v. Douglas*, 103 N. C. 19, 9 S. E. 453.

The second cause assigned for the dismissal of the action was properly refused. It was not necessary for the defendant to have received the manual possession of the money which had been placed to his credit and under his control in the treasury department at Washington for the services of his deputies, to fix him with liability on the acceptances which he had made for them. For whatever reason the defendant had failed or refused to make his settlement with the government, his deputies had no concern. Their compensation, though due to them by the defendant, was audited and passed upon by the proper government officials, and put to the credit and under the control of the defendant; and, upon that having been done, there was a receiving by the defendant of the funds. So far as he and his deputies were concerned, the defendant became liable to them, and, as a consequence, to their assignees, the plaintiffs. The exceptions to the judgment cover the same grounds as do the motions to dismiss, and they are not sustained here. There is no error in the judgment, even if it be conceded that the court, in rendering it, gave a wrong reason therefor. No error.

FURCHES, J., having been of counsel, did not sit on the hearing of this case.

(116 N. C. 550)

UNITED STATES NAT. BANK OF NEW YORK v. McNAIR.

(Supreme Court of North Carolina. April 2, 1895.)

BILLS AND NOTES—ACTION BY INDORSEE—SET-OFF.

1. A purchaser of several notes for value and before maturity, without notice of any set-off, who pays one half of their aggregate face value, and gives the indorsee credit for the balance, subject to his check, holds all the notes free from any right of set-off in favor of the maker as to any remaining unpaid, and the fact that he may have recovered on part of the notes does not deprive him of the character of a purchaser for value, so as to let in the right of set-off as to the others.

2. That an indorsee who rediscounts notes

may have paid less than their face value for them does not entitle the maker to any right of set-off to which he would not otherwise be entitled.

Appeal from superior court, New Hanover county; Brown, Judge.

Action by the United States National Bank of New York against S. P. McNair on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the statement on appeal:

The following issues were submitted to the jury: "(1) Is the defendant indebted to the plaintiff? And, if so, in what sum? (2) Is the note sued on in this action subject to the set-off pleaded in the answer?" The plaintiff offered in evidence a note for the sum of \$2,500 dated 21st November, 1891, and due 30 days after date, executed by the defendant to the First National Bank of Wilmington, N. C., indorsed to the plaintiff by said First National Bank before maturity. The defendant denied that the plaintiff was a purchaser for value of the said note. The defendant introduced as witness in his behalf Asa Walker, who testified as follows: "I was corresponding clerk of the First National Bank before its failure. Our correspondent in New York was the plaintiff. The First National Bank repeatedly sent the plaintiff notes for rediscount. The note sued on was indorsed to the plaintiff, and sent on for rediscount, with a batch of other notes aggregating \$17,000 on the 21st day of November, 1891. These notes were all discounted by the plaintiff, and reported in the account current furnished us by the plaintiff under date of 23d of November, 1891." The notes so sent are described in a letter from the plaintiff to the First National Bank dated 23d November, 1891, and marked "Exhibit A." (Said letter put in evidence.) The account current furnished to the First National Bank by the plaintiff for the month of November, 1891, marked "Exhibit B" is also put in evidence by the defendant. Telegram dated 25th November, 1891, signed H. M. Bowden, to the plaintiff, was also put in evidence, marked "Exhibit C." Also telegram from the defendant to the plaintiff, dated 27th November, 1891, marked "Exhibit D," was also put in evidence, the said telegram being a night message. S. P. McNair testified as follows: "When the First National Bank failed, on the 25th day of November, 1891, I had on deposit in said bank, subject to check, \$2,683.01." J. G. Boney was also called as a witness by the defendant, and the defendant offered to prove by this witness that a note of Boney & Harper's, for the sum of \$5,000, was one of the notes in the batch of notes for \$17,000, indorsed by the First National Bank to the plaintiff at the same time with the note in suit, and which was sent on to the plaintiff on the 21st November, 1891, for rediscount, and was discounted; that suit had been brought thereon by the plaintiff, and since suit had been brought they had paid thereon into court, for the use of the plain-

tiff, the sum of \$1,900. This evidence was excluded by the court upon the plaintiff's objection, and the defendant excepted. This was offered as tending to show that the plaintiff had received back a part of the money which it had paid out on these notes and is not a purchaser for value. The defendant offered to prove that there was a note of Morris Bear & Bro. for \$2,000 also rediscounted in the same batch of notes of 23d November, 1891; that said note was sent out for suit, and suit brought, and it was paid. This evidence was also excluded, and the defendant excepted. The court instructed the jury that they should answer the first issue, "\$2,500, with interest at the rate of 8 per cent. per annum from the 24th day of December, 1891, till paid," and answer the second issue, "No." The jury having returned their verdict in accordance with his honor's instructions, judgment was rendered as stated in the record. The defendant moved for a new trial, and assigned the following errors: "(1) For that his honor excluded all the evidence tending to show that the plaintiff had received back part of the money it had actually paid out on the discount of the notes, and was not a purchaser for value. (Motion overruled. Appeal.) The defendant assigned as error on appeal the excluding by the court of all the testimony tending to show that the plaintiff had received back a part of the money which it had actually paid out on the batch of notes referred to, and was not a purchaser for value."

#### EXHIBIT A.

"First National Bank of Wilmington.

"New York, 23d November, 1891.

"Wm. S. O'B. Robinson, Receiver. H. M. B. &c., Wilmington, N. C.: We have this day discounted the following notes contained in your favor of the 21st inst., and proceeds of same placed to your credit, as follows:

Boney & Harper, due 12th Dec. '91.....	\$5,000	\$15 83
McNair & Pearsall, due 22d Dec. '91.....	5,000	24 17
M. Bear & Bro., due 24th Dec. '91.....	2,000	10 38
S. P. McNair, due 24th Dec. '91.....	2,500	12 92
B. F. Mitchell & Son, due 23d Dec. '91.....	2,500	25 42

Amount of notes.....	\$17,000
Less discount at 6 per cent.....	88 67

Proceeds.....\$16,911 33

"John J. McAuliffe."

George Rountree, for appellant. S. C. Weill and Shepherd & Busbee, for appellee.

CLARK, J. The familiar general rule is that an indorsee of negotiable paper for value before maturity, without notice of any infirmity, takes it clear of all equities and defenses between antecedent parties, and is, of course, entitled to recover the full amount of the same, according to its tenor. The exceptions to this rule are: (1) When by statute the paper is void in whole or in part from its inception, as for usury. In such cases it is void to the same extent into whosoever hands it may pass, even if acquired before maturity, for value and without notice, and the sole remedy of the hold-

er for the deficiency is against the indorser. Ward v. Sugg, 113 N. C. 489, 18 S. E. 717, and cases there cited. (2) Where the original consideration of the paper is illegal or fraudulent, or it is taken as collateral security, the right of recovery is restricted to the consideration actually paid by the indorsee before notice of the fraud (Dresser v. Construction Co., 93 U. S. 92), or the amount of the debt to which it is collateral. Kerr v. Cowen, 17 N. C. 356. But the exception does not extend further, not even to cases where the note was issued without any consideration, though it may be purchased by the indorsee for less than its face. Daniels v. Wilson, 21 Minn. 530. These propositions are also sustained (among a wealth of authorities) by 1 Daniel, Neg. Inst. (4th Ed.) §§ 758, 758b; Allaire v. Hartshorne, 21 N. J. Law, 665; Stalker v. McDonald, 6 Hill, 93; Edwards v. Jones, 7 Car. & P. 633; Williams v. Huntington (Md.) 13 Atl. 336; Cromwell v. County of Sac, 96 U. S. 51; Hubbard v. Chapin, 2 Allen, 328. Still less does the exception extend to a case like the present, in which there was neither fraud nor illegality, and where the note was executed for full consideration, and indorsed to the plaintiff before maturity without notice of set-off, and upon payment of half the purchase money, credit for the balance being entered on the books, subject to check by the indorser. To so extend the exception would not only be without precedent, but would impair the freedom of transfer and negotiability which is the distinctive feature of commercial paper, by means of which so large a part of the business of the world is transacted. Could the maker, after rediscount of this paper, by notifying the indorsee that he held a set-off against his note, have prevented the indorser from having its checks for the unpaid balance paid by the indorsee? And wherein does the indorser's insolvency extend the maker's rights in this regard? Has not the receiver the same right to check out this balance that the indorser would have had, if it had remained solvent? But where there is fraud it is different, and the indorsee could not have paid the indorser's check for the balance after notice. Indeed, the same contention as in this case was presented and passed on in Bank v. McNair, 114 N. C. 335, 19 S. E. 361, which concerned this same transaction, and is between the same plaintiff and one of the defendants in that action.

There were five notes, aggregating \$17,000, indorsed at the same time by the First National Bank of Wilmington to the plaintiff and rediscounted by it. In the trial of this action, which is brought on one of said notes, the defendant offered evidence to show that the plaintiff had recovered on two others of this batch of notes \$3,900, "as tending to show that the plaintiff had recovered back a part of the money which it had paid out on these notes, and is not a purchaser for

value." As the plaintiff paid \$3,102 in cash on the purchase of said notes, besides giving the credit for the balance (after deducting discount), the evidence would not, in any view, have shown that the plaintiff was not still a purchaser for value. If there is part payment, the title to the paper passes to the purchaser, when there is no fraud, while if there is fraud it does not, and the indorsee is only entitled in equity to the payments he has made before notice of the fraud. The plaintiff has a right, as such purchaser, to collect in full all five of the notes, in which event it will owe the First National Bank the \$8,808 placed to its credit by reason of the balance due on the purchase of said five notes, but, should there be a deficiency in collecting the full amount of all of the notes, the plaintiff might offset such deficiency upon the \$8,808 to the credit of the Wilmington bank; for, by the maturity of the notes without payment, the plaintiff holds a liability against the First National Bank of Wilmington for \$17,000 and interest. The \$8,102 in cash and the credit of \$8,808 were on no particular note, but on the rediscount value of all five. There is no principle of law that the collection of the notes the plaintiff may be persuaded to sue on first will exonerate the other notes, and enable the makers of the other notes thereupon to plead against the indorsee any set-offs they may have against the payee. Such rule will make the rights of parties depend, not upon the equal and impartial application of the principles of law to all five notes, but upon the election of the indorsee as to which notes he will be pleased to exhaust first. The plaintiff holds all the notes without liability for set-offs, and any surplus it may collect over and above the cash paid the Wilmington bank, discount and interest added, will go to the First National Bank of Wilmington, to be disbursed in the settlement of its liabilities. The unpaid purchase money is due the indorser, and not the makers of the note. As to such unpaid balance, there is the right of set-off as between the indorsee and indorser, but not between the indorsee and maker, unless the note is void, illegal, or fraudulent. The hardship of the defendant in this case, in not obtaining his set-off, is no greater than in any other case where a note (as to which there is no fraud or illegality) is assigned before maturity and for value and without notice, though the maker holds set-offs against it. It can make no possible difference to the maker whether the indorsee paid full value or less, or whether the payment was all cash or partly credit. If the note is not void, illegal, or fraudulent, the indorsee who takes it for value, before maturity, and without notice, gets the title free from all equities, no matter how much he pays. On the other hand, though he pays full value in cash, he would still be liable to equities if he did not take before maturity, for value, and without notice. These are the three requirements to protect the holder of

negotiable paper, and there is no precedent or reason to add as a fourth that the amount must be paid in cash, to the full amount agreed to be paid. No error.

(116 N. C. 211)

LEAVELL v. WESTERN UNION TEL. CO.

(Supreme Court of North Carolina. April 2, 1895.)

TELEGRAPH COMPANIES—ILLEGAL RATES—ILLEGAL DISCRIMINATION.

1. Where a telegraph company has a continuous line between two points in the state, it cannot defend an action for violation of the rate prescribed by the commissioners for the transmission of a message sent over the lines of one company, on the ground that the message was in fact sent over the lines of two companies. *Railroad Com'rs v. W. U. Tel. Co.*, 18 S. E. 389, 113 N. C. 213, affirmed.

2. Nor is it any defense that the part of the defendant's line between the points where the message was sent by the other company was fully occupied by the work it had contracted to do for a railroad company, as the contract with the railroad, giving it a preference to the exclusion of others, is an illegal discrimination.

Appeal from board of railroad commission.

Action upon relation of R. E. Leavell against the Western Union Telegraph Company for violation of the rate prescribed by the railroad commission of North Carolina. From a judgment of the railroad commission against the defendant, defendant appeals. Affirmed.

Robert Stiles, for appellant. The Attorney General, for appellee.

CLARK, J. In *Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 16 S. E. 393, this court affirmed the constitutionality of the act (chapter 320, Acts 1891) establishing the railroad and telegraph commission. In *Mayo v. Telegraph Co.*, 112 N. C. 343, 16 S. E. 1006, it sustained the power of such commission, under section 26 of said act, to establish rates for telegraph companies. In *Railroad Com'rs v. Western Union Tel. Co.* (Albea's Case) 113 N. C. 213, 18 S. E. 389, the court held that telegraphic messages transmitted by a company from and to points in this state, although traversing another state in the route, do not constitute interstate commerce, and are subject to the tariff regulation of the commission. In this it followed the unanimous opinion of the supreme court of the United States, delivered by Fuller, C. J., in *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806. To the same purport, *Campbell v. Railroad Co.*, 86 Iowa, 587, 53 N. W. 351. In the present case the commission find as a fact that "the defendant has a continuous line by which messages may be transmitted from Wilson to Edenton and other adjacent points in North Carolina, but this line traverses a part of the state of Virginia, passing through the city of Norfolk"; and it properly holds, upon the evidence, "that the

telegraph office at Edenton is under the control of the defendant, and the operator, though employed by the railroad company, is the agent and operator of the defendant." It necessarily follows from this state of facts that, as the defendant could have sent the message the whole distance over its own line, it cannot be heard to say that it did not do what it ought to have done, and thus collect 50 cents for the message, instead of 25, as allowed by the commission tariff. The defense set up, that in fact it only carried the message to Norfolk, and then paid another company to forward it to Edenton, cannot be regarded when it might itself have completed the delivery of the message. The defendant seeks to excuse itself on the plea that it has only one wire to Edenton, and that this is fully occupied at that office by the work it does for the railroad company. But it is the duty of the telegraph company to have sufficient facilities to transact all the business offered to it for all points at which it has offices. If the press of business offered is so great that one wire or one operator at a point is not sufficient, it is the duty of the company to add another wire or an additional employé. It is not a mere private business, but a public duty, which the defendants, by their franchise, are authorized to discharge. It is further to be noticed that in giving to the railroad company the preference in the use of their line to Edenton, while at other points, as Moyock, Centreville, and Hertford, on the same line, the public is admitted to the use of the wire, the defendant is making a forbidden and illegal discrimination in favor of one customer, and against the public at large, as was intimated in *Albea's Case*, 113 N. C., on page 226, 18 S. E. 389. The findings of fact and evidence are fuller, and present a somewhat different and stronger case against the defendant, than in *Albea's Case*. By Section 11 of the defendant's contract with the railroad company, the defendant remains owner of the telegraph line to Edenton, N. C., and its belongings, which are to remain "part of its general telegraph system," and "to be controlled and regulated by the telegraph company." Section 3 of the contract gives the railroad messages precedence over commercial business, but stipulates that, when railroad business shall require the exclusive use of one wire, the telegraph company shall, on 60 days' notice, furnish material for a second wire, which second wire shall be used for railroad business exclusively, and such commercial business as can be done without interfering with railroad business. Section 6 provided that, where the railroad company shall open offices, the operators, "acting as agents of the telegraph company," shall receive such commercial and public telegrams as may be offered, collecting rates prescribed by the telegraph com-

pany, and render monthly statements, and pay over the receipts to the telegraph company. Section 7 provides that, whenever the volume of business at any point justifies it, the telegraph company shall put in an additional operator. It will be thus seen that the line to Edenton is an integral part of the defendant's general telegraph system. It is only by virtue of its franchise as a telegraph company that it can operate its line to Edenton at all. It cannot discriminate at that point in favor of or against any customer. It cannot subtract itself from obedience to the rates prescribed by the authority of the state, acting through the commission, by a contract giving one customer—the railroad—preference in business, and pleading that such business occupies the only wire it has. The discrimination is itself illegal. Besides, if it were not, the small cost of an additional wire, which it is common knowledge does not exceed \$10 per mile, furnishes no ground to exempt the defendant from furnishing the additional facility to do the business for all. The charge of a double rate between Edenton and other points in North Carolina is a far heavier imposition upon the public than the cost of the additional wire to defendant, and is just the kind of burden and discrimination which the commission was established to prevent. In *Albea's Case*, supra, no commercial message was tendered, and the point now decided was not presented by the record. The ruling of the commission is in all respects affirmed.

(116 N. C. 670)

**HARTSELL v. COLEMAN et al.**

(Supreme Court of North Carolina. April 2, 1895.)

**DEEDS—VAGUE DESCRIPTION—EXTRANEOUS EVIDENCE.**

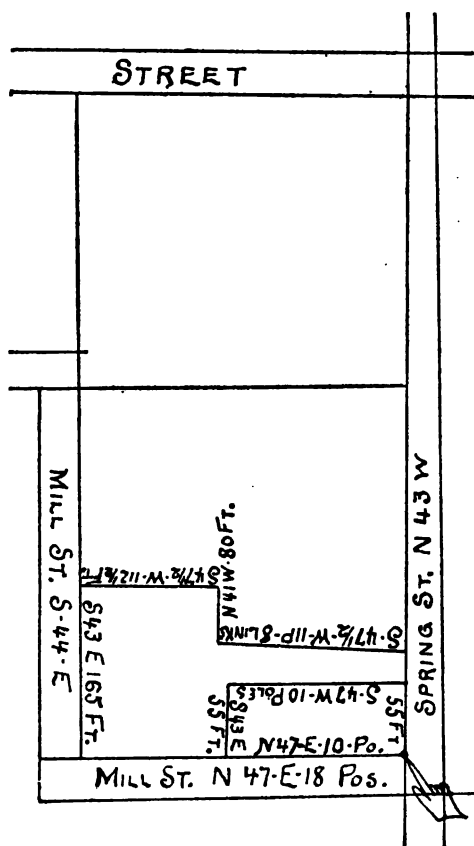
A description of lands in a deed as "lying on the west side of Spring street, and north of Mill street," followed by courses and distances from "a stone" on Spring street around a parallelogram to the place of beginning, without indicating whether the starting point is at the intersection of Spring and Mill streets, or at a more remote point, is not so vague and uncertain on its face as to require the exclusion of proof aliunde to locate the land by fitting the description to the lot claimed under the deed.

Appeal from superior court, Cabarrus county; Boykin, Judge.

Action by J. L. Hartsell against W. C. Coleman and others for the possession of land. From a judgment for plaintiff, defendant Coleman appeals. Reversed.

The defendant, in order to meet the prima facie case made by the plaintiff in an action for title and possession of land, introduced two mesne conveyances, which connected him by an older deed with the grantor of the plaintiff, and proposed to offer testimony to locate the calls of said conveyances so as to cover his possession. The description in the deeds was as follows: "All

that lot of land situated in the county of Cabarrus, in the state of North Carolina, adjoining the lands of Dr. John Fink, in the town of Concord, and others, and bounded as follows: Lying on the west side of Spring street, and north of Mill street. Beginning at a stone on Spring street, and runs N., 43 W., 55 feet, to a stone on Spring street; then S., 47 W., 10 poles, to a stone; then S., 43 E., 55 feet, to a stone; then N., 47 E., 10 poles, to the beginning,—containing 38 square rods, more or less."



W. G. Means, for appellant. W. J. Montgomery, for appellee.

AVERY, J. The words, "lying on the west side of Spring street, and north of Mill street," might be interpreted as meaning that the lot is to be located immediately west, or indefinitely, but not very remotely, west of it. If it is not the usual interpretation given to them, and therefore the proper construction, it is certainly not erroneous, if the defendant could proceed upon that theory, and prove to the satisfaction of a jury that such a hypothesis would enable him to fit the description to the lot claimed by him, so as to bring all of the descriptive expressions into harmony, to hold that it would be competent for him to do so. If we can conceive of a

reasonable theory upon which pertinent parol evidence might subserve this purpose, the opportunity should have been given to the defendant to adduce such proof to support it. Supposing that the intention of the parties was that the deed should be interpreted as if the word "side" had been inserted after "north," it would follow necessarily that the beginning corner must be located at the intersection. This must be true, because it would be impossible otherwise to run the first call, N., 43 W., 55 feet, from one point to another on Spring street, and thence S., 47 W., 10 poles, to a stone; then S., 43 E., 55 feet, to a stone; then N., 47 E., 10 poles, to the beginning,—and still leave Mill street on the immediate south of the parallelogram (which, as a mathematical certainty, must be formed), unless such were the relative positions of the street and lot. We might have supposed, for the purposes of this case, that there was an intersection of the streets, even if it had not been admitted by counsel; and if, by running from it, the location should prove to be in perfect accord with the other parts of the description, as, for instance, by finding that the parallelogram would be bounded on the north and west by lands owned at the date of the deed by Dr. John Fink, and on the east and south by the two streets, there would be abundant evidence to go to the jury to fit the description to the thing. *Edwards v. Bowden*, 99 N. C. 80, 5 S. E. 283. The question being whether the description was too vague and uncertain, upon its face, to warrant the admission of proof allunde to locate it, we have endeavored to discard from our minds the statements of counsel as to what the testimony would have been under a different ruling. The map, with explanations, must be treated as if it had been drawn by a surveyor acting upon a theory, and making a possible location out of what appeared upon the face of the deeds. Testing the accuracy of the ruling of the court below in this way, we think there was error in holding that the description could not have been fitted to the land upon any reasonable hypothesis that could be fairly deduced from it. There was error which entitles the defendant to a new trial.

(116 N. C. 451)

GLENN et al. v. WINSTEAD.

(Supreme Court of North Carolina. April 2, 1895.)

INTERNAL REVENUE—ILLEGAL DISTILLING—FORFEITURE.

1. Rev. St. U. S. § 3281, provides for the forfeiture by a distiller, maintaining a distillery without giving bond, or with intent to defraud the government, of all his right, title, and interest in the land on which the distillery is maintained, and for the forfeiture of all the right, title, and interest of every person who has suffered or permitted the distillery to be there carried on. *Held*, that a sale, in proceedings in rem, of land forfeited by the distiller, does

not pass the title of a mortgagee, without whose knowledge the distillery was maintained.

2. The mere erection of a house on land, and its use as a distillery, is not, as a matter of law, notice to a mortgagee that a distillery is being maintained thereon, so as to render his interest liable to forfeiture for violation by the distiller of the revenue laws.

Appeal from superior court, Person county; Hoke, Judge.

Action by Mary A. Glenn and husband against C. S. Winstead to recover possession of land. From a judgment for defendant, plaintiffs appeal. Affirmed.

Shepherd & Busbee and Merritt & Bryant, for appellants. J. W. Graham, W. W. Kitchin, and A. L. Brooks, for appellee.

EVERY, J. Whether a distiller incurs liability to forfeiture by failure to pay taxes to the government, by carrying on the business without bond or with intent to defraud the government, or by conducting a licensed business contrary to law or to the regulations prescribed by the government, it seems to be settled that in none of these instances does the sale of the premises on which the distillery is located, under a decree of a circuit court of the United States in a proceeding in rem, pass the title of a mortgagee under a mortgage previously made, who has not permitted or connived at the illicit distillery. *U. S. v. Stowell*, 133 U. S. 1, 10 Sup. Ct. 244; *Mansfield v. Refining Co.*, 135 U. S. 326, 10 Sup. Ct. 825. As a rule, only the mortgagor's equity of redemption passes by such a sale under a judgment in rem, or by virtue of any decree rendered in a proceeding in which there were no parties other than the mortgagor. *Mansfield v. Refining Co.*, supra. But the court instructed the jury, in effect, that the purchaser under the decree of the circuit court acquired the interest of the mortgagor, and of all other claimants "who had knowingly permitted a distillery to be operated when they had the right to control the matter," and it seems to us that the instruction given is in strict accord with the rule laid down in *U. S. v. Stowell*, 133 U. S. 14, 15, 10 Sup. Ct. 244. After referring to the statutes, Justice Gray, delivering the opinion of the court, said: "Congress has thus clearly manifested its intention that the forfeiture of land and buildings shall not reach beyond the right, title, and interest of the distiller, or of such other persons as have consented to the carrying on of the business of a distiller upon the premises. \* \* \* The intention of congress that no interest in land and business shall be forfeited which does not belong to some one who has participated in or consented to the carrying on of the business of distilling therein is further manifested in the provision of section 3262 of the Revised Statutes, which directs that 'no bond of a distiller shall be approved unless he is the

owner in fee unincumbered by any mortgage, judgment or other lien of the lot of land on which the distillery is located, or unless he files with the collector, in connection with his notice, the written consent of the owner of the fee or any mortgage or judgment creditor or other person having a lien thereon, duly acknowledged, that the premises may be used for the purpose of distilling spirits subject to the provisions, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such mortgage, judgment or other incumbrance, and that in case of the forfeiture of the distillery premises or any part thereof, the title of the same shall vest in the United States, discharged from such mortgage, judgment or other incumbrance.' The section clearly indicates that the interest of an innocent mortgagee or other person having a lien on the lot or tract of land on which the distillery is situated would not otherwise be included in a forfeiture for acts of the owner only." The court in the same opinion subsequently construe section 3258 (making it a criminal offense to have "in possession any still, etc., set up") and section 3205 (in reference to sales of land for taxes), in connection with section 3281,<sup>1</sup> to mean that the sale in either case passes to the purchaser only the right, title, and interest of the offender. The law does not impute to a mortgagee, without any proof whatever, a guilty participation in the fraud of a mortgagor, and declare his interest forfeited, because the collector may have failed to secure the assent of all holders of liens, as he is required by law to do, before permitting the distiller to begin operations on the land. Where this precautionary requirement of the statute has not for any reason been complied with, and where at the same time there has been a connivance at or a less formal assent to the operations of the distiller on the part of the holder of the lien, it would seem to have been the purpose of congress that the rights of the government should be protected by the proceeding in equity provided for in section 3208 of the Revised Statutes, whereby all persons, other than distillers, whose interests have been subjected by their conduct to forfeiture, might be concluded by the decree of condemnation. Whatever may be the rule where proceedings in rem are instituted against a vessel, the proceeding applicable to seizures of land for violation of the internal revenue laws is embodied in the statutes, and the supreme court of the

<sup>1</sup> Rev. St. U. S. § 3281, provides for the forfeiture by a distiller, maintaining a distill, without giving bond or with intent to defraud the government of all his right, title, or interest in the land on which the distill is maintained, and also for the forfeiture of all the right, title, and interest of every person who has suffered or permitted the distill to be there carried on.

United States have declared the intent of congress to have been as we have already stated. The question presented is one of construction only, and we have been anticipated in passing upon it by the court that is the final arbiter in all controversies as to the meaning of the acts of congress.

If the authorities cited did not warrant us in holding that there was no error in the instructions given or the rulings made by the court below (as to the effect of the judgment in rem) of which the plaintiff can justly complain, we might add that, upon reasoning which by analogy supports that view of the law, it has been repeatedly held that sales of land, under the acts providing for the confiscation of property for participation in the Rebellion, passed only the right, title, and interest of the offender for his life, and not that acquired by any person under a mortgage executed "previously to his offense." *U. S. v. Dunnington*, 146 U. S. 346, 13 Sup. Ct. 79; *Shields v. Schiff*, 124 U. S. 351, 8 Sup. Ct. 510; *Avegno v. Scharnedt*, 113 U. S. 293, 5 Sup. Ct. 487. Conceding that the second assignment of error was taken in apt time, we cannot conceive how it can affect this controversy. According to the testimony offered for the plaintiff, the building for the distillery "was commenced on the still-house lot in the fall of 1878 and the spring of 1879." The defendant offered testimony tending to show that it was completed in the summer of 1879, and no distilling was done until late in the summer of 1879. While it was declared in *U. S. v. Stowell*, supra, that the government was not embarrassed by any rule requiring revenue laws imposing forfeitures to be construed like other penal statutes, it was not intended to go to the other extreme, and construe them, in the face of the express provisions referred to in that case, to mean that the mere erection of a house upon a tract of land or its use for the purpose of distilling should be constructive notice to the owner or to any subsequent purchaser of the superior right of the United States to insist upon its forfeiture and condemnation by a proceeding in rem, without actual notice to the owner. There is no principle upon which we would be prepared to admit that the connivance or guilty participation of an owner or mortgagee in a fraud upon the government should be inferred from any testimony that constitutes sufficient notice to a subsequent purchaser of an equitable claim. But the supreme court of the United States, in the case last cited, manifestly meant to construe the statutes as bringing under the same condemnation as the distiller only those holders of liens who have actual notice of the commission of the offense, and refrained from suppressing the illicit conduct when they had the power to do so. For the reasons given, we hold that the judgment of the court below must be affirmed.

(116 N. C. 606)

## SINCLAIR v. HICKS et al.

(Supreme Court of North Carolina. March 26, 1895.)

## CONTRACT—SUPPLYING OMISSIONS.

Where a clause in a contract, having been left unfinished, is meaningless, the court will not supply supposed omissions to give it legal effect.

Appeal from superior court, Cumberland county; Brown, Judge.

Action by N. A. Sinclair, assignee, against R. W. Hicks and another. From a judgment for plaintiff, defendants appeal. Affirmed.

A jury trial was waived, and the court found the facts. The controversy involves the interpretation to be given to the last sentence of a contract, marked "Exhibit A," construed with another contemporaneous contract. If the effect of said sentence was to discharge R. W. Hicks from liability to the plaintiff, who is the assignee of the payee therein mentioned, as the indorser on a note for \$625, then the plaintiff is not entitled to recover; otherwise he is entitled to recover. The two contracts entered into contemporaneously are as follows:

## "Exhibit A.

"North Carolina, Cumberland County. Whereas, M. McD. Williams owes R. W. Hicks the sum of \$2,765.60, for payment of which said Hicks holds as collateral security a mortgage from W. J. McDiarmid and A. K. McDiarmid and their wives to M. McD. Williams, the same having been transferred for that purpose by said Williams to said Hicks, which mortgage covers the lands in Cumberland and Harnett counties, North Carolina, known as the 'McDiarmid Lands' (about 13,000 acres), and the Cameron tract of 146 acres, and is a second mortgage on said lands, made in December, 1890, and duly recorded in Cumberland and Harnett counties; and whereas, said M. McD. Williams, as assignee of said W. J. McDiarmid & Bro., and conducting the assigned business and managing the assigned property during the year 1891, by an agreement of the creditors, has incurred liabilities, as appears by his statements of account; and whereas, R. W. Hicks, J. Y. Gossler, and M. McD. Williams have this day entered into an agreement for an arbitration, etc., of an account which M. McD. Williams claims against the property lately in his hands as assignee of W. J. McDiarmid & Bro., and incurred, as he claims, under the agreement of the creditors of W. J. McDiarmid & Bro.; and whereas, R. W. Hicks may become one of the purchasers of the assigned property of W. J. McDiarmid & Bro. at the sales to be made this day by J. D. Williams, as first mortgagee of said McDiarmid lands, and by Joseph G. Brown, trustee, of the Mill tract, containing five and eight-tenths acres, and the machinery and improvements thereon, located at Spout Springs, N. C., and also a part of said assigned estate, in the event of which purchase

said R. W. Hicks' claim of \$2,765.69 against said M. McD. Williams would become liable to scale in proportion as said R. W. Hicks' claim represented the purchase money of the whole of said assigned property; and in case the indebtedness incurred by said M. McD. Williams as assignee of W. J. McDiarmid & Bro., and by virtue of the agreement between said Williams and the creditors of said W. J. McDiarmid & Bro., should finally be decided to be proper, correct, and a charge against the assigned estate, and, in any event, would be subject to the individual claim of about \$2,700.00 of M. McD. Williams, to be passed upon, audited, and finally determined and settled in accordance with the terms of an agreement of this date between R. W. Hicks, J. Y. Gossler, and said M. McD. Williams, which agreement is hereby referred to in further explanation of this agreement, and is made a part thereof so far as concerns said R. W. Hicks and M. McD. Williams; and whereas, it is the desire of M. McD. Williams that his indebtedness to said R. W. Hicks, collaterally secured by said mortgage from W. J. McDiarmid & Bro. to said M. McD. Williams, shall be fully paid, without any scale or offset, and, in case said Hicks should become one of the purchasers, that said sum of \$2,765.69, due him by said Williams, shall be allowed as cash on said purchase, and without scale or offset in any event: Now, therefore, in consideration of the premises, and the further consideration of ten dollars, in hand paid by R. W. Hicks to M. McD. Williams, the receipt of which is hereby acknowledged, the said M. McD. Williams agrees, covenants, and promises with and to said R. W. Hicks that in any event said \$2,765.69 shall be without scale or offset of any kind, and that he will protect and save said Hicks harmless as to any scale or offset on said sum, and that any note or other paper signed or indorsed by R. W. Hicks upon the coming in of the award of the arbitrators or by reason of any claims against said assigned property contracted by M. McD. Williams as assignee of W. J. McDiarmid & Bro. and agent of the creditors under said contract of December, 1890.

M. McD. Williams. [Seal.]

"Witness: H. McD. Robinson."

"Exhibit B.

"Articles of agreement made and entered into this day by and between J. Y. Gossler, Gossler & Co., R. W. Hicks, and M. McD. Williams. Whereas, M. McD. Williams is indebted to R. W. Hicks in the sum of \$2,765.69, for which he holds as collateral security a mortgage by W. J. McDiarmid and Brother to said Williams, and has agreed to assign to said Hicks a sufficient interest in amount of said mortgage to liquidate said debt; and whereas, there will then be a balance of about \$862.61 due to M. McD. Williams on the said mortgage; and whereas, there are matters of difference between said

Gossler and said Williams, and between the creditors of the said W. J. McDiarmid and Brother and the said Williams: Now, therefore, the said Gossler and Company and John Y. Gossler and the said Hicks agree with the said Williams: (1) That if the said Gossler and Hicks, or any person for them, shall purchase and take deeds for the properties of W. J. McDiarmid and Brother, at the sales advertised for this day at Spout Springs, they will, on or before January 9th, 1892, pay to the said Williams the sum of about \$862.61, and he will thereupon assign and transfer the said balance due upon his said mortgage to the said Gossler and Hicks. (2) That all matters of difference between the said Gossler and Hicks and the said Williams and the creditors of W. J. McDiarmid and Brother and the said Williams shall be at once submitted to the arbitration of J. C. MacRae and N. A. Sinclair, they, in advance, to select an umpire; and the award of a majority shall be final. This upon the condition that the said Gossler and Hicks, or some person for them, shall purchase and take deeds for the properties to be sold this day. (3) The said Gossler and Hicks and the said Gossler and Company agree that the corporation to be formed shall immediately, upon the coming in of the award, give to the said Williams four notes for the amount of the award of equal amounts, payable in 2, 4, 6, and 8 months after their date, with interest at the rate of 8 per cent.; one of the said notes to be indorsed by said Hicks and the others by said Gossler. Thereupon the said Williams is to assign to the said Gossler and Hicks his claim and interest under the said award. (4) Said Williams agrees to sell at public sale any and all properties not included in the said J. D. Williams mortgages and the Brown deeds of trust at once. In the meantime and at once the said Williams is to deliver to the said Gossler and Hicks all property and assets of every description belonging to the said trust estate of McDiarmid & Brother, if they become the purchasers as aforesaid. This is to include all the property included in the J. D. Williams mortgages and the Brown deeds of trust, and all property and assets of the said trust estate not included in the said Williams mortgages and the Brown deed of trust. The said Gossler and Hicks agree that the property which the said Williams shall advertise for sale as herein provided shall be forthcoming at the sale of the said Williams. The said Gossler & Hicks shall in the meantime hold the same in trust for said Williams until the day of sale. Dated January 2nd, 1892.

"Jno. Y. Gossler. [Seal.]

"Witnesses: Gossler & Co.

"H. McD. Robinson. R. W. Hicks. [Seal.]

"N. A. Sinclair. M. McD. Williams. [Seal.]

"M. McD. Williams, as assignee, agrees at once to execute to Gossler and Hicks, if they become the purchasers, quitclaim deeds for all the properties."



The conclusions of law were as follows: "(1) That no evidence has been offered showing any breach of the covenant contained in last 17 lines (or last clause) in the paper writing marked 'Exhibit A.' (2) That said paper writing does not convey to Hicks the award of the arbitrators for \$2,500 or any part of it in favor of M. McD. Williams. (3) That if the paper marked 'Exhibit A' is the basis of any demand in favor of R. W. Hicks against M. McD. Williams, such claim should, under section 2 of the agreement (Exhibit B) to arbitrate, have been submitted to the arbitrators. (4) That the interest of said Williams in the award shall be assigned to Gossler & Hicks, as provided in section 3 of the agreement (Exhibit B), upon payment of the sum of \$625, with 8 per cent. interest from July 2, 1892, by the said corporation. (5) That the plaintiff is entitled to receive and recover the said \$625 and 8 per cent. interest from said date from the defendant corporation, and to recover the same from the defendant the Consolidated Lumber Company, and the said Hicks as surety or indorser. (6) That plaintiff recover costs to be taxed by clerk." All of the other facts found by the court below which are material are embodied in the opinion. The defendants appealed from the judgment rendered.

MacRae & Day and H. McD. Robinson, for appellants. N. A. Sinclair and Shepherd & Busbee, for appellee.

AVERY, J. The award of the arbitrators declares that the plaintiff is entitled to receive of Gossler & Co. and R. W. Hicks the sum of \$2,500 in full of all claims and demands whatever, and it is agreed that by a subsequent arrangement the defendant the Consolidated Lumber Company became responsible for the payment of the said amount awarded to the rightful claimant, and has paid all except the sum of \$625, evidenced by a note indorsed by the defendant R. W. Hicks, and which he contends was not due to the plaintiff's assignor, Williams, under a contract (marked "Exhibit A") entered into by said Williams contemporaneously with the signing of another agreement, which is to be construed with it, and in which, in addition to the mutual stipulations to submit to arbitration, Williams contracted to assign a sufficient portion of a debt secured to him by a certain mortgage executed by W. J. McDiarmid & Bro. to satisfy a debt of \$2,765.69, due to R. W. Hicks from Williams individually. Williams had been appointed assignee by McDiarmid & Bro., and had subsequently executed an assignment to plaintiff for the benefit of his own creditors. By the terms of the last-named contract, such sum as should be awarded to Williams was to be secured by four notes in equal amounts, three of which were to be indorsed by Gossler and one by R. W. Hicks. It is contended for the defendants that Williams

agreed to hold Hicks harmless in advance as to any apparent liability he might incur by indorsing a note for one-fourth of the amount of the award (\$625), which is the subject of the controversy, to Williams. The language of the concluding portion of the instrument, to which it is insisted this construction must be given, is as follows: "Now, therefore, in consideration of the premises, and the further consideration of \$10 in hand paid by R. W. Hicks to M. McD. Williams, the receipt of which is hereby acknowledged, the said Williams agrees, covenants, and promises with and to said Hicks that in any event said \$2,765.69 shall be without scale or offset of any kind, and that he will protect and save said Hicks harmless as to any scale or offset on said sum, and that any note or other paper signed or indorsed by Hicks upon the coming in of the award of the arbitrators, or by reason of any claims against said assigned property, contracted by Williams as assignee of McDiarmid & Bro. and agent of the creditors under said contract of December, 1890," signed by M. McD. Williams, and witnessed by H. McD. Robinson. It is admitted that the debt of \$2,765.69 has been realized by Hicks out of the proceeds of the claim against McDiarmid & Bro., which had been assigned to him by Williams, and therefore the contract to hold Hicks harmless as to that has been performed. Whatever the parties may have intended for the draftsman to incorporate in reference to the note to be indorsed by Hicks, it is evident that in the hurry of preparing to embark on a train a sentence was left incomplete, and the latter part of it, as it was written, is not sufficient to limit his liability in any way. Courts may decide between one of two possible constructions of ambiguous terms, and may resort sometimes to pertinent extrinsic evidence, to arrive at a proper interpretation; but they are not at liberty to supply a supposed ellipsis in order to give legal effect to language that, without addition or alteration, would be meaningless. It is the duty of the parties to express intelligibly, and it is the office of the court to enforce when so expressed, the intent of two or more minds that constitutes the contract. The judgment of the court below is affirmed.

(116 N. C. 12)

SPRINGER et al. v. SHAVENDER et al.

(Supreme Court of North Carolina. March 19, 1895.)

COLLATERAL ATTACK.—SALE OF DECEDENT'S LANDS  
—HARMLESS ERROR.

1. An administrator's sale of lands is void for want of jurisdiction, and may be impeached in a collateral action, where the children of the owner, under a misapprehension of the facts, admitted the allegation of the petition, that he was dead, and submitted to the decree, when such owner was in fact living at the date of the decree and sale.

2. The administrator's sale upon which plaintiffs base their title being void, the sufficiency of the description in either plaintiffs' or defendants' deeds, under which they deraign title, and the competency of the evidence, were immaterial.

Appeal from superior court, Beaufort county; Armfield, Judge.

Action by S. W. and E. D. Springer against William Shavender and others. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

Civil action for trespass in cutting and removing timber from land, tried at spring term, 1894, of Beaufort superior court, before Armfield, Judge. The issues submitted and the responses to them were as follows: "(1) Was George W. Dixon dead at the time of the institution of the proceedings by his alleged administrator to sell his lands and at the time of the sale thereunder? Answer. Living. (2) Are the plaintiffs the owners of the timber standing upon the lands described in the complaint? Answer. No. (3) Did the defendants unlawfully take possession of the said timber and convert it to their own use? Answer. No. (4) What is the value of the said timber? Answer. (5) Did the defendants unlawfully take possession of the logs cut from the lands by plaintiffs? Answer. No. (6) If so, what damage have the plaintiffs sustained thereby? Answer. None. (7) Is the defendant William M. Shavender the owner of the lands described in the complaint? Answer. Yes; the Mallison land, not Sear's land. (8) Did the plaintiffs trespass upon said land? Answer. No. (9) If so, what damage has the defendant sustained? Answer."

The plaintiffs offered to connect themselves with G. W. Dixon, and, to connect the defendant with the same source of title, the following deeds were offered in evidence: (1) A deed from R. C. Windley to plaintiffs, dated March 24, 1886, and properly recorded. (Clerk will attach a copy of this deed, marked "A.") (2) A deed from W. G. Jarvis, administrator of George W. Dixon, to R. C. Windley, dated May 17, 1882. (Clerk will send up a copy, marked "B.") (3) A record of special proceedings, No. 190, entitled "W. G. Jarvis, Administrator of George W. Dixon, against George A. Dixon and others." (Clerk will send up a copy, marked "C.") (4) A deed from Alfred Pilly to George W. Dixon, dated August 10, 1869. This deed conveyed a tract of land claimed by the plaintiffs to be the Sears land. (Clerk will send up a copy, marked "D.") (5) A deed from M. Shaw, clerk and master, to Alfred Pilly, dated November 19, 1867. (Clerk will send up a copy, marked "E.") This deed is claimed to convey the Sears land. (6) Record in a foreclosure suit of John L. Pilly against Duncan McLaughlin. (7) A mortgage by Duncan McLaughlin to John L. Pilly, dated March 24, 1861. This mortgage is also claimed to cover the Sears land. (8) A deed from Samuel L. Snell to George W. Dixon, dated

February 27, 1869. (Clerk will send up copies, marked "F.") This deed conveys a tract known as the "Franklin Mallison Land." (9) A deed from Elizabeth Dixon, wife of George W. Dixon, and others, children of George W. Dixon, to William M. Shavender, dated November 14, 1887. This deed conveyed to the defendant William M. Shavender two tracts of land, known as the "Franklin Mallison Land" and the "William Sears Land." This deed was offered to show under whom defendant Shavender claimed, and to estop him.

As the case was made to depend upon the finding that G. W. Dixon was living at the time of the sale at which Windley bought, it is not necessary to give more of the record. The other essential facts are stated in the opinion.

W. B. Rodman and J. H. Small, for appellants. Chas. F. Warren and J. W. Hinsdale, for appellees.

AVERY, J. The question that confronts us to the threshold of this investigation is one that, as we think, has been heretofore in effect passed upon by this and other appellate courts, but one which requires careful consideration and discussion. Where the children of a person, under a misapprehension of the facts, admitted the allegation of a petition that their ancestor was dead, and submitted to a decree for the sale of his land by his administrator for assets, will they be allowed collaterally to impeach such judgment, and avoid the estoppel of title derived through it, by showing that the ancestor was at the date of the decree actually living? It is quite as important that courts of inferior jurisdiction should command the confidence of the public in the regularity and binding force of their decrees, upon which titles depend for their validity, as that appellate courts should be trusted to adhere to decisions upon the stability of which rights of property depend. But while mere irregularities in the conduct of a proceeding will not subject the decree rendered therein to a collateral, or even, under some circumstances, to a direct, attack, the rule is different when the allegations in the pleadings that are essential to the jurisdiction of the court are untrue, and where, if the truth had appeared upon the record, it would have become the duty of the court, on motion or ex mero motu, to declare the suit coram non iudice. If, in the special proceeding under discussion, it had appeared that G. W. Dixon was alive, or had not been admitted that he was dead, the very basis of the jurisdiction would have been wanting, and there would have been no serious controversy as to the duty of the court to pronounce the judgment a nullity, even when assailed collaterally only. Black. Judgm. §§ 215, 242, 278. The same effect must be given to proof aliunde, after the decree is entered, that the person supposed to be dead was in fact alive. *London v. Railroad*, 88 N. C. 584; *State v. White*, 7

Ired. 116; Book of Monographs ("Void Judicial Sales") p. 20; Withers v. Patterson, 27 Tex. 497; Becket v. Selover, 7 Cal. 237; Duncan v. Stewart, 25 Ala. 408; Griffith v. Frazier, 8 Cranch, 10, 22; Flisk v. Norvel, 9 Tex. 13; 1 Herm. Ex'ns, p. 378; Joehumsen v. Bank, 3 Allen, 87; Johnson v. Beazley, 27 Am. Rep. 285; Thomas v. People, 107 Ill. 517; Mella v. Simmons, 30 Am. Rep. 746; Morgan v. Dodge, 44 N. H. 259; Black, Judgm. §§ 218, 220. In the case of Hyman v. Gaskins, 5 Ired. 272-275, Nash, J., discusses at length the distinction between such probate judgments as are declared merely voidable, because the court or ordinary had the right to act but did not comply with the requirements of the law, and such as are void, because the court had no authority to act. While the learned judge did not have occasion then to pass directly upon the effect as an estoppel of administering upon the estate of a person before his death, he cited the case of Griffith v. Frazier, supra, as one in which Chief Justice Marshall had "had occasion to examine the doctrine of void and voidable letters of administration in his usual clear and forcible manner." In the case referred to the learned chief justice had said: "But suppose administration to have been granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every case in which letters of administration issue. Yet the decision of the ordinary that the person for whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by law; and, although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." But this court in a later case (State v. White, supra) held that an action could not be maintained upon an administrator's bond where it was shown that the supposed decedent was in fact alive when administration was granted upon his estate. The decision rested upon the ground that the probate court had no authority, as the agent of the state, to take charge of the property of a person then living, or to take the bond sued upon. This case was cited arguendo, and approved by Smith, C. J., in London v. Railroad, supra. The court, it is true, has held that, where there is a decedent, the acts of an administrator who was not entitled to the appointment under the statute are valid, but that the order appointing such person is voidable in a direct proceeding instituted by those having a superior right. Garrison v. Cox, 95 N. C. 353; Atkins v. McCormick, 4 Jones (N. C.) 274. This ruling

rests upon the doctrine that in such cases the essential basis of jurisdiction exists, there being a decedent and an estate to be administered. The appointment of the wrong person is but an irregularity, subjecting the order of appointment to direct attack, but not invalidating acts done in pursuance of the law, in the course of administration by him who has been inducted into the place by mistake. McPherson v. Cunliff, 11 Serg. & R. 422; Devlin v. Com., 101 Pa. St. 273; Johnson v. Beazley, 65 Mo. 250. In the case last cited the supreme court of Missouri quote the language of Judge Redfield, that the holding of the court of appeals of New York, in the case of Roderigas v. Savings Inst., 63 N. Y. 460, that the appointment of an administrator upon the estate of a living man could not be attacked collaterally, was "without precedent either in English or American jurisprudence." But it seems that in a later case (Roderigas v. Savings Inst., 76 N. Y. 318) Chief Justice Church, admitting that the authorities at common law were uniformly in conflict with it, rested his apparently reluctant approval of the former case upon the ground that it was founded upon a construction of a statute. The appointment of an administrator upon the estate of a living man is void for all purposes, and everything that is founded upon it is a nullity, because there was no jurisdiction. "It must always be remembered," says Black (volume 2, Judgm. § 633), "that in order to the conclusiveness of a probate decree, or in the case of sentence emanating from any other tribunal, it is absolutely necessary that the court should have possessed jurisdiction." 1 Herm. Estop. § 411. The finding by the clerk in a proceeding that was coram non iudice, because it was founded upon the false basis of jurisdiction, that G. W. Dixon was dead, does not preclude the heirs at law from showing that he was alive. To make it conclusive, the judgment must be rendered by a court of competent jurisdiction (Roulhac v. Brown, 87 N. C. 1; Wingo v. Watson, 98 N. C. 482), and, to give the court authority, its jurisdiction must extend both to the parties and the subject-matter (Condry v. Cheshire, 88 N. C. 375; Morris v. Gentry, 89 N. C. 248; 1 Black, Judgm. § 218). We know of no principle upon which the judgment, void as to G. W. Dixon if he were a party to this action, for want of jurisdiction of the subject-matter, could be held valid without jurisdiction, either against the parties to the proceeding or those in privity with them. The court did not have jurisdiction of the estate of Dixon, if he was at the time living, and it was not error to submit this question to the jury. Should a case be presented where administration had been granted not upon false information of a person's death, but upon a presumption of law arising from his absence without being heard from for seven years, a different question might be presented. Whether the acts of

an administrator who proceeded honestly upon a presumption, to which the law gave the force of a fact, will not be held, because of such presumption, to be valid, as in some courts has been the decision, where an executor performed a part of his imposed trust under a will afterwards ascertained to be a forgery, we need not now determine. To exclude a conclusion, it may be best, however, to announce that, should such a case arise, the question whether it is to be governed by or distinguished from the ruling in that before us is an open one. Such a case would raise the point whether the presumption of law that one is dead does not confer jurisdiction over a living person's estate, when it could not possibly be acquired in the absence of such presumption.

It was admitted that Mrs. Matilda E. Dixon, wife of G. W. Dixon, was not a party to the proceeding, and it would, of course, follow that she was not bound by the decree upon other grounds than those relied upon by the heirs at law. *Condry v. Cheshire*, supra. The court submitted an issue involving the question whether G. W. Dixon was living when the proceeding was instituted, and when the decree therein was rendered, and it was answered by the jury in the affirmative. This was one of the questions that grew out of the general issue of title raised in the pleadings, and it has been repeatedly decided by this court, beginning with *Emery v. Railroad Co.*, 102 N. C. 211, 9 S. E. 139, that it is within the discretion of the presiding judge to determine whether he will submit such specific issues or only those that are more general. There was no exception to the competency of the testimony bearing on that issue, except the general one, made to the competency of Smart's deposition, that the defendants were estopped by the decree in the special proceeding from denying the title under it, with the consequences, if the position had been well taken, that it would be immaterial whether he was in fact living, as Susan testified he was after the date of the sale under the decree, or dead. But now that we have held that neither the heirs at law nor the defendants, if in privity with them, are concluded, it seems to us that the finding upon the first issue defeats the plaintiffs' right to recover in any aspect of the evidence. There was no evidence offered on either side tending to show a forcible trespass on the part of the defendants, and it was not error, therefore, to instruct the jury, as the court did without objection, that the ownership of the timber was dependent upon the title to the land entered upon. *Cohoon v. Simmons*, 7 Ired. 189; *McCormick v. Monroe*, 1 Jones, 13; *Harris v. Sneeden*, 104 N. C. 377, 10 S. E. 477.

The plaintiffs propose to show title, as the burden rested upon them to do, not by a regular chain from the state, but by making G. W. Dixon the source of title, and connecting themselves, through the sale and administrator's deed under the decree to R. C. Windley,

and by a string of mesne conveyances, with Dixon. They offered other deeds and evidence to connect the defendant with G. W. Dixon as a common source of title, with the view of insisting that plaintiffs' was the older and better title, and that, under the established rule of evidence, the defendants were precluded from denying that fact. If the plaintiffs had succeeded in proving that both derived title from the same source by means of the evidence offered, and that, of the two chains so exhibited, their own was the better, it would have been as effectual proof of their right against the world as a chain extending back to the state, unless the defendants had connected themselves with some other older and better title. But since it appears that the proceeding, decree, sale, and deed, by which they propose to show title out of G. W. Dixon, are nullities, the plaintiffs have failed to connect themselves with the alleged source of title, and therefore have failed to establish their right to recover. The judge might have instructed the jury that if they should find, in response to the first issue, that Dixon was living at the time of sale under the decree, they would find, in response to the second issue, that plaintiffs were not the owners (as in that event they would fail to show themselves to be) of any of the land for which they brought suit. In that view of the case, it is not material whether the description in either the plaintiffs' or defendants' deeds was sufficient or insufficient, or whether the testimony complained of was competent or incompetent, or the charge was erroneous as to matters not involved in or essential to the determination of the controversy. The response to the first issue was necessarily decisive, therefore, of the first six issues. The remaining three grew out of the counterclaim, which the court held that the defendants could not maintain, and the defendants did not appeal. The plaintiffs have no reason, therefore, to complain of the charge, which was more favorable than they had a right to expect, under the view we have taken of the law. Judgment affirmed.

(116 N. C. 654)

**SHERILL v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of North Carolina. April 2, 1895.)

**CERTIORARI—AMENDMENT OF RECORD.**

A motion for a writ of certiorari will be granted on an affidavit of a defendant that the word "not" was inadvertently omitted in an important part of the testimony, to which is appended a telegram from the judge to the same effect, expressing his readiness to make the correction.

Action by H. Z. Sherrill against the Western Union Telegraph Company. Affidavit filed by defendant for a writ of certiorari on the ground that a word was inadvertently omitted in an important part of the testimony. Motion allowed.

L. C. Caldwell and Burwell, Walker & Cansler, for plaintiff. Jones & Tillett, for defendant.

CLARK, J. The case on appeal was settled by the judge. The defendant files an affidavit for certiorari, on the ground that the word "not" was by inadvertence left out in an important part of the testimony, and appends a telegram from the judge to that effect, expressing his readiness to make the correction. This complies with the requirements laid down in the authorities. *Boyer v. Teague*, 106 N. C. 571, 11 S. E. 330; *Bank v. Bridgers*, 114 N. C. 107, 19 S. E. 276. That the hearing might not be delayed, an *instant* certiorari was ordered to issue, and the cause placed at the end of the docket, to be called in its order on the second call of the docket for the week. Considering the nature of the correction asked, on suggestion from the court, the argument is proceeded with on the first call, subject to any change which may be made in the record by the return to the certiorari; the decision being withheld till such return is made. Motion allowed.

(116 N. C. 665)

SHARPE et al. v. ELIASON.

(Supreme Court of North Carolina. April 2, 1895.)

REFERENCE—INSUFFICIENT REPORT.

The report of a referee in an accounting with an assignee for creditors, stating that certain property sold was part of the effects belonging to the assigned estate, and was duly accounted for by the assignee, is too uncertain, in not stating the amount realized from such property, nor how it was accounted for by the assignee.

Appeal from superior court, Iredell county; Boykin, Judge.

Action by J. M. Sharpe and others against W. A. Eliason, assignee for creditors, to have an account taken to ascertain the amount with which defendant is alleged to be chargeable as such assignee, and to have him removed, and a receiver appointed. From a judgment confirming the report of a referee appointed in such action, plaintiffs appeal. Reversed.

L. C. Caldwell, for appellants. Robbins & Long, for appellee.

FAIRCLOTH, C. J. This case was heard on referee's report, and one fact found was as follows: "That the blackberries sold Wallace Bros. were part of the effects belonging to the assignment, or became such, and are duly accounted for by the said Eliason as assignee." The plaintiffs except, and say "that said report is vague and uncertain, in that it does not state the amount of money realized for berries sold Wallace Bros., and does not state how the same was accounted for." The other two findings of fact, and exceptions thereto, present the same question. His honor overruled these exceptions, and

gave judgment confirming the report, etc. In this there was error. The reason is, as has been heretofore stated by this court, that the parties are entitled, from the referee, to a statement of all the items of the account between them, in order that either may, if he thinks proper, except to any particular item. *McCampbell v. McClung*, 75 N. C. 393. Exceptions sustained. Cause remanded to be proceeded in, etc. Judgment reversed.

(116 N. C. 1616)

STATE v. PAGE et al.

(Supreme Court of North Carolina. April 2, 1895.)

CRIMINAL LAW—REVIEW.

A conviction will be affirmed where the defendant made no exception to the evidence or the instructions, and, although the case states that "defendants excepted" after the denial of a new trial, it does not specify anything to which they excepted.

Appeal from superior court, Robeson county; Whitaker, Judge.

Indictment against B. L. Page and others for assault and battery. From a conviction thereof, defendants appeal. Affirmed.

The Attorney General, for the State.

FAIRCLOTH, C. J. The defendants made no exception to the admission of the evidence, nor to his honor's charge. After verdict and rule for new trial discharged, the case states that "defendants excepted," but does not specify anything to which the defendants excepted. We have examined the record, and find no error therein. Affirmed.

(116 N. C. 593)

HINSDALE v. UNDERWOOD.

(Supreme Court of North Carolina. April 2, 1895.)

REVIEW ON APPEAL—EXCEPTIONS TO FINDINGS—APPEARANCE.

1. In supplemental proceedings to enable the appellate court to review a finding of fact of the trial court, the exception must be taken on the ground of the want of evidence to support the finding. A mere exception to the finding is insufficient.

2. In supplemental proceedings, defendant, by appearing generally, waives all defects in the service of notice.

Appeal from superior court, Cumberland county; Boykin, Judge.

Supplemental proceedings by J. W. Hinsdale against Joseph B. Underwood. From a judgment of the superior court affirming a ruling by the clerk, defendant appeals. Affirmed.

N. A. Sinclair and N. W. Ray, for appellant. S. H. MacRae and MacRae & Day, for appellee.

MONTGOMERY, J. The alleged insufficiency of the affidavit, as argued here by defendant's counsel, is that its material

facts were not based on the knowledge of the plaintiff, or on information and belief; the plaintiff using the words "so far as affiant is informed and believes," instead of an unqualified statement of necessary matters on information and belief. His honor found as a fact that the words "so far" were not in the original affidavit, and by inadvertence were inserted in the copy. The defendant excepted to this finding, but did not put the exception on the ground that there was no evidence to support it. Neither did he ask his honor to find the facts, if any were before him, in order to have the law, which was applied to them, reviewed in this court. It appears from the record in the case that the words "so far" were in the original affidavit, but had at some time been erased, and that they were also in the copy served on the defendant. The testimony on which they were erased in the original was not set out by the judge. The exception must be overruled. "This is an action at law, and hence we have no authority to review the findings of fact by the court below. Such findings are final, and must be accepted here as warranted by competent evidence, unless it should be objected in a proper way that there was no evidence to support the findings, or one or more of them. We can only review questions and matters of law in such cases arising upon the facts as found." *Travers v. Deaton*, 107 N. C. 500, 12 S. E. 373. As to the exception to the insufficiency of the service of the notice, it is only necessary to say that the appearance before the clerk by the defendant was a general one, and all defects in the service of the notice were waived thereby. Besides, the appeal from this ruling of the clerk was premature; the order at most was interlocutory. If the notice had not been properly served, the court would simply have directed a reasonable delay of proceedings, or that a new notice issue forthwith, to be served within a day specified. *Turner v. Holden*, 109 N. C. 182, 13 S. E. 731. There is no error, and the case is remanded to the clerk of the superior court of Cumberland county to be proceeded with according to law. No error.

(116 N. C. 673)

**MARTIN v. CHAMBERS et al.**

(Supreme Court of North Carolina. April 5, 1895.)

**DISMISSAL OF APPEAL—REINSTATEMENT.**

An appeal dismissed under rule 15, because, when reached in its order at the third term on which it was on the docket, no one appeared to prosecute it, will not be reinstated on appellant's affidavit that his attorney was sick, it not appearing that appellant made any inquiry of his attorney regarding the appeal, or sought to get other counsel to attend to it.

Action by Leland Martin against John A. Chambers and others. Judgment was rendered for plaintiff, and defendants appealed.

The appeal was dismissed for want of prosecution, and appellants move to reinstate the same. Motion denied.

L. S. Benbow, of counsel for petitioners.

**CLARK, J.** This case, having been on the docket two terms without being prosecuted, when reached in its order at the third term, no one yet appearing to prosecute it, was dismissed, as provided by rule 15. *Wiseman v. Commissioners*, 104 N. C. 330, 10 S. E. 481. The appellant now moves to reinstate on the ground that he intrusted his case to his counsel, and supposed he would attend to it, and that said attorney was sick and unable to attend to the appeal, and avers that appellant was without fault, and that he has not been negligent. The conclusion at which the appellant arrives is not warranted by the facts stated. The cause was on this docket three terms. It does not appear that counsel was ill the whole of that time. If he was, the appellant was clearly negligent in not securing other counsel to attend to his appeal in this court. If he was not ill the whole time, it is not averred that the appellant inquired about the case of his counsel, or urged him to attend to it, or paid any attention to it in any way whatever. There may be cases in which the appellant has to this extent entirely abandoned all attention to his appeal, intrusting it solely to his counsel, and making no further inquiry. If an appellant chooses so to act, abandoning all thought of his case to his counsel, and his appeal, after being neglected three terms, is dismissed under the rules, his grievance has been sustained at the hands of his counsel, and his remedy (if he can show he has suffered loss) is by action against his counsel for damages sustained by his neglect so grossly to discharge the duty he has contracted to perform. But an appellant who so entirely abandons all attention to his appeal as to let it remain for three terms in this court without ascertaining, and without inquiry even, whether it was receiving any attention, or even whether such counsel had attended this court, is not in a condition to ask this court to incumber its docket longer with a case which concerns himself so little, nor to vex the party who has secured judgment below by protracting the litigation. The judgment below is presumed to be correct, and the party seeking to reverse it must assign and show error, and must prosecute his appeal with more diligence than the appellant has shown. Motion denied.

(116 N. C. 394)

**SHIELDS v. TOWN OF DURHAM.**

(Supreme Court of North Carolina. April 5, 1895.)

**JAILS—INJURIES TO PRISONER—LIABILITY OF TOWN.**

1. Where a town provides in its prison the necessities to protect a prisoner from bodily suf-

fering, it is not liable for injuries to his health, caused by the failure of the custodians of the jail to supply him with such necessities, where its governing officers were not negligent in exercising a proper supervision over the custodians.

2. To render a town liable for injuries to the health of a prisoner confined in its jail from the absence of window glass, it must be shown that the governing officers of the town had notice thereof, or were negligent in exercising supervision over the jail.

Appeal from superior court, Durham county; Hoke, Judge.

Action by J. H. Shields against the town of Durham for damages for personal injuries. The complaint is as follows:

"(1) That the town of Durham is a municipal corporation, created by the state of North Carolina, having the power and authority, among its many powers, to appoint police officers or constables for the municipality, and having the power and authority to maintain, erect, and construct suitable houses for the imprisonment of persons charged with violating its ordinances and laws of the state. (2) That on or about January 1, 1893, and for some time previous thereto, and for some time subsequent thereto, one J. S. Scarlet was a duly appointed and commissioned public officer or constable of said town of Durham. (3) That on or about January 7, 1893, the said J. S. Scarlet, while acting in the pretended discharge of his duty of police officer of the defendant, and under color and by virtue of his said office, with force and arms, at and in the county of Durham, and in the state of North Carolina, unlawfully and willfully struck and beat the plaintiff, he, the said plaintiff, not being guilty of any violation of the laws of the state or of the ordinances of the town of Durham; and after such unlawful assault and battery upon the plaintiff as aforesaid, the said J. S. Scarlet, acting under his pretended authority and power as a police officer of the defendant, the town of Durham, and in the pretended discharge of his duty as such officer, unlawfully and willfully, with force and arms, arrested the plaintiff without warrant; the said plaintiff not violating any law of the state of North Carolina, or any ordinance of the town of Durham; and the said J. S. Scarlet, public officer of the defendant as aforesaid, did with force and arms unlawfully and willfully imprison the plaintiff in the guardhouse or jail of the defendant, and did detain him, the said plaintiff, in said jail for more than twelve hours; all to the great damage and injury of the plaintiff. (4) That while plaintiff was unlawfully detained in the guardhouse or town prison of the defendant, as hereinbefore stated, the weather was excessively cold, the ground being covered with snow and ice; that the said guardhouse was a small room, exposed, having glass in its windows broken out, plaintiff was furnished with wholly insufficient bedclothes, and these offensive and unclean; during the time of plaintiff's imprisonment the fire that

heated said guardhouse went out, and was not replenished, and no fuel furnished; and that by reason of and in consequence of the bad condition of said guardhouse of defendant, and the cruel negligence of the defendant, plaintiff suffered then greatly from the severe cold, and has since then, in consequence thereof, suffered great pain and sustained great injury to his health. (5) That the bad and dangerous condition of said guardhouse was well known to the defendant, but it unlawfully and negligently permitted it to be and continue. (6) That the defendant negligently and carelessly selected, appointed, and commissioned the said J. S. Scarlet to be a police officer of the town of Durham, and the said J. S. Scarlet was wholly unfit and unsuitable to be a police officer of the defendant, as is well known. (7) That on account of the wrongful acts and conduct of the defendant, plaintiff has sustained great and serious injuries, from which he now suffers, to his great damage in the sum of two thousand dollars. Wherefore plaintiff prays judgment against the defendant for the sum of two thousand dollars; second, for such costs as are allowed by law; third, for such other and further relief as is consistent with law and the facts proven."

The answer denied all the material allegations of the complaint. The issues and responses of the jury were as follows: "(1) Was plaintiff injured by negligence of defendant? Answer. Yes. (2) In what sum, if any, was he damaged? A. \$200."

Judgment: "It is considered and adjudged that the plaintiff recover of the defendant the sum of two hundred dollars, and interest on the same from the 8th day of October, 1894, until paid, at the rate of six per cent. per annum."

The plaintiff was introduced as a witness in his own behalf and testified as follows: "I was imprisoned in the guardhouse of the defendant on January 7, 1893. The weather was severe. Had snowed during the day. The room was small, with a bunk for sleeping. The floor was zinc, and, from defect in the water pipe, floor was covered over with water. Several window panes were out. A mattress and an old dirty blanket were all the protection from the cold. Both were filthy and whole room offensive. A negro was in there, scratching like he had the itch. Was in guardhouse from twilight one afternoon till the next morning at 9 o'clock. Was sober. Suffered a great deal there, and have suffered more since. Caught cold, giving me pain in my jaw and one of my hands. Was rendered rheumatic, and still have very severe pain in the arm, thereby impairing my usefulness. Blanket was wet and dirty. The water had frozen on bottom of cell. Room was five feet square, and not room enough to move around in. Police officer put in a little coal at 9 o'clock that night, which went out, and this was the only effort to make a

fire. There was none made in the morning. A stove was in the room over next to the window. There was only one blanket there, and that was too dirty to use. Room was six feet one way, and an iron railing ran across, separating me from the stove. Weather had been cold all that day and before. Nothing to eat or drink was furnished me. Cross examined: Had been arrested for being drunk Saturday night before." Mr. Morris, witness for plaintiff, testified as follows: "It was exceedingly cold weather, and had been for several days. I went down to guardhouse about 8 o'clock the next morning, and went on plaintiff's bond. Plaintiff was shivering, and seemed to be suffering from a cold. The west window had a broken pane or window light. Quite a breeze was blowing through when he approached. A stove was there, but no fire was in it. Shields complained to me, saying that he had not slept, and that he had no covering. It was dark there, or there was very little light. Is Shield's brother-in-law." Mr. Hutchings, a witness for the plaintiff, testified as follows: "It was exceedingly cold weather, and had been for a week, and was very cold that night. I went to the country, but it was so cold that I could not travel; so left my horse, and came back on the train. There was snow and ice on the ground. Shields lives some five or six miles from town."

Defendant's evidence: Mr. Scarlet, witness for the defendant, testified: "I was in the guardhouse. There was a good fire in the stove till I left, at 12 o'clock. There were two blankets and two mattresses to each cell. There was plenty of coal, and there were two mattresses and two blankets to each cell. There was no water there, and no water pipe tapped the room. The stove was red when Shields was put in there. He was drunk. There were good shutters to the windows of the room. Room was ten feet square, and the ceiling eight feet. Cross-examined: When we went in there the second time, Shields was asleep on the bunk. There were three windows to guardhouse, and the chief of police would have panes put in as fast as drunken men broke them out. The shutters were kept closed in cold weather. I went in there that night, and spread out the blankets, before putting Shields in, and saw that the fire was made up before going away. I and Shields have had several fights, but had nothing against him." Mr. Woodall, witness for the defendant, testified: "Was chief of police at this time, and remember the night in question. It was the town's duty to furnish blankets, and I was charged with that duty. Comfortable blankets were provided, and when they wore out would get new ones. Town furnished me with the means, and instructed me to keep plenty of blankets, and I did so to the best of my knowledge. There was plenty of coal on hand, and I was instructed to keep fire there all night when it was cold. Cross-examined:

Shields was numb, and walked badly next morning. Had means furnished to put in glass and keep guardhouse comfortable." Mr. Cutts, witness for the defendant, testified: "There was fire kept in guardhouse every night in cold weather. There were two bunks, and a mattress and a double blanket to each. There was no water where Shields was, and no way for water to get there. This was the Saturday night before. Don't know the condition on the night in question. Cross-examined: On this last night does not know whether there was any coal in cell or not. Was not there this last Saturday night, and does not know where Shields was placed." Mr. Cheek, witness for the defendant, testified: "Was policeman in January, 1893, and recollect the night in question. Went in the cell where Shields was about 6 o'clock in the morning. There was fire in the stove at that time. Shields was standing at the door, and he and I had a talk. Did not go in, and could not say blankets were there, but know they were always kept there. There were two double blankets for each bunk, and no single blankets, and good shuck mattresses when new. Cross-examined: It was the coldest weather that has been in years." Mr. Woodward, witness for the defendant, testified: "Was clerk of the board of town commissioners in January, 1893. Chief of police Woodall had full authority to provide full comforts for the guardhouse, and to provide what was necessary for keeping it up. His bills for coal, blankets, etc., were always approved and paid. Sometimes the authority was verbal, and sometimes written." Mr. Wood, witness for the defendant, testified: "Was policeman at this time, and am now. Good bunks, blankets, and coal furnished. Provision made to replenish the fire, and kept fire all night in cold or wet weather. Cross-examined: Did not go into the cell that night, and don't know who did. Don't know whether there were any mattresses in there or not."

This was all the evidence.

The defendant excepted to his honor's refusal to give his instructions asked for, and not embodied in the charge. His honor charged the jury as follows: "If the jury answer the first issue 'No,' they need not consider the second issue. The burden of proof is upon the plaintiff, and he must satisfy the jury by a preponderance of the evidence that he was injured, and injured by the negligence of the defendant. If you shall find from the evidence that the plaintiff was injured, and was injured by the negligence of the defendant, you will answer the first issue 'Yes,' and the second issue, such amount as you shall determine from the evidence is a fair compensation for his injury. If you shall find from the evidence that the window panes in the window of the guardhouse had been broken out for any considerable length of time, exposing occupants to the inclemency of the weather, when it ought to have been



discovered in the exercise of ordinary care, the town authorities are affected with notice; and, if the injury to the plaintiff occurred from this, the defendant was negligent. The plaintiff claims that the prison was improperly constructed, insufficiently furnished and attended. The defendant is liable in damage only for a failure to so construct its prison, or so provide it with fuel, bedclothing, heating apparatus, attendance, and other things necessary, as to secure to prisoners a reasonable degree of comfort, and to protect them from such actual bodily suffering as would injure their health. If the prison of the defendant was properly constructed, and the board of commissioners of defendant provided the prison with sufficient fuel, bedclothing, heating apparatus, attendance, and other things necessary to secure to the plaintiff a reasonable degree of comfort, and protect him from such actual bodily suffering as would injure his health, but the jailer, policeman, or attendant neglected to properly administer to his wants and necessities, the defendant is not liable, and the jury will answer the first issue 'No.' The laws of this state impose upon governing officials of municipal corporations the duty of exercising ordinary care in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in the immediate control of the prisoners, so far at least as to replenish the supply of necessary articles when notified that they are needed, and of employing such agents and of appropriating such money as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates." Here his honor fully recapitulated the evidence, and arrayed the testimony of the plaintiff and the defendant, and the contentions of each arising therefrom, and proceeded to charge as follows: "If the jury shall find the prison to be as described by the plaintiff's testimony, and this arose because the town authorities had not made proper provision for prisoner's comfort, and the injury was caused by such failure, the jury will answer the issue 'Yes'; if the jury shall find that the defendant had provided fuel and blankets sufficient to make the plaintiff comfortable, the jury will answer the issue 'No'; or if the injury to plaintiff arose because plaintiff did not take advantage of the provision that was made for his comfort, the jury will answer the issue 'No'; or if plaintiff's injury arose because the policemen charged with the duty failed to give the plaintiff the benefit and protection of the provision made by the defendant, the jury will answer the issue 'No.' Municipal authorities are not responsible for the wrongful conduct of their agents or subordinates in the exercise of the judicial, discretionary, or legislative authority conferred by their charters, or in the discharge of a duty imposed solely for the public benefit, unless some statute subjects them to liability for such negligence.

They are not responsible for unlawful arrests of persons by their officers, but the duty is imposed upon the governing authorities to provide a properly constructed prison, and to have it properly supervised and overlooked, as heretofore called to your attention. In regard to the broken window panes, if the jury believe they were broken, and if the jury shall believe that they were broken out unexpectedly or recently, the defendant is not liable unless the governing authorities had notice. If the defendant supplied and furnished its chief of police with the means or proper credit to supply blankets in sufficient number to provide for the comfort of its prisoners under circumstances which might reasonably have been anticipated, the plaintiff is not entitled to recover."

Upon the issues submitted, the jury responded as set out in the record. Motion for a new trial by the defendant. Motion overruled. Judgment as set out in the record. Appeal by defendant. Notice of appeal waived. Appeal bond fixed at \$25. By agreement, 30 days allowed to serve statement of case on appeal. Twenty days thereafter allowed appellee to file counter statement on objection.

Defendant prayed the following special instructions: "(1) In order for the plaintiff to recover in this action, it is necessary to prove that he was actually damaged. There is no evidence by any witness of any actual damage whatever. (2) That before the plaintiff can recover in this action he must allege and prove that he sustained an injury, whereof the proximate cause was the negligence of the city defendant or its authorities; and it has not been alleged, and there is no evidence that such negligence existed or was such proximate cause. (3) If the jury shall find that the plaintiff contributed in any manner to his own injury, if any injury he sustained, either by drunkenness or failure to avail himself of the means furnished by the defendant for keeping himself warm, or in any other manner which the testimony may show, then he is not entitled to recover. (4) The defendant was bound to use only ordinary care under the circumstances, and there is no evidence showing or tending to show any want of ordinary care on its part. If, therefore, the jury shall find that the plaintiff was injured by the window panes being out in the prison, or by there being no proper bedclothes, or by failure of the police officers to keep a fire in the prison, they must, in order to render the defendant liable, show that these facts were known to the city authorities, or that they had existed such a length of time as they would ordinarily have known it; and of these things there is no evidence. If the jury shall find that there was coal or other sufficient fuel where-with to build fire sufficient to warm the room, then the defendant is not liable, even though the police officer in charge, on the night of the confinement of the plaintiff, failed

and neglected to replenish and keep up said fire during the night, unless defendant knew that such police officer was negligent and careless in such particular; and there is no evidence that defendant knew or had any reason to believe that such officer was generally negligent and careless. If the defendant supplied and furnished its chief of police with the means or proper credit necessary to supply blankets in sufficient numbers to provide for plaintiff, under circumstances which might reasonably have been anticipated, the plaintiff would not be entitled to recover. (5) The plaintiff must satisfy the jury by a preponderance of evidence that the injury he sustained, if any, was the proximate result of the negligence of the defendant, and not of the policeman; and if the jury shall be of opinion that such injury was brought about, even in part, by the negligent act of the plaintiff in failing to use the means supplied, or otherwise, the plaintiff would not be entitled to recover; but, in order to recover, the jury must be satisfied by a preponderance of evidence that the exposure of the plaintiff in the prison, and without his fault, was the sole cause of his injury, not in any way aided by anything else wherein the plaintiff failed to exercise ordinary care. Plaintiff must be without fault in that regard, and take care of himself as a man of ordinary prudence would under such circumstances, in order to entitle him to recover. The town of Durham can be liable to the plaintiff in no event except for its own negligence. It cannot be liable for the tortious negligence of its police officers. (6) If the plaintiff sustained an injury by reason of the failure of the defendant to anticipate and provide against an extraordinary cold night, he cannot recover therefor. Before the plaintiff can recover for an injury, he must show by a preponderance of the evidence that the injury was the ordinary or probable consequence of the act complained of. (7) If the plaintiff could have avoided the consequence of the act of the defendant, if such an act existed, by the exercise of ordinary care, he cannot recover. It is not only requisite that the damage, actual or inferential, should be suffered, but the damage must be the legitimate consequence of the wrong. If any injury has resulted in consequence of the wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as the direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. (8) In this case, if the window glass had been broken, and the bedclothing furnished for the plaintiff had been destroyed, or the policeman had failed and neglected to provide for the plaintiff, but the governing officers of the defendant are not shown to have had actual notice thereof, or to have been negligent in providing such oversight of the prison as would naturally be expected to give them

timely information of its condition, there is not such a failure in discharging the duties of construction or superintendence of the prison as to subject the city to liability for injury sustained by the plaintiff by reason of the broken window or lack of bedclothes or failure on the part of the policeman to furnish them; and there is no evidence that the governing officers knew of the broken windows, if they were broken, or that there was not sufficient bedclothing, or that the policemen were careless and negligent of their duties, or that fire was not sufficient to keep the prisoner comfortable. (9) All the evidence tends to prove that the chief of police was authorized and empowered to supply and put in window panes and necessary beds and bedclothing, and necessary fuel for keeping prisoner comfortable. There is no evidence of negligence on the part of the governing authorities of the town of Durham in any particular, and the plaintiff is not entitled to recover. If the governing authorities furnished means or credit to supply everything necessary so as to secure the prisoners a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health, the city is not liable in damage for sickness and suffering endured by the prisoner, and caused by the neglect of the jailer, policeman, or attendant to properly minister to his wants and necessities. All the evidence tends to prove that the chief of police was authorized, directed, and empowered by the governing officers to purchase and supply all the means necessary for the comfort of prisoners confined in the prison of the town, and always paid for such supplies, and also furnished the means necessary for rendering said prison comfortable and healthy. (10) Upon the whole evidence, the plaintiff is not entitled to recover." Of these instructions only those were given as are embodied in the charge.

Boone & Boone, for appellant. J. W. Graham and Manning & Foushee, for appellee.

MONTGOMERY, J. In actions of this nature this court has decided in *Moffit v. Asheville*, 103 N. C. 237, 9 S. E. 695, that cities and towns "are liable in damages only for a failure either to so construct their prisons, or so provide them with fuel, bedclothing, heating apparatus, attendants, and other things necessary as to secure to the prisoners committed to them a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health." If the aldermen of the city built a reasonably comfortable police prison, and afterwards furnished to those who had immediate charge of it everything that was essential to prevent bodily suffering on the part of prisoners from excessive cold or heat or hunger and to protect their health, the city would not be liable, even if the suffering or sickness of the plaintiff was caused by neglect of the jailer,

the policemen, or the attendants to keep the fires burning all night, or to give the plaintiff the necessary bedclothing furnished to them. In *Moffitt's Case*, supra, Justice Avery, who delivered the opinion of the court, further says: "We think that where window glass in the windows of a police prison has been broken, and the bedclothing furnished for its inmates has been destroyed, but the governing officers of the town are not shown to have had actual notice of the breaking or destruction, or to have been negligent in omitting to provide for such oversight of the prison as would naturally be expected to give them timely information of its condition, there is not such a failure in discharging the duties of construction or superintendence as to subject the corporation to liability." The facts in the case before us are almost identical with those developed on the trial in *Moffitt's Case*. The plaintiffs in both testified to having been injured from cold blasts of air rushing through broken panes of window glass in the prison windows upon them in their cells, and from a want of blankets and bedclothes and fires to protect them from the cold. The defendants in both cases introduced six or more witnesses, including the chief of police, the clerk of the board of commissioners, and others connected with the city government, who testified that the governing authorities of the town had always furnished plenty of warm blankets, and had instructed the officers in immediate charge of the prison to keep plenty on hand, and also to keep fuel and fires sufficient to make the prisoners comfortable, and had always furnished those officers with the means and credit to do so. In the present case it was also put in evidence for the defendant that the chief of police had broken window panes put in as fast as drunken men broke them out. There was no evidence put in by the plaintiff to rebut this testimony of the defendant. No evidence was introduced by the plaintiff to show notice to the defendant of the broken panes of glass or of the want of blankets, bedclothes, or fire, or that the town authorities were negligent in omitting to provide for such oversight of the prison as would naturally be expected to give them timely information of its condition. It is evident from the charge of his honor that that part, and the only part, of the complaint which made any allegation concerning the faulty construction of the guardhouse, to wit, "that the said guardhouse was a small room, exposed, having glass in its windows broken out, and that by reason of and in consequence of the bad condition of said guardhouse," was eliminated on the trial from the case, and that the case which his honor submitted to the jury was upon the cause of action for the defendant's failure to furnish the plaintiff with the proper bedclothing and blankets and fires. His honor, in his instructions to the jury, said: "If you shall find the prison to be as described by the plaintiff's testimony, and this arose because

the town authorities had not made proper provision for the prisoner's comfort, and the injury was caused by such failure, the jury will answer the issue 'Yes.'" If it should be thought that by these words the court submitted the question of the alleged faulty construction of the prison to the jury, the next sentences of the charge will show that that view of the case was not in his mind: "If the jury shall find that the defendant had provided fuel and blankets sufficient to make the plaintiff comfortable, the jury will answer the issue 'No'; or if the injury to plaintiff arose because plaintiff did not take advantage of the provision that was made for his comfort, the jury will answer the issue 'No'; or if plaintiff's injury arose because the policemen charged with the duty failed to give the plaintiff the benefit and protection of the provision made by the defendant, the jury will answer the issue 'No.'" If the matter of the construction of the guardhouse had been in his mind, he could not have given that portion of his charge last quoted, because the town might not have been negligent in the matter of furnishing blankets, bedclothes, and fires, and yet have been negligent in the building and construction of a guardhouse suitable for a prison. The instructions asked the court by the defendant numbered 8, 9, 10 should have been given to the jury. There is error, and the defendant is entitled to a new trial.

(116 N. C. 614)

## MCCRIMMEN v. PARISH.

(Supreme Court of North Carolina. April 5, 1895.)

## APPEAL—AFFIRMANCE.

Appellant must show error affirmatively, and where the record is insufficient to determine whether or not error was committed the judgment will be affirmed.

Appeal from superior court, Moore county.

Action by John McCrimmen against John B. Parish for the recovery of land. From an order denying a new trial, plaintiff appeals. Affirmed.

Black & Adams, for appellant. Douglass & Shaw, for appellee.

FURCHES, J. This is an action for possession of land, and there is but one exception presented by the record for our consideration. The judge, among other things, charged the jury, as requested by counsel for defendant, as follows: "Every grant and deed must have a beginning corner, and if the jury should find the beginning corner of the McAuley 50 acres to be at M, then they must find the beginning corner of the John C. Bule 100 acres to be at O.; and, if they find the beginning corner of the 100-acre tract, then the beginning corner of the 23-acre John C. Bule grant is at the point Q, and the plaintiff cannot recover, and you must answer the first issue 'No.' Plaintiff

excepted, and, upon denial of motion for new trial, appealed." It appears from the case on appeal that the plaintiff offered in evidence two grants from the state of North Carolina to John C. Bule, and a deed from Bule to the plaintiff, and the defendant offered in evidence two grants from the state to Murdoch McAuley, and a deed from Margaret Ann Moore to defendant. And the case states that "a copy of said grants is hereto attached." But upon examination of the record we find no such copies. And we suppose from the statement of the case that there had been a survey of the land mentioned in said grants, as each grant seems to be located by letters A, B, and C. But there is no map or plot of such survey attached, or furnished the court. Therefore, it is impossible for the court to see whether his honor's charge was erroneous or not. And as it devolves upon the appellant to show that there was error, and as he has failed to do so, it only remains for us to affirm the judgment. Affirmed.

Since filing the opinion in this case, copies of the grant to Bule and of the deed from Bule to plaintiff, and also a plot of the survey, have been filed; no copies being furnished of the grants to Murdoch McAuley. And we have examined the copies and the plot with as much care as we could, thinking we might find sufficient statements to enable us to give an opinion more satisfactory to ourselves than was the opinion heretofore filed. But we find it to be a complicated question of location, and the plot is without explanation. So we are compelled to leave the case as our original opinion left it, by saying, if there is error, the appellant has failed to show it to this court. No error.

(116 N. C. 1017)

#### STATE v. ARKLE.

(Supreme Court of North Carolina. April 5, 1895.)

#### LARCENY—EVIDENCE.

On trial for larceny it appeared that defendant, while away from home, received the property consisting of a pocketbook containing money, bank certificates, and a check payable to the prosecuting witness, from his wife, who found it, defendant not having been present when it was found. The day after he returned home, defendant wrote to the bank which issued the certificate for the name of the owner. There was some delay in returning the property, caused by a feeling engendered by correspondence with the owner, to whom defendant explained the whole matter, and by defendant's demand for a reward. *Held* error to submit the case to the jury.

Appeal from superior court, Columbus county; Brown, Judge.

George Arkle was convicted of larceny, and appeals. Reversed.

Lewis & Burkehead and J. B. Schulken, for appellant. The Attorney General, for the State.

FAIRCLOTH, C. J. The defendant was indicted for stealing a pocketbook containing money, bank certificates, and a check payable to the prosecutor; also for receiving the same knowing that they were stolen property. The second count was withdrawn, and is out of the case. In every instance there must be an original felonious intent, general or special, at the time of the taking or finding of lost property, in the mind of the accused, to constitute larceny. If such intent be present, no subsequent act or explanation can change the felonious character of the taking. If it be not present, it is only a trespass, and cannot be made a felony by any subsequent misconduct or bad faith in the taker. "The omission to use the ordinary and well-known means of discovering the owner of goods lost and found raises a presumption of fraudulent intention, more or less strong, against the finder, which it behooves him to explain and obviate; and this is most readily and naturally done by evidence that he endeavored to discover the owner, and kept the goods safely in his custody, until it was reasonably supposed that he could not be found, or that he openly made known the finding, so as to make himself responsible for the value to the owner when he should appear. In this class of cases it is material for the prosecutor to show that the felonious intent was contemporaneous with the finding." 3 Greenl. Ev. § 159; Rap. Larceny. It is urged by the attorney general that the defendant's delay from May 9th to June 6th to disclose the fact that he had possession of the pocketbook, with internal evidence of the ownership, was some evidence of an original felonious intent, and was sufficient to be submitted to the jury. If that were so, it could only relate to the receiving of the pocketbook from his wife, as there is no evidence that he was present at the finding of the lost article, and the count for receiving is not before the court. We do not think, however, that the evidence was such as ought to be submitted to a jury. His explanation is found in his letters used by the state, in which it appears that on the day after his return to his home in Wheeling, W. Va., from a southern tour, he made a proper and reasonable effort to discover the owner by writing to the bank at Wilmington which had issued the certificates, etc., and in a few days explained the whole matter to the owner, and kept his property safe for him. Without this voluntary disclosure, the prosecutor had not a scintilla of evidence by which he could trace his property or the defendant. Our views on such evidence as we think should not go to the jury were fully expressed in *Young v. Railroad Co.* (at this term) 21 S. E. 177. The further delay in the matter seems to be the result of some feeling engendered by the correspondence, and because defendant demanded compensation or reward. This does not affect the main question. In *Reg. v. Gard-*

ner, Leigh & C. 243, this case is found: Bougher, a lad 14 years old, found a check, and soon showed it to the defendant, who took it, and refused to return it. He knew and saw the owner, but held the check for a reward, and the jury so found. Held by the court that the facts do not show any felonious intent, and that the mere withholding the check did not amount to such a taking as is required to constitute the offense of larceny. New trial.

(116 N. C. 675)

**SHOAF et al. v. FROST.**

(Supreme Court of North Carolina. April 5, 1895.)

**EXEMPTIONS—APPRAISAL—VERDICT.**

Under Act 1885, c. 347, providing that, on appeal from an appraisal of homestead and personal property exemptions, the jury shall assess the value of the property embraced therein, and the court shall appoint three commissioners to set apart the exemptions in accordance with the verdict of the jury, the commissioners are bound to assume that the jury placed a correct value on the property.

Appeal from superior court, Davie county; Battle, Judge.

Action by C. J. Shoaf & Co. against E. Frost. From an allotment and appraisal by commissioners of defendant's exemptions, plaintiffs appealed. The allotment was set aside, and defendant appeals. Affirmed.

Glenn & Manly, for appellant. Watson & Buxton, for appellees.

**CLARK, J.** The act of 1885, c. 347, amendatory of section 519 of the Code, provides that, if the homestead appraisal or assessment shall be increased or reduced by the jury on appeal, "the jury shall assess the value of the property embraced therein," and that "the court shall appoint three commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury." If upon the jury's finding an allotment excessive, or the reverse, the case should simply go back to another board of assessors or appraisers, without any valuation fixed by the jury on the allotted property, another valuation of the appraisers could be excepted to, again and again, and the matter could thus be kept in court indefinitely. To prevent this very evil the act of 1885 was passed, providing that the property embraced in the allotment should be valued by the jury. Then, when the commissioners appointed by the court meet, taking such valuation as final, it is their duty merely to add or cut off enough (as the case may be) to make the amount of the constitutional allotment. Any exception to the action of this second board can only be to the correctness of the valuation added or subtracted, as the case may be, taking the jury valuation of the property first allotted as the basis. The act (Clark's

Code, p. 526) provides that the court shall appoint three disinterested commissioners to make the new allotment in accordance with the verdict of the jury. It was probably an inadvertence that his honor directed the sheriff to summon them; meaning, it seems, that the sheriff should also select them. The judgment must be modified in this particular by the judge, at the next term, appointing the commissioners, who shall then be summoned by the sheriff. As the modification in the allotment made by the new commissioners must be "in accordance with the verdict of the jury," the valuation placed upon the allotted property by the jury must be taken as absolutely correct. For extraordinary reasons, as added improvements, or great rise in values, or, on the other hand, the destruction of buildings or great depreciation in values, it may be that relief can be had in the manner pointed out in *Vanstory v. Thornton*, 110 N. C. 10, 14 S. E. 637, upon an action brought for that purpose. But the commissioners appointed by the judge, under this act, to make the reallocation, must be guided by the valuation fixed by the verdict of the jury. Modified and affirmed.

(116 N. C. 961)

**WATKINS v. RALEIGH & A. AIR-LINE R. CO.**

(Supreme Court of North Carolina. April 2, 1895.)

**CASE ON APPEAL—DELAY IN SERVICE—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.**

1. When appellant's counsel telegraphs, within the time appellee is required to serve his counter case, that he will, on his return home, accept service, he is estopped to claim that the counter case was not served in time.

2. A passenger alighting from a moving train at the direction of the conductor is not, as a matter of law, guilty of contributory negligence, where there was no appearance of danger either in the locality where he alighted or the rate of speed of the train.

Appeal from superior court, Richmond county; Brown, Judge.

Action by Elias Watkins against the Raleigh & Augusta Air-Line Railroad Company for personal injuries received in alighting from a train. There was a judgment for plaintiff, and defendant appeals. Affirmed.

MacRae & Day, for appellant. Jones & Tillett, for appellee.

**CLARK, J.** The appellee's counter case was not served in the five days required by the amendatory act of 1889 (chapter 161). The appellant could therefore insist on his motion that his statement should be taken as the true case on appeal (*Cummings v. Hoffman*, 113 N. C. 267, 18 S. E. 170) but for the fact that his counsel waived the objection by telegraphing that he would accept service on his return home, which he did. Though the appellant's counsel except-

ed when he sent the case and counter case to the judge, with request to settle the case on appeal, on the ground that the acceptance was after the expiration of the five days, the telegram was an estoppel; for, but for the telegram, the appellee might have served the counter case within the statutory time by leaving a copy at the residence or office of appellant or his counsel. Code, § 597 (3); *State v. Price*, 110 N. C. 599, 15 S. E. 116. The case as settled by the judge must be taken as the case on appeal.

The entire charge of the judge is not presumed to be sent up, but only that part having reference to the exceptions taken. *State v. Cox*, 110 N. C. 503, 14 S. E. 688. The instruction excepted to is fully sustained by the cases of *Lambeth v. Railroad*, 66 N. C. 494, and *Nance v. Railroad*, 94 N. C. 619. Indeed, this is a stronger case against the defendant, as there was evidence that the train was moving very slowly, and the plaintiff got off the train by direction of the conductor, and with care. As the prayer for instruction which was declined was "that, if the jury believed the evidence, the plaintiff could not recover," this evidence, for the purposes of the exception, must be taken as true. Passengers alighting from trains at the direction of the conductor "are justified in assuming the place to be safe, and only under exceptional circumstances will their alighting be contributory negligence." *Bish. Noncont. Law*, § 1101. In *Lambeth's Case*, supra, the passenger alighted on the platform, and was killed. Here, fortunately, he got off on sandy soil, and only his leg was broken. The case of *Burghin v. Railroad Co.*, 115 N. C. 673, 20 S. E. 473, holds that the passenger is not justified in leaping from the train while in motion, unless invited to do so by the carrier's agent, and when it is not obviously dangerous, and approves *Lambeth's Case*. In the present case there was no appearance of danger, either in the locality itself or in the rate of speed at which the train was moving, which made it contributory negligence to obey the conductor's injunction to "step right off here, old man." No error.

(116 N. C. 339)

**UNION BANK OF RICHMOND, VA., v.  
BOARD OF COM'RS OF TOWN  
OF OXFORD.**

(Supreme Court of North Carolina. March 26, 1895.)

**RAILROAD AID BONDS — ELECTION TO AUTHORIZE  
— COMPROMISE DECREE — ESTOPPEL — NONSUIT  
— CONSTITUTIONAL LAW.**

1. A compromise decree entered in a suit by a railroad company to compel the issuance of railroad aid bonds, releasing the town from liability for one-half of its subscription in consideration of the issuance of bonds for the remaining portion, estops the town from thereafter disput-

ing the validity of the bonds issued pursuant to the decree.

2. Railroad aid bonds issued pursuant to a compromise decree in a suit by the company to compel the issuance of bonds as previously authorized are not invalidated in the hands of a bona fide holder because a formal release of the town from further liability was not executed by the railroad company as provided in the decree, where no demand of such release was made.

3. Where an act authorizing the issuance of railroad aid bonds provides the mode of payment thereof, but does not provide for an election on the question of their issuance, the election, by necessary implication, should be conducted in conformity with the existing election laws relating to the borrowing of money by municipalities; and bonds issued pursuant to such an election are valid in the hands of bona fide holders.

4. Acts 1891, c. 315, § 10, relating to certain railroad aid bonds, and providing for the mode of payment thereof, is not void under Const. art. 7, § 7, because it does not provide for a special election to authorize the issuance of such bonds, as the general laws relating to such elections are applicable.

5. In an action to compel a town to pay railroad aid bonds issued by it, an answer merely denying the allegations of the petition and setting up nonuser, failure to complete the road, and other facts for which the state might forfeit the company's charter, and praying that the bonds be canceled, does not contain such a counterclaim or demand for affirmative relief as will prevent plaintiff, at the close of the evidence, from taking a nonsuit on the court's holding that the bonds are void.

Appeal from superior court, Granville county; Hoke, Judge.

Petition for mandamus by the Union Bank of Richmond to compel the commissioners of the town of Oxford to levy taxes to pay certain railroad aid bonds.

The court, at the close of evidence, and after argument, having intimated an opinion that on the evidence, if believed, plaintiff could not recover, and that he would charge the jury, if they believe the evidence, they should answer second issue, "No." That the bonds were issued without authority, and plaintiff was affected with notice. In deference to the opinion, the plaintiffs submitted to a nonsuit, and appealed. Notice waived, and appeal bond fixed at \$100. Defendant also appealed. Nonsuit set aside, and new trial granted.

The bond, with coupons, sued upon, is as follows:

**"Exhibit A.**

"United States of America. The County of Granville, Town of Oxford. No. 1. \$1,000.00. The board of commissioners of the town of Oxford, for value received, is justly indebted to and promises to pay \* \* \* or bearer the sum of one thousand dollars upon presentation of this bond at the office of the treasurer of said town of Oxford, Granville county, and state aforesaid, on the 1st day of August, 1922, with interest thereon at the rate of six per cent. per annum, to be paid semiannually upon the 1st days of February and August in each and every year till the maturity of said bond, upon the surrender of and in accordance with the terms of the interest warrants or coupons hereto annexed.

This bond is issued in pursuance of the powers and the authority granted by the state of North Carolina, as provided in chapter 49 of the Code of North Carolina, and in pursuance of the authority granted by section 30 of the charter of said town of Oxford, which is embraced in chapter 21 of the Private Laws of 1885, as passed by the general assembly of said state, and in pursuance of the authority granted by chapter 315 of Laws of 1891, passed by the general assembly of North Carolina, and ratified the 5th day of March, 1891, entitled 'An act to incorporate the Oxford and Coast Line Railroad Company.' And in pursuance of an election held in said town of Oxford on the 27th day of April, 1891, and of a settlement and adjustment of a controversy and litigation in which the Oxford and Coast Line Railroad Company et al. were plaintiffs and the board of commissioners of Oxford and mayor of said town were defendants, adopted by the said board of commissioners July 25th, 1892, and the judgment and decree of his honor, H. G. Connor, judge presiding, in said action at July term, 1892, of Granville superior court. This bond may, at the option of the board of commissioners of Oxford, be redeemed at any time after the expiration of ten years from the date of said bonds upon the payment of the principal and interest due and fifty dollars additional upon each of the bonds so redeemed, due notice of the call therefor having first been given by publication for sixty days in some newspaper published in the city of New York, and in some newspaper published in the city of Baltimore, and in some newspaper published in the town of Oxford, and after the expiration of the time mentioned in said notice all interest on said bond shall cease. In testimony whereof, the said board of commissioners of Oxford have caused this bond to be signed by the mayor of said town, ex officio chairman of said board of commissioners, and attested by the clerk of said board with the corporate seal of said town of Oxford, North Carolina, this 1st day of August, 1892.

"George P. Fleming.

"Clerk and Secretary.

"A. A. Hicks.

{ Corporation Seal  
of Oxford.  
N. C. } "Mayor and Ex Officio Chairman of Board of Commissioners of Oxford."

"Exhibit B.

"\$30.00.

Coupon No. 2.

"The town of Oxford, North Carolina, will pay to bearer on the 1st day of August, 1893, thirty dollars, being six months' interest on its bond No. 20, issued to aid in constructing the Oxford and Coast Line Railroad. Dated August 1st, 1892. Payable at the office of the town treasurer in Oxford, North Carolina. [Signed] A. A. Hicks, Mayor.

"[Signed] Geo. P. Fleming, Clerk."

"Agreement.

"State of North Carolina, Granville County. This covenant and agreement made and entered

into this the 25th day of July, 1892, by and between the Oxford & Coast Line Railroad Company (chartered by an act of the general assembly of North Carolina entitled 'An act to incorporate the Oxford & Coast Line Railroad Company,' and ratified the 5th day of March, 1891) on the one part, and the board of commissioners of Oxford (a municipal corporation, also chartered by an act of the general assembly of North Carolina, entitled 'An act to repeal chapter 215 of the Laws of One Thousand Eight Hundred and Fifty-Two, and to charter the town of Oxford,' and ratified the 16th day of February, 1885) on the other part, witnesseth: That whereas, in the year 1891, the board of commissioners of Oxford ordered an election to be held in the said town of Oxford on the 25th day of May, 1891, to decide upon the question as to whether the town of Oxford should vote to issue bonds to the amount of forty thousand dollars, to subscribe to the capital stock of the Oxford & Coast Line Railroad Company, the money so received to be used in building that portion of the said road in Granville county, and afterwards the said board of commissioners changed the day of holding said election to the 27th day of April, 1891, by another order, with the direction that those who favored said proposition should vote a ballot with the word 'Approved' thereon, and those opposed should vote a ballot with the words 'Not Approved' thereon; and whereas, said election was accordingly held in said town, and a majority of the qualified voters of the said town voted ballots having the word 'Approved' thereon; and whereas, the Oxford & Coast Line Railroad Company, under a contract with James T. Pruden, proceeded to construct a railroad from said town of Oxford to a point in said county of Granville on the Durham & Northern Railroad, at Jack Dickerson's, in said county, and, after having done considerable work in the grading of the same, demanded that the board of commissioners of Oxford should issue bonds to the amount of forty thousand dollars as aforesaid, as a subscription by the said board of commissioners to the capital stock of said Oxford & Coast Line Railroad Company, which said board of commissioners refused to do; and whereas, a controversy has arisen thereupon between the parties to these presents, the party of the first part claiming and insisting that it has the right to have such bonds as aforesaid issued as a subscription by the party of the second part to the capital stock of the said Oxford & Coast Line Railroad Company, and to compel the issue of the same, and the said party of the second part claiming and insisting to the contrary, and that said party of the first part has no right to require or compel said party of the second part to become a subscriber at all to the capital stock of said Oxford & Coast Line Railroad Company, or to issue any bond or bonds as a subscription to the same; and whereas, there may be reasonable doubt as to whether said party of the first part has such right

as claimed by it as aforesaid, and whether said party of the second part is justified in its refusal as aforesaid; and whereas, two suits have been brought to the superior court in the said county of Granville by the said Oxford & Coast Line Railroad Company and James T. Pruden against the board of commissioners of Oxford, A. A. Hicks, mayor of the town of Oxford, being applications for mandamus; and whereas, upon a conference between the parties to these presents, it has been concluded by and between them that it is best for the interests of both parties to compromise and settle said controversy in manner and upon the terms hereinafter set forth: Now, therefore, it is covenanted and agreed by and between the said parties to these presents as follows, to wit: (1) That the said party of the second part, instead of subscribing anything to the capital stock of said Oxford & Coast Line Railroad Company, or issuing bonds to the amount of forty thousand dollars as a subscription to the same, shall, for the purpose only of a compromise and settlement of this controversy, issue to the said party of the first part bonds to the amount of twenty thousand dollars, the said bonds or their proceeds to be used exclusively and applied in aid, in the first place, of the payment and satisfaction of the present indebtedness, contracts, and liabilities of the said party of the first part, of every description, and, in the second place, if more than sufficient to complete such payment and satisfaction, then, as to the excess, in aid of completing the construction of said railroad which is now in course of construction by said party of first part between the town of Oxford and a point on the said Durham & Northern Railroad as aforesaid; said bonds to be each in the sum of \$1,000.00, dated August 1, 1892, and due and payable on the first day of August, 1922, with coupons of interest attached, at the rate of six per cent. per annum, and payable semiannually on the first day of February and the first day of August in each and every year, and both bonds and coupons to be payable upon presentation at the office of the treasurer of said town of Oxford, in said town, and upon the surrender of the same, and said bonds to purport upon their face to be issued under and in pursuance of chapter 315 of Laws of 1891, and chapter 21 of the Private Laws of 1885, and the election held April 27, 1891. And this agreement and settlement and the judgment and decree of the superior court for the said county of Granville to be entered in the said suits as hereinafter is mentioned, and that said party of the second part shall, after the expiration of ten years from the date of said bonds, have the privilege of redeeming all or any of said bonds before maturity upon paying the principal and interest due and fifty dollars additional upon every one of said bonds so redeemed. (2) Contemporarily with the issue and delivery of the said bonds to the amount of twen-

ty thousand dollars as aforesaid, the said party of the first part shall and does covenant and agree to fully release, acquit, and discharge the said party of the second part from all liability or obligation whatsoever to subscribe or pay anything whatever to the capital stock of said Oxford & Coast Line Railroad Company, or to issue for any purpose or on any ground or claim whatsoever any further or other bonds than the twenty thousand dollars of bonds so agreed to be issued as aforesaid, and also to guaranty and fully to protect said party of the second part from and against being called on at the demand of said party of the first part, or of any person or persons, party or parties, whomsoever or whatsoever, to subscribe anything to said capital stock, and from and against any liability or obligation to pay anything on account of any subscription or liability to subscribe to said capital stock. Said release, acquittance, and discharge, guaranty, and protection to be secured by instrument or instruments in writing properly drawn and executed in form sufficient for that purpose. (3) And the said party of the first part does further covenant and agree to and with the said party of the second part that the said bonds agreed to be issued as aforesaid, or the proceeds of the same, shall be faithfully applied first to the payment and satisfaction of all existing debts, contracts, and liabilities of the said party of the first part, of every kind and nature whatsoever, until the same are fully paid and satisfied; and, secondly, if the said bonds or their proceeds should be more than sufficient to pay, satisfy, and discharge in full the debts, contracts, and liabilities of the said party of the first part as aforesaid, then the surplus of the same shall be faithfully applied in aid of the completion of said railroad, now in course of construction as aforesaid. (4) And the said party of the first part doth further covenant and agree to and with the said party of the second part that the said railroad now in course of construction from Oxford to a point on the Durham and Northern Railroad at Jack Dickerson's, as aforesaid, shall be fully completed and put in operation within a reasonable time from and after the issuing of said bonds as aforesaid. (5) It is further agreed by and between the parties to these presents that the said suits shall be consolidated, and that a judgment or decree shall be entered therein in accordance with the said compromise and agreement, and that the said parties of the first part shall pay the cost of said suit. (6) It is further agreed and understood by and between the parties to the presents that if the said James T. Pruden shall refuse or fail to consent and agree to the entry of such judgment or decree as aforesaid, then and in that case these presents shall be void and of no effect. In testimony whereof, the said Oxford and Coast Line Railroad Company has caused these presents to be signed by Wm. F. Beasley,



president, and R. W. Lassiter, secretary, of said company, and the common seal of said company to be hereto affixed, and the said board of commissioners of Oxford has caused the presents to be signed by A. A. Hicks, mayor of said town of Oxford, and G. P. Fleming, secretary of said board of commissioners, and the corporate seal of the board of commissioners of Oxford to be hereto affixed, this 25th day of July, 1892.

"The Oxford and Coast Line Railroad Co.

{ Oxford and Coast  
Line Railroad  
Company of  
North Carolina.  
Incorporated  
1891. }

"By W. F. Beasley.

"President.

"R. W. Lassiter,

"Secretary.

"The Board of Commissioners of Oxford.

{ Corporation of  
Oxford, N. C.  
Seal. }

"By A. A. Hicks,

"Mayor,

"And G. P. Fleming,

"Clerk and Sec.

"We, Wm. F. Beasley and James T. Pruden, concur in the foregoing agreement, and agree to be bound by the same in all respects and to the same extent as if we were parties thereto. Our hands and seals this 25th day of July, 1892.

"W. F. Beasley. [Seal.]

"J. T. Pruden. [Seal.]"

"North Carolina, Granville County. In the Superior Court, July Term, 1892.

"(14) The Oxford and Coast Line Railroad Company and James T. Pruden, Plaintiffs, vs. The Board of Commissioners of Oxford, A. A. Hicks, Mayor of said Town of Oxford, Defts. Judgment.

"(15) Also, The Same vs. The Same. Judgment.

"On motion and by consent of the parties on both sides it is ordered by the court that the above-mentioned actions, one returnable to the present term of the court in term, and the other returnable before Hon. H. G. Connor (the judge presiding and holding said court) at chambers, on the 25th day of July, 1892, be consolidated, and that the defendants be allowed to file one answer only, to be considered and used as an answer in both said actions. And the defendants having filed their answer as aforesaid, and the parties having thereupon filed in court in said action, as consolidated as aforesaid, an agreement between them in writing, the same being a compromise and settlement of the matters in controversy in said actions between the parties upon the terms in said agreement set forth, one of which terms is that a judgment or decree shall be entered in said consolidated actions in accordance with said compromise and agreement, now, on motion of the parties on both sides, the court, consenting thereto, and proceeding to render judgment in said consolidated actions in accordance with said agreement of compromise and settlement, doth adjudge and decree, order and direct, that the defendant the board of commissioners of Oxford

have prepared and issue at its own expense to the plaintiff, the Oxford and Coast Line Railroad Company, bonds of said defendant to the amount of twenty thousand dollars, the said bonds or their proceeds to be used exclusively and applied in aid, in the first place, of the payment and satisfaction of the present indebtedness, contracts, and liabilities of the said Oxford and Coast Line Railroad Company, of every description, and, in the second place, if more than sufficient to complete such payment and satisfaction, then, as to the excess, in aid of completing the construction of the railroad now in course of construction by said Oxford and Coast Line Railroad Company between said town of Oxford and a point on the Durham and Northern Railroad at Jack Dickerson's, in the county of Granville; and the said bonds to be each in the sum of one thousand dollars, dated August 1st, 1892, and due and payable the first day of August, 1922, with coupons of interest attached at the rate of six per centum per annum, and payable semiannually on the 1st day of February and the first day of August in each and every year until paid, and both bonds and coupons to be payable when due upon presentation at the office of the treasurer of the said town of Oxford, in said town, and upon the surrender of the same, and the said bonds to purport upon their face to be issued under and in pursuance of chapter 315 of Laws of 1891 and chapter 21 of the Private Laws of 1885, and the election held April 27, 1891, and the agreement and settlement aforesaid, and this judgment and decree and said bonds to contain a provision or stipulation that the board of commissioners of Oxford shall have the privilege of redeeming all or any of said bonds after the expiration of ten years from the date of the same, and before their maturity at any time upon paying the principal and interest due and fifty dollars additional upon every of said bonds so redeemed. And the court doth further adjudge and decree, order and direct, that, coterminously with the issue and delivering to the said Oxford and Coast Line Railroad Company of the said bonds to the amount of twenty thousand dollars as aforesaid, the said Oxford and Coast Line Railroad Company, at its own charge, deliver to the board of commissioners of Oxford an instrument of writing with the corporate name of said company signed, and its common seal affixed thereto and signed by its president and secretary, by its direction and authority, fully releasing, acquitting, and discharging the board of commissioners of Oxford from all liabilities and obligations whatsoever to subscribe or pay anything whatsoever to the capital stock of said Oxford and Coast Line Railroad Company, or to issue for any purpose or any ground or claim whatsoever any further or other bonds than the twenty thousand dollars of bonds aforesaid, and also fully guarantying and protecting said

board of commissioners of Oxford from and against being called on or required at the demand of the said Oxford and Coast Line Railroad Company, or any person or persons, party or parties, whomsoever or whatsoever, to subscribe anything to the capital stock of said Oxford and Coast Line Railroad Company, and from and against any liability or obligation to pay anything on account of any subscription or liability to subscribe to the capital stock of the same. And the court doth further adjudge and decree, order and direct, that the said Oxford and Coast Line Railroad Company apply the said bonds herein directed to be issued as aforesaid, or their proceeds, first to the payment and satisfaction of all existing debts, contracts, and liabilities of said company of every kind and nature whatsoever, until the same are fully paid, satisfied, and discharged; and, secondly, if the said bonds or their proceeds should be more than sufficient to pay, satisfy, and discharge in full the said existing debts, contracts, and liabilities of the said company as aforesaid, then that the said company apply the surplus of said bonds or their proceeds in aid of the completion of the railroad now in course of construction as aforesaid. And the said Oxford and Coast Line Railroad Company, its officers and agents, are hereby strictly prohibited and enjoined from using, disposing of, or applying said bonds of twenty thousand dollars herein directed to be issued as aforesaid, or the proceeds of the same, or any part thereof, to or for any other use or purpose whatever than is hereinbefore mentioned. And the court doth further adjudge and decree, order and direct, that said Oxford and Coast Line Railroad Company complete and put in operation, or cause to be completed and put in operation, the said railroad now in course of construction from the said town of Oxford to a point on said Durham and Northern Railroad, at Jack Dickerson's, in Granville county, as aforesaid, within a reasonable time from and after the issuing of said bonds of twenty thousand dollars as aforesaid. And the court doth further adjudge and decree, order and direct, that the plaintiff, the Oxford and Coast Line Railroad Company, pay the costs of said actions to be taxed by the clerk of this court. And, in case any of the parties shall refuse or fail in anything to comply with this judgment or decree, or fully to do and perform all or any of the things herein required and directed to be done and performed by such parties, then the other parties, or any of them interested therein, shall be at liberty to apply to the court.

"H. G. Connor, Judge Presiding."

"State of North Carolina, Granville County. This indenture, made and executed this 3d day of December, 1894, A. D., by and between the Oxford & Coast Line Railroad Company, corporation, party of the first part, and the board of commissioners of Oxford,

corporation, party of the second, witnesseth: That whereas, the party of the second part did on August 15th, 1892, issue and deliver to the party of the first part, in pursuance of a decree and judgment of the superior court of Granville county, at its July term, 1892, and in accordance with the terms of a written agreement executed by the parties hereto on July 25th, 1892, twenty coupon bonds of the party of the second part in the denomination of one thousand dollars each, containing the recitals directed in said agreement and said judgment: Now, therefore, the said party of the first part, for and in consideration of the receipt of said bonds, doth hereby fully release, acquit, and discharge said party of the second part from all liabilities or obligations whatever to subscribe or pay anything whatever to the capital stock of said party of the first part, or to issue for any purpose, or any ground or claim whatsoever, any further or other bonds than the twenty thousand dollars of bonds so agreed to be issued as aforesaid, and the party of the first part doth hereby guaranty and fully protect said party of the second part from and against being called on at the demand of the said party of the first part, or of any person or persons, party or parties, whomsoever or whatsoever, to subscribe anything to said capital stock, and from and against any liability or obligation to pay anything on account of any subscription or liability to subscribe to said capital stock of the party of the first part. The erasures in lines three and four of page 2 before, made before execution. In the witness whereof the said the Oxford and Coast Line Railroad Company hath caused its corporate seal to be hereto affixed, and hath caused its president and secretary to sign their name hereto.

"The Oxford and Coast Line Railroad Co.,

"By A. W. Graham,

{ Seal of Oxford  
and Coast Line  
R. R. Co. }

"President.

"A. W. Graham,

"President.

"R. W. Lassiter, Secretary."

"Proceedings of the Board of Commissioners of the Town of Oxford, N. C., March 9, 1891.—Page 168.

"State of North Carolina, Granville County. Mayor's Office, March 9, 1891.

"At the regular meeting of the board of town commissioners held this day there were present: Messrs. L. G. Smith, Mayor; L. R. Hunt, A. W. Graham, John Webb, and R. T. Smith, Commissioners. B. S. Royster presented to the board a petition in word and figures following: 'We, the undersigned citizens and taxpayers in the town of Oxford, solicitous for the welfare of the town, and earnestly desirous to promote the same, respectfully petition the board of commissioners of the town of Oxford to provide for an election in said town on the proposition to subscribe the sum of \$40,000 to build a railroad from the

town of Oxford to Springhope, or to some point on the A. C. L. R. R., or to some other R. R. system. [Signed] B. S. Royster, R. W. Lassiter, Jr., F. B. Wimbish, C. J. Turner, W. G. Griffin, D. C. Hunt, J. C. Hundley, J. C. Horner, S. D. Booth, G. W. Knott, J. M. Currin, S. M. Bobbitt, G. K. Hundley, J. G. Hall, J. A. Williams, J. M. Hays, R. F. Knott, H. W. Kronheimer, T. D. Waller, H. G. Cooper, J. F. Edwards, A. Crews, W. T. Lyon, M. Oppenheimer, L. E. Wright.' Any action on said petition was postponed until after a meeting of the incorporators of the Oxford & Coast Line R. R. Co.

"F. B. Hays, Clerk."

"Proceedings of the Board of Commissioners of the Town of Oxford, N. C., March 14, 1891.—Page 166.

"State of North Carolina, Town of Oxford. Mayor's Office, March 14, 1891.

"At a called meeting of the board of town commissioners held that day there were present: Messrs. Louis G. Smith, Mayor; A. W. Graham, R. T. Smith, L. R. Hunt, John Webb, Commissioners. After a discussion of the subject by various citizens, it was ordered that an election be held on the 25th day of May, 1891, to decide upon the question as to whether the town of Oxford shall vote to issue bonds to the amount of forty thousand dollars (\$40,000), to subscribe to the capital stock of the Oxford & Coast Line R. R. Co., and that the money so raised be used in building that portion of the said road in Granville county. F. B. Hays, Clerk."

"Proceedings of the Board of Commissioners of the Town of Oxford, N. C., March 24, 1891.—Page 168.

"State of North Carolina, Town of Oxford. Mayor's Office, March 24, 1891.

"At a called meeting of the board of town commissioners held this day there were present: Messrs. Louis G. Smith, Mayor; A. W. Graham, R. T. Smith, John Webb, Commissioners. Messrs. R. W. Lassiter, Jr., and J. G. Hall, a special committee from the Commonwealth Club, petitioned the board to change the time for holding the election on the question of the town subscribing forty thousand dollars to the capital stock of the Oxford and Coast Line Railroad from the 25th day of May to the 27th day of April next. It was so ordered. At said election those who favor said proposition shall vote a ballot with the word 'Approved' thereon; those opposed shall vote a ballot with the words 'Not Approved' thereon. The mayor was requested to appoint a registrar and inspectors of election, both for the said railroad election and for the regular annual municipal election to be held the first Monday in May next, when a mayor and seven commissioners will be elected. Mr. Graham was appointed a committee to have printed and distributed among the electors of the town

about one hundred hand bills, notifying them of the change in the date of the railroad election. No further business offering, the board adjourned.

"O. B. Leach, Clerk pro tem."

"Proceedings of the Board of Commissioners of the Town of Oxford, N. C., April 19, 1892.—Pages 246 and 247.

"State of North Carolina, Granville County. Entered on April 19, 1892. Mayor's Office, August 4, 1891.

"At an adjourned meeting of the town commissioners held on August 4, 1891, in mayor's office, there were present: J. S. Brown, Mayor pro tem.; R. T. Smith, R. F. Knott, J. H. Bullock, Commissioners. Ordered, that the following paper be spread on town record, as follows: Whereas, on the 27th day of April, 1891, it was ordered by the board of commissioners of the town of Oxford to submit to the qualified voters of the town the question of subscribing the sum of forty thousand dollars to assist in building the Oxford & Coast Line Railroad; and whereas, at the election held on the 27th day of April, 1891, the said question was submitted to the voters of said town, and out of a registered vote of \* \* \* it was found that 323 votes had been cast 'Approved,' and 15 votes had been cast 'Not Approved,' which was a clear majority of the qualified registered vote of said town; and whereas, the result of said election was duly declared in front of the courthouse door in Oxford, on the 28th day of April, 1891, by W. H. White, registrar, and the poll holders of said election, and was duly recorded (on the 19th day of August, 1891) in the minutes of the board of commissioners: Now, therefore, be it resolved, that the bonds of the town of Oxford, to the amount of forty thousand dollars of the denomination of one thousand dollars each, payable on the 1st day of December, 1921, with interest not exceeding six per cent. per annum, payable on the 1st days of June and December each and every year until maturity, with the right to the town, after 10 years, upon 3 months' notice in some newspaper published in the town of Oxford and the cities of Baltimore and New York, to redeem said bonds upon paying the sum of \$1,050 and the accrued interest on each bond,—be immediately, and upon a completion of a contract by the authorities of the Oxford & Coast Line Railroad for the construction of the same, that the same be delivered to the president of said railroad company to aid or assist in building said railroad. And that whatever proportion of said forty thousand dollars is used in building and equipping said road shall be considered a subscription to the capital stock of said railroad, and a certificate shall be issued to the town of Oxford for stock to said amount. The reason this part of the meeting held on the 4th of August was not put on town record at proper time, it was lost, and was

not found until a few days before this. It was put on as soon as it was found.

"G. P. Fleming, Clerk."

"Proceedings of the Board of Commissioners of the Town of Oxford, N. C., August 3, 1892.—Page 290.

"North Carolina, Granville County. Mayor's Office, August 3, 1892.

"At a called meeting of the board of commissioners held this day there were present: Messrs. A. A. Hicks, Mayor; J. M. Currin, W. L. Mitchell, C. D. Osborn, J. G. Hall, J. F. Edwards, Commissioners. \* \* \* Ordered, on motion of Mr. Edwards, that the receipt of the Oxford & Coast Line R. R. Co. be spread on town record. The receipt is as follows, to wit: 'Received, August 15, 1892, of A. A. Hicks, Esq., mayor of the town of Oxford, North Carolina, twenty bonds of the denomination of one thousand dollars each, bearing interest at the rate of six per cent. per annum, semiannually, payable on the first days of February and August of each year, principal due on the first day of August, 1922. Said bonds having been authorized and issued under and by virtue of a resolution of the board of commissioners of the town of Oxford, and a judgment of the superior court of Granville county, rendered at the July term, 1892, in the case of the Oxford & Coast Line R. R. Co. against the board of commissioners and the mayor of the town of Oxford. [Signed] Oxford & Coast Line R. R. Co., by Wm. F. Beasley, President, H. C. Herndon, Treasurer.' \* \* \*

"G. P. Fleming, Town Clerk."

"Proceedings of the Board of Commissioners of the Town of Oxford, N. C., March 16, 1893.—Page 313.

"North Carolina, Granville County. Oxford. Mayor's Office, March 16, 1893.

"Called meeting of the board of town commissioners held this day. There were present: A. A. Hicks, Mayor; J. G. Hall, E. T. White, C. D. Osborn, W. L. Mitchell, J. F. Edwards, G. A. Coggeshall, J. M. Currin, Commissioners. A. W. Graham addressed the board, and asked them to issue an order on the town treasurer for six hundred dollars, with which to pay coupons on O. & C. L. R. R. bonds. On motion of G. A. Coggeshall, the clerk was instructed to issue an order on the Town treasurer, payable six months after date, for six hundred dollars, to A. W. Graham, attorney, to pay coupons now due on O. & C. L. Railroad bonds.

"E. T. Crews, Clerk to Board."

The following are the portions of the statutes and constitution to which reference is made in the opinion:

Acts 1891, c. 315, § 10: "That whenever any county, city, town or township shall issue bonds to aid in building said Oxford & Coast Line Railroad, the money derived from tax-

ation of said railroad within said county shall be applied to the payment of the interest on said bonds so long as they shall remain outstanding, and in the event that two or more cities, towns or townships in any county shall issue bonds as aforesaid, then the money derived from the taxation of said railroad within said county shall be applied to the interest on said bonds in proportion to the amount of bonds so issued by said cities, towns or townships as aforesaid."

Acts 1885, c. 21, § 30 (Priv. Laws): "That among the powers hereby conferred on the board of commissioners [of the town of Oxford] they may borrow money only by the consent of a majority of the qualified registered voters, which consent shall be obtained by a vote of the citizens of the corporation after 30 days public notice, at which time those who consent to the same shall vote 'Approved' and those who do not consent shall vote 'Not Approved'; they shall provide water, provide for repairing and cleaning the streets, regulate the market, take all proper means to prevent and extinguish fires, make regulations to cause the due observance of Sunday, appoint and regulate town watches, suppress and remove nuisances, preserve the health of the town from contagious and infectious diseases, appoint constables to execute such precepts as the mayor or other persons may lawfully issue to them to preserve the peace and order and execute the ordinances of the town, and shall appoint and provide for the pay and prescribe the duties of all such officers as may be deemed necessary; they shall have the right to regulate the charge for the carriage of persons, baggage and freight by omnibus or other vehicle, and to issue license to omnibuses, hacks, drays or other vehicles used for transportation of persons or things for hire."

Const. art. 7, § 7: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

J. S. Manning, Shepherd & Busbee and W. J. Leake, for plaintiff. W. A. Guthrie and Edwards & Royster, for defendants.

AVERY, J. If an action had been brought by a taxpayer of the town of Oxford to enjoin the issue of bonds in payment of its subscription to the Oxford & Coast Line Railroad Company, any final judgment upon the merits would have operated as an estoppel both upon other taxpayers of the town and the municipality itself. 2 Black, Judgm. § 584. In two actions brought by that company against the mayor and commissioners of Oxford, asking for mandamus to compel the issuing of a subscription of \$40,000 in bonds to the capital stock of the company, in which a controversy arose, among other matters, as to the authority to make such

subscription, a compromise decree, drawn in pursuance of a previous agreement between the parties, was entered in the two suits, consolidated by order of the court into one, whereby the town was released from further liability upon the issue of \$20,000 instead of \$40,000 in its bonds payable to the company, and upon surrendering its right to call for certificates of stock in the company to the amount of \$40,000. If the decree concluded the town from questioning the validity of the bonds, the estoppel would be as effectual in favor of the plaintiff, who sues upon past-due coupons of which it is the owner, as if the action were brought by the railroad company. *Thomson v. Lee Co.*, 3 Wall. 327. Prior to the passage of Act 1874-75, c. 178 (Code, § 574), an agreement to receive a part in lieu of the whole of a debt due was held to be a nudum pactum as to all in excess of the sum actually paid. *Currie v. Kennedy*, 78 N. C. 91; *Hayes v. Davidson*, 70 N. C. 573; *Mitchell v. Sawyer*, 71 N. C. 70; *Love v. Johnson*, 72 N. C. 415. But where such agreements have been made since the act was passed they are deemed to have been entered into in as full contemplation of its provisions as though it had been incorporated into the contract. *Koonce v. Russell*, 103 N. C. 181, 9 S. E. 316. Indeed, independent of statutes, where disputed claims have been preferred against it, "a town may make a contract with a creditor whereby the latter agrees to discount or throw off a portion, and such an agreement [says Judge Dillon] is founded upon a sufficient consideration, and will be enforced." 1 Dill. Mun. Corp. § 477; *Inhabitants of Baileyville v. Lowell*, 20 Me. 178; *Amy v. Taxing Dist.*, 114 U. S. 387, 5 Sup. Ct. 895. In our case there were mutual considerations which, it would seem, would have given vitality to the contract, and made it enforceable even at common law. The town surrendered its claim to \$40,000 in certificates of capital stock in consideration of being released from its obligation to issue 40 instead of 20 \$1,000 bonds to the railroad company. We can see no force in the contention that the failure to deliver a release in accordance with the decree in any way affects its validity, when it does not appear that the railroad company ever refused or neglected on demand to execute it. The town cannot take advantage of the laches of its authorities in failing to demand its execution, in order to repudiate their debt, if it is valid. The plaintiff was warranted in assuming that the town had demanded its execution, and was not bound to look behind the decree to ascertain whether it had exercised common prudence in protecting itself. These 20 bonds recite that they are issued in pursuance of the power and authority granted in chapter 49 of the Code (chapter 315, Acts 1891, and section 30, c. 21, Acts 1885, being the charter of the town), and also by virtue of an election held as provided for in the

acts referred to, and in accordance with the compromise decree in the cases to which we have referred. It is conceded without question that no municipal corporation is authorized to issue bonds unless the power to do so is granted either in express terms or by necessary implication by the legislature. The unavoidable implication arising from section 10, c. 315, Laws 1891 (the charter of the company), is that it was the intention of the legislature to empower "counties, cities, towns, and townships" to issue bonds to aid in building the road, and to compel either corporate body that might lend its credit in that way to pay all such tax as it might collect on the franchise and property of the completed road in payment of the interest accruing thereon. But it is insisted that the power cannot be exercised in the face of the prohibitory provision of the constitution (article 7, § 7) unless the authority to loan its credit received the sanction of a majority of the qualified voters of the municipality, and that it is as essential to the validity of the bonds that the legislature should in express terms authorize the election, and require specifically a vote of a majority of the qualified voters, as that it should empower the town to aid. It is admitted to be an essential prerequisite to the validity of such bonds that the legislature should grant the power to aid, and that the majority of the qualified voters should signify their approval by their ballots cast. The machinery for ascertaining the will of the electors is a secondary consideration. The main purpose was to prohibit the imposition of a tax for certain objects without the assent of a majority of the qualified voters. The act of 1891, in assuming that counties, towns, and townships may subscribe, impliedly manifests a purpose on the part of the legislature to allow municipalities "to issue bonds to aid in building" this railroad, and leaves them at liberty to aid as may seem to them best, and by implication to do what they were expressly allowed to do in the charter of the Oxford & Clarksville road,—either make donation or subscriptions. The statute puts no restriction upon the town as to the manner of issuing its bonds in aid of the construction, leaving them to donate or subscribe, at their option, with the approval of the requisite number of voters. In the case of *Wood v. Town of Oxford*, 97 N. C. 233, 2 S. E. 653, Justice Merrimon, speaking of the contention that the provision in the railroad charter that if a majority of the votes cast were favorable the town would be authorized to issue the bonds was unconstitutional, said: "It may be that the statute contemplated that if a simple majority of the qualified voters voting shall be in favor of such donation, this shall be sufficient to authorize it to be made. This is questionable, but we need not decide whether it so provides or not, because the purpose to allow such donation to be made is manifest, and

it appears in the case before us that a clear majority of all the qualified voters of the town of Oxford voted in favor of the proposed donation of forty thousand dollars in question, thus certainly meeting the essential prerequisites provided by the statute, and observing the provisions of the constitution (article 7, § 7), forbidding towns and other municipal corporations to make a debt, except, etc., unless by a vote of a majority of the qualified voters therein, and likewise observing the requirements of the charter of the town." It is now well settled that under the constitutional provision a majority of the qualified voters is necessary, and, in the absence of proof to the contrary, a majority of the registered voters will be deemed a majority of the qualified voters. *Rigsbee v. Durham*, 98 N. C. 81, 3 S. E. 749.

The purpose of the legislature to authorize the issue in our case in order to aid in any way they might deem best is apparent. The fact that a majority of the qualified voters have cast their ballots in favor of extending aid by subscription is undisputed. If it is not admitted, the records of the town show that a proposition to allow the municipality to lend its aid by the issue of bonds was submitted after 30 days' notice, and a majority of the qualified registered electors signified their assent by voting "Approved," and it is settled that such a record is conclusive evidence that the will of the majority was so expressed. *Norment v. Charlotte*, 85 N. C. 387; *Cain v. Commissioners*, 86 N. C. 8; *Southerland v. City of Goldsboro*, 96 N. C. 52, 1 S. E. 760; *Duke v. Brown*, 96 N. C. 127, 1 S. E. 873; *McDowell v. Construction Co.*, 96 N. C. 514, 2 S. E. 351; *Rigsbee v. Durham*, 98 N. C. 81, 3 S. E. 749. In some of the cases which we have cited it is declared by the court to be immaterial that the act providing the machinery for ascertaining the wishes of the qualified voters had provided, in direct conflict with the constitution as construed by the court, that a majority of the votes cast should be sufficient. These decisions rest upon the ground that the two evils intended to be guarded against were the using of the credit of municipal corporations—First, without the assent of the legislature clearly given; and, second, without the approval of a majority of the qualified voters fairly ascertained. It was this broad view which inspired the intimation that either section 30 of the charter of Oxford, a section of a railroad charter which was declared in part unconstitutional, or the constitutional provision itself in connection with the general election law, would be sufficient to authorize an election to ascertain the will of the voters, where the assent of the legislature that the municipality might create a debt had been clearly given. In *Wood v. Town of Oxford* the court said (after what has already been quoted from the opinion): "As the purpose of the legislature to allow such donations to be made is clear and ex-

press, it is sufficient if the condition upon which it might be made has certainly, in the most adverse view of the proposition as to the vote, happened." In any aspect, it is beyond question that the requisite constitutional majority has approved of what the legislature first clearly assented to,—lending the aid of the town by issuing its bonds to the building of the railroad. With the legislative permission to so use its credit, we see no reason why the necessary implication should not follow that the town might as certain the wishes of the voters in a way provided in the charter for the purpose of borrowing money in compliance with the same section of the organic law, or, in the absence of such special provision, under the general law governing elections held for municipalities; the natural inference being, when an election is authorized, that it is to be held in the usual, if some unusual mode is not provided. Where legislative sanction is given, and the will of the majority of qualified voters is actually ascertained, it is certain that the danger line has not been crossed, so as to wrongfully subject municipalities to the burden of a debt for any purpose except necessary expenses. The imperative requirement of the constitution is that there shall be a concurrence of the legislative and the popular will; the former evidenced by a grant of authority to vote, the latter by the record that a majority of the qualified voters have cast the ballots in favor of creating the debt. Whether the legislative purpose is expressed or may be fairly implied from the language of the statute is immaterial,—1 Dill. Mun. Corp. § 89 (55); *Clark v. City of Des Moines*, 87 Am. Dec. 423,—as is the question whether the election is conducted under statutes passed for the particular purpose, or, in the absence of such special provision, under the general election law enacted for the town or for counties generally, so that the sense of the voters is unquestionably and fairly ascertained. The power to subscribe being given, the fair implication was that the legislature intended that the use of the machinery provided generally for taking a vote to authorize the borrowing of money might be used. The principle of strict construction is never "carried to such an unreasonable extent as to defeat the legislative purpose fairly appearing upon the entire charter or enactment." If the special provision for holding an election in a town or county fails to provide in detail the mode or what is in common parlance called the "machinery" for conducting it, it must be inferred that the legislature intended that general election laws might be resorted to to fill in the hiatus, and not that the legislative will should be thwarted or defeated by any such omission.

The case of *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, which was relied upon by the defendant, is clearly distinguishable from that at bar. If the only authority for

issuing the bonds that gave rise to this controversy were the provisions in the charter empowering the town to borrow money, it would be a case in point. But we have already adverted to the fact that the charter of the railroad company (section 10, c. 315, Laws 1891) expressly contemplates, and by implication authorizes, the issuing of bonds by the town to aid in the building of the road (not simply the borrowing of money by such towns for corporate purposes), and that, in accordance with a familiar rule of construction, all statutes bearing upon the subject must be construed in *pari materia*. Every doubt must be resolved in favor of the constitutionality of any act passed by the legislature (State v. Moore, 104 N. C. 743, 10 S. E. 183); and upon the same principle, where the assent of the legislature to the creation of a municipal debt has been given by fair implication, it would be "sticking in the bark" to render such expression of its will nugatory by insisting that special election machinery should have been provided for ascertaining the popular feeling, when general laws can be made to subserve the purpose. It must be conceded that the result of the election cannot be drawn in question in this collateral proceeding if the law authorized the holding of it. McDowell v. Construction Co., *supra*.

Pretermittit the question whether the court could look beyond the compromise judgment for the purpose of determining whether the statute authorized the holding of the election, we have preferred to declare that the town was in fact authorized by fair implication of law to hold it. The purchaser of such coupons as those sued upon must so far act upon the notice contained in the recitals, as a general rule, as to examine the statutes referred to, and ascertain at his peril whether the essential prerequisites to the validity of the bonds have been met both by legislative and popular action. We hold that upon a fair construction of the organic law and pertinent statutes, and their application to the facts of this case, there has been a sufficient compliance with the essential requirements of the law to render the election valid. We think, therefore, that the court erred in holding that the plaintiff was not entitled to recover, and the judgment of nonsuit must be set aside, and a new trial granted.

#### Defendant's Appeal In Same Case.

The facts are stated in the foregoing appeal. The defendant objected to the judgment of nonsuit, and insisted upon the right of the town to demand a verdict and judgment thereon, and appealed from the judgment on that ground.

The defendants, further answering by way of defense to said action, say:

"(1) That section 5 of acts of the general assembly of North Carolina, entitled 'An act to incorporate the Oxford and Coast Line Railroad Company,' and ratified the 5th day

of March, A. D. 1891, which is in complaint mentioned and referred to, provided, among other things, that upon the subscription of five thousand dollars of the stock and the election of directors as therein is mentioned said company should be deemed and held fully organized for all purposes, and might proceed to carry out the objects of their charter; and the defendants further say, upon information and belief, that while it is true that prior to the pretended organization of said company hereinafter mentioned, to wit, on or about the 12th day of March, 1891, the amount of fifty-four hundred dollars or thereabout was in form and appearance subscribed (all by private individuals) to the capital stock of said company, yet that said subscriptions, or nearly all of them, were not in good faith, but were made with an agreement or understanding between said subscribers generally that each should pay in on account of his said subscription the sum of ten dollars only, for the purpose of meeting expenses preliminary to the commencement of the construction of said railroad, and should never be called on or required to pay anything more on account of said subscriptions, it being the intention of said subscribers in making said subscriptions merely to enable them to effect a pretended organization of said company with an appearance of legality and of a compliance with the provisions of said charter; and that, notwithstanding there had not been bona fide subscribed, and so not really subscribed, to the capital stock of the said company, the sum of five thousand dollars, as required by said charter, before said company could be legally organized, yet the said subscribers, or some of them, proceeded to make and did make a pretended organization of said company by an election of directors; and that afterwards all said subscribers, with two exceptions, refused and failed to pay anything further on their said subscriptions, upon the ground of the agreement and understanding aforesaid, and, indeed, were not called on to pay anything in addition to the ten dollars aforesaid, until after the board of commissioners of Oxford refused to issue the said bonds of forty thousand dollars, which said company claimed they were bound to do, in pursuance of said election mentioned in the complaint, and that said subscribers were then called on to pay their said subscriptions, and refused and failed to pay the same, although they were threatened with a suit or suits to compel them to do so; and the defendants further say they deny that the Oxford and Coast Line Railroad Company mentioned in the complaint, and which is the same that was so pretended to be organized as aforesaid, was ever duly or legally organized under said act of the 5th of March, 1891, or was at the time of the issuing of the bonds, so called, mentioned in the complaint, or is a legally constituted and valid corporation; and was not nor is entitled to receive payment

of subscriptions to the capital stock of said Oxford and Coast Line Company chartered by said act.

"(2) The defendants further say they deny that chapter 49 of the Code of North Carolina, or the election mentioned in the complaint, authorized any subscription to the capital stock of said Oxford and Coast Line Railroad Company, or the issue of any bonds for such purpose by the board of commissioners of Oxford, or that said chapter 49 of the Code of North Carolina, or any of said acts of the general assembly of North Carolina, authorized or provided for the holding of said election, or that the same was ordered or held by any authority of law. And the defendants further say that, however the said bonds, so called, may purport to have been issued, the defendants deny that in point of fact they were issued in pursuance of any powers or authority granted by said chapter 49 of the Code of North Carolina, or in pursuance of any authority granted by any of the acts of the general assembly of North Carolina in said complaint mentioned and referred to, or in pursuance of said election, but that they were really and truly issued in pursuance of said agreement of compromise and consent judgment or decree only. And the defendants further say that the only election authorized and provided for in said charter of said town of Oxford is an election for the election of officers as therein is set forth, and that, even if the provisions of said charter of said town of Oxford could be considered as including such an election as that mentioned in said complaint (which the defendants deny), yet they deny that said election was regularly or legally held in the manner prescribed in said charter for the election therein authorized; that said charter of said town of Oxford, in the twelfth section, provides, amongst other things, that for the purpose of the election therein authorized and provided for the commissioners shall appoint, in manner as therein set forth, three inspectors, and chapter 62 of the second volume of the Code of North Carolina (section 3788)—which applies, when not inconsistent with the charter—provides that such elections as are mentioned in the complaint shall be held under the inspection of such persons, not exceeding three, as the board of town commissioners may appoint. And the defendants further say that the inspectors who held and conducted the election in the complaint mentioned were four in number, and were appointed, not by commissioners, but by the mayor, who had no authority to appoint the same. And the defendants further say that said election mentioned in said complaint was utterly null and void, and gave the board of commissioners of Oxford no power or authority to subscribe to the capital stock of said Oxford and Coast Line Railroad Company (and they have never done so), or to issue bonds for any amount as a subscription to the same, or for any other purpose.

"(3) The defendants further say that at the time of the ordering of said election in the complaint mentioned, and before and at the same time of holding the same as aforesaid, it was represented to the citizens and taxpayers of the town of Oxford by the organizers of said Oxford and Coast Line Railroad Company as aforesaid, and the promoters of their plans, that their plan and purpose was to build (as they were authorized by their charter to do) a railroad from Oxford, passing through Franklin county, to Springhope, in the county of Nash, North Carolina, which had and has a connection by railroad with the Wilmington and Weldon Railroad at Rocky Mount, in Nash county, North Carolina, so as to bring Oxford in direct and convenient communication with the eastern part of the state; that the said representations were assiduously made and circulated with the view of inducing the voters of Oxford to favor the proposition submitted to them in said election, and a great majority of those who voted in favor of said proposition in said election were induced to do so by such representations; that after said election the said Oxford and Coast Line Railroad Company, so called, laid out and commenced the construction of a railroad only from Oxford aforesaid to a point on the Durham and Northern Railroad at Jack Dickerson's, in said county of Granville, a distance of not more than four and a half miles from Oxford, if that. And the defendants further say, upon information and belief, that there was and is no purpose on the part of said Oxford and Coast Line Railroad Company, so called, to extend said railroad beyond said point on said Durham and Northern Railroad, and that it never had nor has it been able to obtain the means to do so; that it never had and never has been able to obtain the means to complete said railroad between Oxford and said point on said Durham and Northern Railroad; that the voters of Oxford did not have in view when voting in said election, or anticipate, the building of a railroad from Oxford to said point on said Durham and Northern Railroad merely; that the same, if completed and operated, would be of little or no benefit or advantage to Oxford in comparison with such a railroad as they understood and believed was to be built as aforesaid, and that a large majority of the voters of Oxford never would have voted in favor of the proposition submitted to them, as aforesaid, or in favor of any other proposition to subscribe to the capital stock of said Oxford and Coast Line Railroad Company, or to incur any obligations of any kind in respect to the same, but for their belief, induced and caused by the representations before mentioned, that said railroad was to be what the name of said company imports, and was to be built from Oxford to Springhope aforesaid, so as to place Oxford in direct and convenient communication with Eastern North Carolina, as aforesaid.



"(4) The defendants further say that said decree directed and required that coterminously with the issuing and delivery to said Oxford and Coast Line Railroad Company of the bonds to the amount of twenty thousand dollars in the said decree directed to be issued and delivered to said company, the said company, at its own charges, should deliver to the board of commissioners of Oxford a release such as in said decree specified, and that no such release has ever been executed and delivered to the board of commissioners of Oxford; and the defendants insist that, if the board of commissioners had any legal right or power to issue and deliver said bonds at all (which the defendants deny as aforesaid), yet it had no right or power to issue and deliver said bonds without at the same time receiving from said Oxford and Coast Line Railroad Company such release, and that the delivery of said bonds in the complaint mentioned to said company was illegal, null, and void.

"(5) The defendants further say that at the time of the making of said judgment or decree and the giving of said order for \$600 to said A. W. Graham, as aforesaid, the only work that had been done towards the construction of said railroad was the grading of the same nearly to Oxford from said point on said Durham and Northern Railroad, and in order to the completion of said railroad the grading was to be finished, and culverts and bridges were to be built, and other things to be done; that said decree requires said company to complete the said railroad then in course of construction from Oxford to said point on said Durham and Northern Railroad, and put the same in operation within a reasonable time from and after the issuing of the bonds therein directed to be issued; and that at the time of the making of said decree and the giving of said order for \$600 to A. W. Graham aforesaid, and before, the officers and agents of said Oxford and Coast Line Railroad Company repeatedly stated and assured the then commissioners of Oxford that said railroad would be completed and put in operation within sixty or ninety days, and, although the completion of said railroad was not more difficult or costly than ordinary, and the same could, with the use of reasonable diligence, have been completed and put in operation within the time which it was stated it would be as aforesaid, yet not only has nothing been done towards the completion of said railroad since the issuing of said bonds, so called, but the work that had been already done as aforesaid was let go to decay by the action of the elements, and has been much impaired and damaged, and would require considerable expense to put it in its former condition. And the defendants say, upon information and belief, that said Oxford and Coast Line Railroad Company has no intention or expectation of completing and putting in operation the said railroad, and has no means nor any expecta-

tion of being able to obtain the means of doing so, and has discontinued and abandoned the work on the same.

"(6) The defendants further say that if said Oxford and Coast Line Railroad Company were a legal corporation, and said bonds and coupons, so called, and mentioned in the complaint, were legally issued and delivered to said company, and were valid (which the defendants deny, as aforesaid), yet said company held said bonds or their proceeds, under and by virtue of said decree, in special trust, and exclusively for the special purpose specified in said decree, and none other, and that said trust attached to said bonds in the hands of all persons or parties to whom the same might come, and that the plaintiff, when and before becoming owner of said bonds (if plaintiff is owner of the same), was put upon inquiry and had notice by matter appearing upon the face of said bonds and by said decree and other proceedings in said actions in which said decree was rendered as aforesaid (and which were notice to the plaintiff and all other persons or parties), of the matter contained therein, and the plaintiff ought to be considered and adjudged as a trustee of said bonds and coupons, and holding the same in trust for the purposes stated and set forth in said decree, and bound for the application of the same or their proceeds to said purposes exclusively, and none other, and is not entitled to recover at all in this action, or, at all events, without giving sufficient security for the complete performance of all things which said decree directed and required said company to do and perform, and which are yet unperformed. And the defendants further say upon information and belief that the plaintiff, at the time of becoming holder of said bonds, so called, in the complaint mentioned (if the plaintiff is holder of the same as alleged in said complaint, or any of them), had notice not only of said false representations made as aforesaid to induce the voters of Oxford to vote in favor of the proposition voted on in said election, and of the illegality of said election and of the want of legal authority to order or hold the same, and of the want of sufficient power and authority, in law, on the part of the board of commissioners issuing said bonds, so called, to issue the same, and of the then condition of said railroad, but also of the inability of the so-called Oxford and Coast Line Railroad Company to complete the said railroad and put it in operation. And the defendants further say upon information and belief that said so-called bonds or their proceeds were not used, applied, and disposed of exclusively to and for the purpose specified and directed in said decree, but that a large part of the same was otherwise used, applied, and disposed of, contrary to the directions and requirements of said decree.

"(7) The defendants further say that, said election being without any authority of law,

and null and void, and the board of commissioners of Oxford issuing said bonds, so called, having no sufficient legal power or authority to issue the same, as aforesaid, neither the agreement of compromise in said decree mentioned nor the said decree (the same being a consent decree) did or could confer upon said board of commissioners any power or authority to issue said so-called bonds so as to conclude or affect any subsequent board of commissioners, and, least of all, the citizens and taxpayers of said town of Oxford, even if the same had been issued in accordance with said decree, and that to compel the citizens and taxpayers of Oxford under the circumstances to pay said so-called bonds or coupons or interest on the same, or any part thereof (for which neither they nor the board of commissioners of Oxford have ever received any advantage or valuable consideration), would be a great wrong and injustice to them; and that the said so-called bonds and coupons ought to be required to be surrendered and canceled.

"(8) And for a still further defense in this action the defendants say they are advised and believe that the alleged bonds and coupons, by reason of the recitals therein and matters appearing upon their face, are not what the law denominates negotiable instruments, and that all holders of the same, as well the plaintiff in said two actions in which said decree was made, the said Oxford and Coast Line Railroad Company et al., referred to in said bonds, as all other persons or parties hereafter receiving the same from said plaintiff in said two actions, the Oxford and Coast Line Railroad Company et al., took the same upon notice and inquiry as to all matters disclosed by the record, compromise agreement, and decree in the suit referred to, and subject to all the stipulations, covenants, agreements, and conditions and disabilities disclosed by said record, compromise agreement, and decree, and, among other things, to the following: First. That while said bonds purported on their face to be issued by virtue of the acts of the general assembly of North Carolina, therein referred to, and in payment of a subscription for stock in the Oxford and Coast Line Railroad Company, such was really and in truth not the fact at all, as the plaintiff well knew, or could have ascertained by inquiry; and said compromise agreement, which was and is the basis of said decree, expressly superseded and canceled (as it was intended to do when said Oxford and Coast Line Railroad Company executed the release therein provided for) the subscription of stock in said Oxford and Coast Line Railroad Company theretofore contemplated by the voters, and which was attempted, as aforesaid, to be authorized by the voters of the town of Oxford as aforesaid, and the said bonds, while purporting to be issued for the subscription aforesaid, were in fact issued for the settlement of a pretended claim on the

part of the plaintiff in said two actions, and without compliance with the former vote of the voters of Oxford, and without ever being submitted to a vote of the people of Oxford at all. Second. That by the terms of the said agreement said so-called bonds and coupons were not issued to raise a fund for the expenses of the government of the town of Oxford, and to meet its obligations, or to borrow money for such purposes, but were issued as a gift or bonus to said Oxford and Coast Line Railroad Company to pay off the debts of said railroad company, and aid in the completion of the railroad theretofore commenced as aforesaid; and that, too, with the express stipulation and agreement on the part of the plaintiffs in the actions in which said decree was made as aforesaid, and to whom said bonds were delivered, that said bonds or their proceeds were to be exclusively used, applied, and disposed of as directed in said decree, and including the completion and putting into operation of said railroad in a reasonable time, as directed and required by said decree, which strictly prohibited and enjoined said Oxford and Coast Line Railroad Company, its officers and agents, from using, applying, and disposing of said bonds therein directed to be issued, or their proceeds, for any other purpose than in said decree is specified. And so the defendants aver that if the plaintiff is the owner and holder of the bonds and coupons mentioned in the complaint, the plaintiff took them with notice, as aforesaid, of their invalidity, and of the equities and incumbrances attached thereto, and also of the failure of said Oxford and Coast Line Railroad Company to comply with its covenants and agreements, and the terms of said decree under which the same was issued.

"(9) The defendants, further answering, say that all and singular the allegations of said complaint which are not hereinbefore admitted or denied they deny.

"(10) That defendants, further answering, say that said Oxford and Coast Line Railroad Company is a necessary party, and ought to be made a party, to this action, and yet the plaintiff has not made said railroad company a party to the same.

"(11) The defendants further say, answering by way of counterclaim, here refer to and reaffirm all and singular the matters and things hereinbefore stated and set forth in manner and form as the same are so stated and set forth, and as particularly as if the same were here set down and repeated, say that the said bonds and coupons which the plaintiff in said complaint claims to be the holder and owner of ought to be, and they demand that the same shall be required to be surrendered and canceled.

"Whereupon, the defendants demand judgment: First. That said bonds and coupons of which plaintiff claims to be holder and owner as aforesaid be required to be surrendered and canceled. Second. For such

further and other relief in the premises as the nature of the case may appear to require, and to the court shall seem meet. And the defendants, having fully answered said complaint in so far as they are advised it is necessary or material to answer the same, pray," etc.

EVERY, J. The plaintiff had a right to insist upon a judgment of nonsuit at the close of the evidence in deference to the intimation of the court, unless the defendant had set up in its answer a counterclaim which, if made good by the proof, would entitle the town to affirmative relief. *Manufacturing Co. v. Buxton*, 105 N. C. 74, 11 S. E. 264; *Pass v. Pass*, 109 N. C. 484, 13 S. E. 908. The defendant might have made the subscription to the capital stock of the company dependent upon the completion of its road to a certain point before a given time, and the failure to do so was an oversight, for which the plaintiff here, who was at most not bound to look further than to see whether those things that were essentially prerequisite to the issuing of a valid municipal bond had been done, cannot be made to suffer. It was competent for the state to authorize the institution of a suit to dissolve the corporation for nonuser of its powers (*Bass v. Water-Power Co.*, 111 N. C. 454, 16 S. E. 402); but the validity of the coupons sued upon cannot be drawn in question in any such indirect way as that relied upon in the answer. The mere prayer, at the conclusion of the answer, that the bonds and coupons, of which the plaintiff claimed to be the owner, should be surrendered up to be canceled, is not of itself such a demand for affirmative relief as would entitle the defendant to insist upon a verdict and judgment thereon instead of judgment of nonsuit. It is not the formal demand, but the preceding averments, that constitute the independent cause of action, which the defendant has elected to set up as a counterclaim, when sued for any matter growing out of the same transaction, or to make the ground of a new suit. The defendant has failed to make any allegations which would entitle it to affirmative relief. The mere denials, which put at issue the allegations upon which the plaintiff bases its claim to relief, are plainly insufficient; and, for the reasons given, the averment of facts upon which the state might proceed for a forfeiture of the company's franchise would not constitute an independent cause of action in favor of the defendant. We see no sufficient reason to take this case out of the general rule that the plaintiff may submit to judgment of nonsuit and appeal, when the court makes an intimation adverse to him, at the conclusion of the evidence. The ruling of the court, in so far as it allowed the judgment of nonsuit to be entered, was not erroneous. No error.

(116 N. C. 441)  
BOARD OF COM'RS OF DURHAM COUNTY v. BLACKWELL DURHAM TOBACCO CO.

(Supreme Court of North Carolina. April 9, 1895.)

TAXATION—CAPITAL STOCK.

Act 1893, c. 296, § 39, provides for a tax on capital stock of corporations, and that the amount of the assessed value of its real and personal property listed for taxation shall be deducted from the market value of the aggregate shares of the company, and the difference taxed as capital stock. *Held*, that the fact that the corporation lists for taxation the shares of its individual shareholders, as required by section 14, or that it owns real and personal property not listed because located out of the state, valued in the amount of the difference between the assessed value of its real and personal property and the actual value of its aggregate shares, does not relieve it from liability to taxation on such difference as capital stock.

Appeal from superior court, Durham county; Hoke, Judge.

Controversy without action between the board of commissioners of Durham county and the Blackwell Durham Tobacco Company to obtain a judicial decision. From a judgment for defendant, plaintiff appeals. Reversed.

J. S. Manning, for plaintiff. W. A. Guthrie and Fuller, Winston & Fuller, for defendant.

CLARK, J. The act of 1893 (chapter 296, § 39) provides that all corporations therein named, "in addition to the other property required by this act to be listed," shall pay a tax on its capital stock. As the mode of ascertaining the amount which shall be taxed as capital stock, subsections 3, 4, 5 provide that the market value, or, if no market value, the actual value, of the aggregate shares of the company shall be taken as a basis, and from that sum the amount of the assessed value of its real and personal property listed for taxation shall be deducted, and the difference, if any, shall be taxed as capital stock. It is stated in the "case agreed" that the actual value of the aggregate shares of stock of the defendant corporation is \$809,334, and that the assessed value of its real and personal property is \$509,334. Upon the plain, explicit provision of the statute the defendant is liable to tax upon the difference, \$300,000, as the taxable part of its capital stock. It is true, the case agreed sets out that the defendant has \$300,000 of personal and real property which is not listed for taxation in this state, because located in Pennsylvania. But that has nothing to do with the taxation of the capital stock, the whole of which, without any deduction, the legislature might, in its discretion, have taxed here, in addition to the tax upon the real and personal property. It is a legislative concession to deduct from the capital stock the amount of real and personal property which pays tax. It also ap-

pears that the total capital stock is \$4,000,000. If, as the defendant contends, tax is to be paid on only \$500,000, this would be to pay tax on barely one-eighth of the sum at which the property is capitalized. It would seem from the case agreed that this capital stock is by agreement of counsel valued at \$809,334, which is about one-fifth of the nominal capital, and is the exact value of the real and personal property, because the stock "has no market value." If so, it is a misconception of the statute applicable to the valuation of the capital stock under this act, and is important enough not to pass unnoticed. Shares may have no market value because too valuable to put on the market, or because the owners do not wish to part with it, or for many other reasons. While the value of the capital stock cannot be less than the value of the aggregate of the real and personal property held by the corporation, unless the latter is in debt, the good will of the business or trade-mark and the rate of dividend will ordinarily make the capital stock more valuable than the mere aggregate of the real and personal property owned by the company. In any corporation, reasonably prosperous, the capital stock is worth much more than the bare real and personal property, which is the value of the dead body, so to speak, of the corporation, should it cease to live and move. As to corporations, by all the authorities, it is in the power of the legislature to lay the following taxes, two or more of them, in its discretion, at the same time: (1) To tax the franchise (including in this the power to tax also the corporate dividends). (2) The capital stock. (3) The real and personal property of the corporation. This tax is imperative, and not discretionary, under the ad valorem feature of the constitution. (4) The shares of stock in the hands of the stockholder. This is also imperative, and not discretionary. The power to levy these distinct taxes simultaneously is laid down in 1 Cook, Stock & S. § 561, and cases there cited; 2 Redf. R. R. (3d Ed.) p. 453, cited and approved by this court (Smith, C. J.) in *Belo v. Commissioners*, 82 N. C. 415; *Worth v. Railroad Co.* (Ashe, J.) 89 N. C. 301, 305; 1 *Desty, Tax'n*, 348; 2 *Thomp. Corp.* § 2810; *Jones v. Davis*, 35 Ohio St. 474, 476; *People v. Coleman*, 126 N. Y. 433, 437, 27 N. E. 818; *State v. Petway*, 55 N. C. 396, 406. "Especially is it important to distinguish a tax on shares of stock from a tax on the capital stock," says 1 Cook, supra (section 563), citing *Porter v. Railroad Co.*, 76 Ill. 561, and numerous cases in note 2 to that section. In *Belo v. Commissioners*, 82 N. C., on page 418, the same distinction is clearly laid down, and additional authorities given, by Smith, C. J. Originally the tax upon the shares of stock was collected of the individual shareholders at their several places of residence. *Bule v. Commissioners*, 79 N. C. 267. But under that statute many shares failed to be listed for taxation; besides, the

shares of nonresident owners, except those of national banks, escaped taxation in this state under the ruling in *North Carolina Co. v. Commissioners of Alamance*, 81 N. C. 454. To remedy this, the provision was passed which is section 14 of chapter 296, Acts 1893, and which requires the list of shares to be given in by the proper officer of the corporation, which shall pay the same in behalf of the shareholders. This does not affect the liability of the shares to tax as the property of the shareholders, but is simply for the convenience of the state in collecting the tax. The effect is merely to change the situs of the shares for taxation from the residence of the owner to the locality where the chief office of the corporation is situated, as was held in *Wiley v. Commissioners*, 111 N. C. 397. It simply extends to the collection of taxes due by shareholders in other corporations the mode of collection already in force as to shareholders in national banks. Rev. St. U. S. § 5219. From this summary it will be seen that the state is within its taxing power in the provisions of chapter 296 of the Acts of 1893. It levies (1) a tax upon the real and personal property of corporations; (2) upon the shares which are the personal property of the shareholders, but requires them to be listed and collected through the agency of the corporation; (3) it levies no tax upon franchises and dividends; (4) it does not tax the entire capital stock, but only the excess of its total value above the value of the real and personal property which the corporation lists for taxation. The capital stock belongs to the corporation. The shares or certificates of stock are entirely a different matter. They belong to the shareholders individually, and, under the constitution, must be taxed ad valorem, like other "property belonging to the holder, independently of the taxation upon the corporation, its franchises," etc. *Smith, C. J.*, in *Belo v. Commissioners*, 82 N. C., on page 419, citing *Cooley, Const. Lim.* 169, and *Field, Corp.* 521, etc. He further says that the relation of stockholders to the corporation "is very analogous to that of a creditor towards his debtor. \* \* \* The latter must bear the taxation imposed upon its property, and this may diminish its distributable profits; but the stockholder cannot, any more than the creditor, claim exemption on this account for his stock, as distinct and separate property in his own hands." 82 N. C. 420. To tax only the real and personal property of the corporation would leave, as we have said, untaxed that large part of its capital stock which represents its good will, its trade-mark, the profitableness of its business, all of which are property, as much protected by the laws, and as capable of being turned into money, as the real and personal property which the corporation owns. To tax the whole of the capital stock, in addition to the tax upon the real and personal property, would be, to the extent of the tax on the latter, double taxation, of the same kind as the tax on mortgaged property

and a tax at the same time on the mortgagor's notes in the hands of the mortgagee; but there is nothing in either case to restrict the legislative power to so decree. Here, however, there is no double tax, but simply a tax on so much of the real and personal property of the corporation as is located in this state, and a tax on the value of its capital stock in excess of the amount of realty and personalty which is listed for taxation here. The tax on the shares is a separate matter, and is a tax on the shareholders on their property, whether they reside in or out of the state, collected through the medium of a quasi statutory garnishment on the corporation. "It has long been the common, if not the only, mode in many states, \* \* \* and indeed is the only mode to collect taxes on shares of stockholders." *Bank v. Com.*, 9 Wall. 353, approved in *Delaware R. R. Tax*, 18 Wall. 206; 2 *Thomp. Corp.* § 2849. We conclude, therefore, that the defendant, upon the case agreed, is liable to tax on the \$300,000, which is the agreed value of its total capital stock in excess of the real and personal property which is listed for taxation; and this irrespective of the fact that the defendant lists for them the shares of the individual shareholders under the provisions of section 14 of said chapter 296 of the act of 1893. Reversed.

(116 N. C. 616)

### THREADGILL v. COMMISSIONERS OF ANSON COUNTY.

(Supreme Court of North Carolina. April 5, 1895.)

**SUIT ON COUNTY BONDS—PRESUMPTION AS TO OWNERSHIP—TAX COLLECTOR AS PLAINTIFF—INSTRUCTION—PROVINCE OF JURY—LIMITATIONS—AMENDMENT OF PLEADING.**

1. Where a tax collector, having, by authority of the county, received certain coupons in payment of taxes, brings suit against the county to recover on coupons of the same kind which he claims to own, his possession of the coupons will not raise the presumption of his ownership.

2. The erroneous charge that the plaintiff's possession of certain coupons raised a presumption of his ownership was not cured by a subsequent charge that the fact of the plaintiff's having received such coupons as tax collector raised a suspicion which it was his duty to rebut by further evidence that he acquired them bona fide.

3. In a charge reciting that certain facts raised a suspicion as to plaintiff's ownership of the coupons sued on, a statement that "plaintiff claims" he has rebutted such suspicion "by showing when and from whom he got some of them, and that he owed none of the taxes for the years he received the coupons," is erroneous, as invading the province of the jury.

4. When the record proper differs from the statement of the case on appeal, the former prevails.

5. Filing an amended pleading does not exclude the party from the benefit of allegations in the original pleading.

6. The statute of limitations begins to run against the coupons on a bond at the time such coupons become due, regardless of when the bond itself falls due.

Appeal from superior court, Richmond county; Bryan, Judge.

Action by S. H. Threadgill, administrator of the estate of G. B. Threadgill, deceased, against the commissioners of Anson county. Judgment for plaintiff, and defendants appeal. Reversed.

R. E. Little and Battle & Mordecai, for appellants. J. A. Lockhart and Burwell, Walker & Cansler, for appellee.

**FURCHES, J.** This is an action brought by the intestate of plaintiff upon a lot of coupons amounting, as plaintiff alleges, to \$2,331, and interest thereon from the date of their maturity. On the trial below the plaintiff recovered, and had judgment for the full amount claimed, and interest thereon, from which judgment the defendants appealed to this court, assigning quite a number of errors. Among the errors assigned by defendants are the following, which we briefly state as follows: (1) That the court erred in holding that, plaintiff being in the possession of the coupons sued on, the presumption is that he is the owner of the same, and that it devolved upon the defendants to rebut this presumption by a preponderance of evidence. (2) That the court erred in admitting in evidence Exhibit H under the objection of defendants. (3) That the court erred in refusing to give defendants' prayer for instruction that the coupons sued on were presumed to be paid by the lapse of time, and in disregard of this prayer charging the jury that if they found from the evidence that plaintiff's intestate was the owner of the coupons at the commencement of this action they should answer the second issue "No," which was the same as instructing the jury that they had not been paid.

It was in evidence, and not denied, that the coupons were taken from bonds issued by the county of Anson, prior to 1860, in payment of the subscription of that county to the Wilmington, Charlotte & Rutherford Railroad Company; that said coupons became due in 1862, 1863, and 1864, and that the bonds from which they were detached became due in 1890. It was admitted that G. B. Threadgill, intestate of plaintiff, was sheriff of Anson county from 1859 to 1868, and as such was ex officio tax collector for the county; and there is evidence tending to show that as such sheriff and tax collector he was authorized and instructed to take such coupons as those sued on in payment of taxes, and that he did receive such coupons in his official capacity in payment of taxes due to the county. We recognize the rule as laid down by the court on the trial below as being the general rule that the holder of negotiable paper is presumed to be the owner, and the burden is on the defendant to show by a preponderance of evidence that he is not. But we are of the

opinion that this rule does not apply in this case. It certainly cannot be that an agent—a fiduciary—of a principal, furnished with the means of the principal to buy up claims against the principal, and who uses such means in buying up the claims, should be allowed to say to his principal, "I've got the claims [the coupons] in my possession, and I am going to hold them as my own, unless you can 'prove by a preponderance of evidence' that they are not mine." This rule would reverse the law of centuries as applied to principal and agent. We understand the law to be just the reverse of that laid down by his honor,—that it is the duty of the fiduciary, the agent (who is in possession of the facts), to show, if he claims the coupons as his own, to the satisfaction of the court and jury, that they are his. The burden of proof is upon him. *Allen v. Bryant*, 7 Ir. Eq. 276. It is doubtful whether Threadgill, the agent of the county, with the means of the county (the tax lists) in his hands, instructed to take up the coupons of the county, and undertaking to do so, had the right to go into the market as a purchaser on his own account. *Boyd v. Hawkins*, 2 Dev. Eq. 207. But we will not multiply authorities on this point of the case. But plaintiff's counsel contended that, if the court was in error in holding and instructing the jury that the burden was on defendants to prove that plaintiff was not the owner of the coupons sued on, this error was corrected by the following, which is also a part of the charge of the court: "In response to defendants' first prayer the court charged that 'if the jury believed the plaintiff's intestate was directed and authorized, as sheriff, by the proper county authorities, to receive the coupons in payment of taxes, and that he did so receive them, it raises a probable ground of suspicion against plaintiff's being the owner of the coupons; and his being the holder of the coupons, the presumption that he is the owner is rebutted, and it devolves on plaintiff to rebut this suspicion by further evidence that he acquired the coupons bona fide. This the plaintiff claims he has done by showing when and from whom he got some of them, and that he owed none of the taxes for the years he received the coupons.' Defendants excepted to refusal to give the first prayer of instruction and to the instructions given." We do not agree with the counsel of plaintiff. The court had just before that part of the charge quoted above charged the jury in the most positive and decided terms that plaintiff's possession of the coupons was a presumption that he was the owner of them, and the burden was upon defendants to show that he was not, as follows: "That plaintiff, having produced the coupons, is presumed in law to be the owner thereof, and the burden of proof is on defendants to show that he is not, and defendants must establish by a preponderance of testimony

that plaintiff is not the owner of the coupons; and if defendants have not satisfied the jury by a preponderance of testimony that the coupons are not the property of plaintiff, they shall answer the first issue 'Yes.' (Defendants excepted.)" We do not think that so undecided an instruction as that relied upon by plaintiff could have the effect to correct the positive error contained in the charge last above quoted. Indeed, we are of the opinion that that part of the judge's charge relied upon by plaintiff is erroneous. It is confused and undecided, and does not charge the law as we understand it to be as between principal and agent. It may be that plaintiff's intestate acquired the coupons bona fide, but as the agent of defendants, and with proper explanation the charge might have been proper; but as it is stated and left in the charge we cannot see that it was any benefit to the jury, and may have been misleading. But, as it appears to us, the court in this instruction invaded the province of the jury in the sentence following the words "bona fide." The court does not say that the plaintiff claims that he has shown "you when and from whom he got some of the coupons," and that he has thereby rebutted "this suspicion," which would have been perfectly legitimate. But the judge says that the plaintiff claims to have rebutted this suspicion "by showing when and from whom he got some of them." So the sentence thus stated is that plaintiff has shown "you when and from whom he got the coupons," and claims that this "rebutts the presumption." We do not think that this was correct.

The next exception we will consider is as to the admission of Exhibit H by plaintiff, under the objection of defendants. The defendants during the course of the trial had introduced Exhibit A, which is as follows: "Statement of Anson County Coupons Presented to the Commissioners of Anson County by Gideon B. Threadgill, and by said Board Referred to Henry W. Ledbetter, John J. Dunlap, and John C. McLauchlin, County Auditing Committee. Coupon No. 3, from Bond No. 1, due January 1, 1862, Indorsed by J. McLendon, \$70, etc.

"Mr. Gideon B. Threadgill makes the following statement touching the coupons above described: 'These coupons came into my possession before the year 1865. I took them up in payment for taxes. I found them about a month ago, among other papers, at my residence, not knowing up to that time that I had them in my possession. I have no recollection whatever of the circumstances under which I retained and filed away these coupons. I have receipts of James A. Leak, given in 1864 and in March, 1865, for \$8,000, which was paid to him for the support of soldiers' families. One of these receipts, for \$5,000 dated November 19, 1864, specifies that the money was a part of railroad funds. My

impression is, I collected the railroad taxes for 1862-63-64, and in paying the same to Mr. Leak for the purposes set forth in his receipt paid him in cash (Confederate money), and kept the coupons which I had taken in in the way of taxes.' In answer to the question, 'Do you know whether you settled the taxes for the years 1862-63-64?' Mr. Threadgill answers: 'I do not. I have no recollection of a settlement of the taxes for those years. I have receipts showing settlement in full of all the other taxes for the years 1862-63-64, but no receipts showing a settlement of the railroad taxes. I find from a statement from the auditor's office in Raleigh that the amount of taxes levied for railroad purposes in 1862 was \$2,106; and I find from an old tax book that the amount levied in 1863, for the same purposes, was \$2,500. I cannot find the amount levied for same purpose in 1864. There is no further statement which I can now make that will throw any light upon the matter.' G. B. Threadgill makes oath that the facts set forth in the foregoing statement, to the best of his knowledge, information, and belief, are true. G. B. Threadgill.

"Sworn to and subscribed before me, August 25, 1880. John C. McLauchlin, C. S. C."

After defendants had offered Exhibit A, the plaintiff offered Exhibit H in reply. Defendants objected, the objection was overruled, and defendants excepted. Exhibit H is as follows:

"The finance committee met to-day at the request of Gideon B. Threadgill, Esq. Present: Col. Henry W. Ledbetter, John J. Dunlap, and John C. McLauchlin. Gideon B. Threadgill, Esq., makes the following statement in addition to and amendatory of the statement made by him heretofore, to wit, on the 25th day of August, 1880, touching the county coupons in his possession, of which an inventory is hereto annexed: 'Since my former statement I have become satisfied that I did not receive all of said coupons before the year 1865, and that I received a portion of them since the year 1865. I received the two, indorsed by F. Milton Kennedy, at the house of J. B. Burns, in Wadesboro, after the close of the war. After the year 1865, I did not collect any back taxes. After the close of the war,—after the year 1865,—I did not collect any back taxes after the close of the war. I find that there was for the year 1866 taxes against Mr. Kennedy amounting to six or seven dollars. I am satisfied that I received the three coupons indorsed by W. G. Wright since the year 1865. I find upon examination of my receipt book that I did not settle in full the taxes for the year 1864. I have my tax books for the years 1862 and 1863. From these books I find that the levies for payment of coupons for those years were for 1862, \$2,100; for 1863, \$2,500.' The abstract from the auditor's office shows only the total levies, and not the amounts levied for specific purposes. Here the further con-

sideration of this matter was postponed until August 17, 1881.

"Wednesday, August 17, 1881. The committee met according to agreement. Present: Henry W. Ledbetter and John C. McLauchlin. Mr. Gideon B. Threadgill continues his statement, as follows: 'Upon reflection, and in consideration of the fact that I find in the package of coupons in my possession some, to wit, those indorsed by F. M. Kennedy and those indorsed by W. G. Wright, which I recognize as having been received by me since the year 1865, I am convinced that I received the whole batch since said year 1865. These coupons are my property. I suppose they were taken by me partly in payment of taxes, and, if so, the county has been paid, as I have settled in full the taxes for the years 1866-67. G. B. Threadgill.'

"Sworn to and subscribed before me the 17th day of August, A. D. 1881. John C. McLauchlin, C. S. C."

And the plaintiff contended that Exhibit H was a part of the same declaration or statement as Exhibit A, introduced by defendants, and was competent on that account. And we find that in the statement of the case on appeal it is said to be a part of the same transaction or declaration as Exhibit A. But we find from an examination of the record that this is not true; that Exhibit A was made on the 25th day of August, 1880, and that the committee to whom it was made made the following report thereon, the same day it was made to them, marked "Exhibit B," as follows:

"We, Henry W. Ledbetter, John J. Dunlap, and John C. McLauchlin, auditing committee for Anson county, submit the following report to the honorable board of commissioners of Anson county, to wit: Gideon B. Threadgill, late sheriff of said county, submitted to us a lot of coupons taken from the Anson county railroad bonds, amounting in the aggregate to (\$2,261) twenty-two hundred and sixty-one dollars. We have prepared a descriptive inventory of said coupons, and have appended thereto Mr. Threadgill's statement touching them, sworn to and signed by himself. Said inventory and statement are appended hereto, marked 'Exhibit A.' We have not been able to find anything beyond Mr. Threadgill's statement to throw any light upon the question whether said coupons have been heretofore paid by the county and are the property of Mr. Gideon B. Threadgill. Respectfully submitted, J. C. McLauchlin, J. J. Dunlap, H. W. Ledbetter, Auditing Committee. August 25, 1880."

And we find from the record that more than a year after the report quoted above the committee made another report, which is very evident to us was the result of plaintiff's statement H, made at his own request, and concluded on the 17th day of August, 1881. This report is as follows: "The claim of G. B. Threadgill, based upon Anson county coupons, amounting to \$2,261, having been

referred to us with instructions to report our judgment as to the question whose property are said coupons, respectfully report that upon a careful consideration of all the facts and circumstances brought to our knowledge in the investigation of this matter we have to state, in our judgment, said coupons are the property of the county of Anson. September 12, 1881,"—signed by J. C. McLaughlin, H. W. Ledbetter, and J. J. Dunlap, finance committee. So it appears from the record that Exhibit A and Exhibit H are not a part of the same conversation or declaration. And it has been too often and too recently held by this court to need the citation of authority that when the record proper differs from the statement of the case on appeal, the statements in the record proper control. It is true that statements A and H are about the same subject-matter, but they are not parts of the same conversation or admission, so as to make H competent evidence for the plaintiff, because the defendants had introduced Exhibit A; and, this being the only ground upon which we can see that it could be competent, and, indeed, being the only ground upon which the learned counsel contend that it was competent, we must sustain the defendants' exception, and hold that there was error in admitting Exhibit H in evidence on behalf of plaintiff.

The next exception we propose to examine is that arising upon the presumption of payment from the lapse of time. It is admitted that the coupons sued on were detached from bonds issued before 1860 and falling due in 1880, and that the coupons became due in 1862, 1863, and 1864. The coupons partook of the same dignity as the bonds from which they were detached, and, being dated before 1860, and falling due before 1868, the statute of limitations does not apply. But they may be barred, or rather paid, by the lapse of time and the statute of presumptions. Rev. Code, c. 65, § 20. But plaintiff, in the first place, denies that the coupons sued on are barred by the lapse of time, and contends that the bonds from which they were detached did not become due until 1880, and they would not be presumed paid till 1890; and the coupons would be good as long as the bonds from which they were taken would be good; and plaintiff further contends that defendants are not entitled to this defense, for the reason that it is not made by the pleadings. Plaintiff admits that defendants pleaded payment in the original answer, but he says that in the amended answer the defendants deny that they have paid these coupons; that the two answers are contradictory; and that the rule is that, where there is an amended pleading filed, the case must be tried on the amended pleadings, and not on the original, and cites some cases from New York, which he says sustain this contention. We have not examined these cases, because, if any such rule obtains in New York, we know the practice is well settled to other-

wise here. Indeed, we find from the record that plaintiff amended his complaint in 1885, the action having been commenced in 1881. But we do not propose to hold the plaintiff down to his amendment, and exclude him from the benefit of his original complaint. And neither do we propose to deprive the defendants of the benefit of the original answer. Nor do we think the rule as to the limitation contended for by plaintiff is the law. To sustain the contention that the coupons were not barred for 10 years after the bonds became due would be equivalent in this case to saying that they would not be barred for 30 years after they fell due. We cannot do this without violating every rule of law that we know of in regard to the lapse of time and the presumption of payment. The coupons, though they have the dignity of the bonds, constitute an indebtedness of their own, independent of the bonds, fixing their own time of maturity,—as, in this case, becoming due nearly 20 years before the bonds from which they were detached became due. The right of action accrues when they become due, and the owner does not have to wait till the bonds become due; and this—the right of action—is what starts the statute. This view seems to us to be so thoroughly sustained by the "reason of the thing" and the logic of the case that it requires no authority to support it. But the case of *Amy v. Dubuque*, 98 U. S. 470, is directly in point, and sustains the view we have taken of this matter.

This only leaves the question of pleading to be considered, and we have seen that defendants are entitled to the benefit of the original answer and of both amended answers. The proper plea to raise this defense is payment. This is elementary learning. It is admitted that defendants have properly pleaded payment in their original answer. But defendants, in the fourth section of the amended answer made at fall term, 1882, use this language: That defendants deny that they "ever made payment of any part of said coupons, as alleged, to the plaintiff, as owner of said coupons." This was said replying to the fourth section of plaintiff's complaint, which contains the following averment: "That on these said coupons the sum of seventy dollars has been paid, leaving a balance of principal due the plaintiff," etc. And we think a fair interpretation of the language used by defendants in the fourth article of the amended answer is a denial of the payment of this \$70, and not a denial that the coupons were paid. So we do not think the answer is subject to the criticism of being inconsistent. But, if it were, it has been held by this court that a defendant may plead as many pleas as he wishes, and even inconsistent pleas. *Reed v. Reed*, 93 N. C. 462, and cases there cited. And defendants in their last amended answer plead the statute of limitations of 10 years, and it was held by this court in *Pemberton v. Sim-*



mons, 100 N. C. 316, 6 S. E. 122, that this was sufficient to enable the court to consider the case on the statute of presumptions. We do not think the pleadings in *Reed v. Reed* or *Pemberton v. Simmons*, *supra*, good pleading, and do not recommend them as models. But this court has many times sustained very imperfect and defective pleadings where there was a sufficient statement of facts to constitute a cause of action, and where it could see that the opposite party had not been misled and injured thereby. But, while the answers in this case are not as concise and logical as they might be, we cannot say that they do not, with sufficient clearness, state the defendants' ground of defense. So our conclusion is that there was error in the judge's charge that the burden was on defendants to prove that plaintiff was not the owner of the coupons sued on. We also think there was error in admitting Exhibit H in evidence for plaintiff. And we are also of the opinion that the court erred in instructing the jury that the statute of presumptions did not bar the plaintiff's claim. This is a question of law and fact, and should have been submitted to the jury upon the evidence in the case, with proper instructions as to whether the plaintiff had rebutted the presumption of payment. There are quite a number of other exceptions which will probably not arise on another trial, and we have not considered them. There is error, and the defendants are entitled to a new trial, and it is so ordered. *New trial.*

(116 N. C. 655)

SHERRILL v. WESTERN UNION TEL. CO.

(Supreme Court of North Carolina. April 5, 1895.)

**ACTION AGAINST TELEGRAPH COMPANY — FAILURE TO DELIVER MESSAGE—DAMAGES—MENTAL ANGUISH.**

1. Where, in an action against a telegraph company for failure to deliver a message, plaintiff shows that defendant received it, and failed to deliver it, a *prima facie* case is made, and the burden is on defendant to show excuse for such failure.

2. Plaintiff having made a *prima facie* case, the question of negligence is for the jury, and an instruction that "upon all the evidence, if believed, plaintiff is not entitled to recover," violates Code, § 413, forbidding an expression of opinion by the court upon the weight of evidence.

3. An instruction that, if defendant made proper inquiries as to the whereabouts of the addressee, from persons of wide acquaintance in the neighborhood, and, upon information so received, delivered the same to another person of the same name, it had used reasonable diligence, was error, as leaving out of view when and after how much delay the inquiries were made.

4. Where a message which, on its face, asked for an answer, was given to a telegraph company, and money paid for special delivery, the failure of the receiving agent to wire the sending office for a better address, when he found difficulty in delivering the message, and to notify the sender immediately of its non-delivery, was negligence.

5. A telegraph company cannot, by contract, restrict its liability for mistake or delay in the delivery of a message.

6. Where a telegraph company negligently fails to deliver a message, the nature of which appears on its face, plaintiff can recover for mental anguish caused thereby.

Appeal from superior court, Iredell county; Bryan, Judge.

Action by H. Z. Sherrill against the Western Union Telegraph Company for damages caused by the nondelivery of a message. From a judgment for defendant, plaintiff appeals. Reversed.

The first instruction granted at the instance of defendant, and to which plaintiff excepted, was as follows: "If the jury believe that defendant, through its operator and messenger boy, made proper inquiries as to the whereabouts of the person to whom the message was addressed, from people of wide acquaintance in the neighborhood, and, upon information so derived, delivered it to another person of the same name, who received it without notifying defendant that it was not intended for him, then the defendant had used reasonable diligence in delivering said message, and is guilty of no negligence for which plaintiff can recover."

Burwell, Walker & Cansler and L. C. Caldwell, for appellant. Jones & Tillett, for appellee.

CLARK, J. The plaintiff having shown the delivery of the message to the defendant, with the charges prepaid (and it would have been the same if the defendant had accepted the message with charges to be collected), and the failure to deliver the message, a *prima facie* case was made out, and the burden rested on the defendant to show matter to excuse its failure. *Thomp. Electr.* § 274, and cases cited; *Bartlett v. Telegraph Co.*, 18 Am. Rep. 447; *Pearsall v. Telegraph Co.*, (N. Y. App.) 26 N. E. 534.

The court erred in granting the defendant's second prayer for instruction,—that "upon all the evidence, if believed, the plaintiff is not entitled to recover, and the jury should answer the fourth issue, 'No.'" The court should instruct the jury that a given state of facts, as a matter of law, would or would not be negligence. *Emry v. Railroad Co.*, 109 N. C. 589, 14 S. E. 352. But, when the plaintiff makes out a *prima facie* case, then to instruct the jury that the evidence rebuts it and overcomes it is to invade the province of the jury, and violates chapter 452 of the Acts of 1796 (Code, § 413), which forbids an expression of opinion by the judge upon the weight of the evidence.

The first instruction granted at the instance of the defendant was erroneous, because it left out of consideration when and after how much delay the inquiries were made. The promptness with which they were made was an essential element in an instruction as to whether there was reasonable diligence.

The third instruction given at the instance

of the plaintiff was erroneous. After showing the contract and the failure to deliver the message, the plaintiff had made out a prima facie case, and the burden was on the defendant to rebut negligence. The court properly told the jury that the defendant was not a guarantor of the delivery, and that they should distinguish between the plaintiff's grief for the death of the child, for which the defendant was in no wise responsible, and that caused by his being deprived by the defendant's negligence of the consolation of seeing his child before its death; but it again erred in telling the jury that there was no evidence to support the second issue, and directing them to answer it "No."

As to the plaintiff's prayers for instructions, the message on its face asked for an answer, and money was paid for a special delivery. The agent at Statesville violated the rules of the company upon his own evidence, in not wiring back to the sending office for a better address, when he found difficulty in delivering the message, and in not notifying the sender immediately of the non-delivery of the message. For these and other reasons appearing in the evidence, it was error to refuse the fourth and sixth of the plaintiff's prayers for instruction. There were other errors excepted to in apt time, but it is unnecessary to pass on them in detail, as they will probably not occur on another trial, in view of the principles above laid down.

The right of the plaintiff to maintain this action was sustained on a former appeal. 109 N. C. 527, 14 S. E. 94. That the defendant cannot by contract restrict its liability was held in *Brown v. Telegraph Co.*, 111 N. C. 187, 16 S. E. 179, which is now reaffirmed. The plaintiff, if the message was not delivered by reason of defendant's negligence, the nature of the message appearing on its face, can recover damages for the mental anguish caused thereby. *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. 1044; *Thompson v. Telegraph Co.*, 107 N. C. 449, 12 S. E. 427. The courts of all our sister states are not in accord with us on this principle. A majority of those which have so far passed on this question sustain this view, being (in addition to this state) the courts of Texas, Indiana, Kentucky, Tennessee, and Alabama. The weight of the text writers is to the same effect. Gray, *Commun. Tel.* § 65; 4 *Lawson, Rights, Rem. & Prac.* § 1970; 2 *Thomp. Neg. p.* 847, § 11; *Sedg. Dam. (8th Ed.)* § 804; *Suth. Dam. (2d Ed.)* § 97; 29 *Am. Law Rev.* 267. An opposite view is held by the courts of Georgia, Mississippi, Kansas, and Dakota. In the United States circuit courts opinions have been delivered on both sides. The better reason, in our opinion, is with those which agree with the precedents in our own court; for otherwise, except where the negligence is as to messages relating to pecuniary matters, there would be no liability for any neglect by telegraph companies, and these

great and necessary public agencies would be irresponsible, and therefore unreliable, as to the correctness in transmission or promptness in delivery of messages of whatever importance, if not relating to mere money transactions. No man could depend upon the correctness or promptness of messages, as to which the law enforces no responsibility, when they must pass through the hands of so many agents. The supreme courts of Illinois and Iowa, though no. passing directly on the point, have intimated a leaning to the view held by this court, while the supreme court of Missouri has recently adhered to the ruling of the minority. The cases have been collected in the notes in several late volumes of the American State Reports. It is unnecessary to cite them here, or to say more than to refer to and approve our own precedents on this point. New trial.

(116 N. C. 1003)

#### STATE v. HATCH et al.

(Supreme Court of North Carolina. April 9, 1905.)

##### OFFICERS—NEGLECT OF DUTY—EVIDENCE.

1. Under Code, § 1090, creating the willful omission, neglect, or refusal of an officer to discharge his duty a misdemeanor, corrupt intent need not be shown.

2. The fact that county property was sold by the commissioners at a grossly inadequate price, for less than could have been obtained by reasonable effort, and without opportunity for competition, is evidence of omission or neglect, within Code, § 1090.

3. Honesty and good intent are not a full defense if there is willful carelessness in the discharge of official duty, resulting in injury to the public.

Appeal from superior court, Chatham county; Green, Judge.

Indictment against W. H. Hatch and others for willful neglect in discharge of official duty. From a judgment for the state, defendants appeal. Affirmed.

H. A. London, for appellants. Jas. C. MacRae and the Attorney General, for the State.

CLARK, J. The cornerstone of our system of government is that it is a government "of the people, by the people, and for the people." It follows that any public officer is a public servant, responsible to the sovereign,—the people. The responsibility attaches for acts of omission as well as commission. For such malfeasances, the trial for some officials is by impeachment; for those of lesser degree, by indictment and trial by jury. Section 1090 of the Code creates two distinct offenses. One is the willful omission, neglect, or refusal to discharge any of the duties of his office. This is a misdemeanor punishable by fine and imprisonment not exceeding two years. The other is the willful and corrupt action of an officer, whether by commission or omission, contrary to the true intent of his oath of office. Upon conviction for the latter offense, termed

by statute "misbehavior in office," the officer must, by the sentence of the court, be removed from office, besides being fined and imprisoned at the discretion of the court. *State v. Pritchard*, 107 N. C. 921, 12 S. E. 50. The first offense is for negligence or other misconduct in official duties, without corrupt intent, and is simple malfeasance, misfeasance, or nonfeasance. The second is such malfeasance, misfeasance, or nonfeasance with a corrupt intent. In this case there is no proof of corrupt intent, but the charge is that the defendants willfully and unlawfully neglected and omitted to discharge the trust reposed in them, by "selling for the sum of twenty-one dollars—a price grossly inadequate, and less than could by reasonable effort have been obtained in cash—\$5,000 shingles, readily worth seventy dollars." There was evidence sufficient to go to the jury to prove the charge. The shingles had recently cost the county \$87.50, and they were sold by the chairman at private sale (together with some lumber of his own) at \$21, and the other defendant had assented to his action. There was no advertisement, and the defendants offered no evidence that they had made inquiry or endeavored to get a better price. The court correctly refused to charge that, unless a corrupt intent was shown, the jury must acquit, and told the jury, if the defendants willfully and negligently omitted or refused to perform their duty, or negligently and willfully abused their discretion in regard to the sale of the shingles, as charged in the bill of indictment, the defendants were guilty. To the above charge, and refusal to charge, the defendants excepted. The jury found them guilty. They were fined one penny each, and appealed.

There is no exception to the indictment or the admissibility of evidence. The judge told the jury that the defendants had the right to sell at private sale. The conviction is not for selling at private sale, nor at a low price, but for willful negligence in not caring for the county property, by selling "at a grossly inadequate price, and at much less than by reasonable effort could have been obtained." The county is entitled to be protected, not only against dishonesty in the sale of public property, but against want of reasonable effort to obtain a fair price. The gross inadequacy in the price obtained, and the sale without opportunity given in some way, either by inquiry or advertisement, for competition, was simply evidence offered to show negligence in the discharge of this duty,—to obtain a fair price.

The indictment under the first clause of the act, which is but an affirmation of the common law, lies against officers for willful neglect of duty, not for mere errors of judgment. 2 Whart. Cr. Law, § 1568. But we think that the charge is sufficient in this respect, and, under the instruction given by the court, the jury must have concluded that

the neglect was willful. In *State v. Hawkins*, 77 N. C. 494, it is held that any public officer is liable to indictment at common law for any willful neglect of his duties or any abuse of his powers. The sale of the shingles in question was a matter intrusted to the defendants as public officers. They did not sell them corruptly. But it is found by the jury that they negligently sold them at less than one-third their cost, and at a price grossly inadequate, and less than could with reasonable effort have been obtained for them. Was a sale made by them without such reasonable effort, and thereby devolving loss on the county, a willful neglect or abuse of the powers and duties intrusted to them? It would seem clear that it was. If it was not, then it could hardly be possible to find an instance in which the common law or the first part of section 1090 would apply, but public officers would be liable for no malfeasance except in cases in which a corrupt intent is alleged and proved. This cannot be the law. Whether such conduct is an omission or neglect of duty, which comes within the first clause of section 1090 of the Code, or is a neglect of duty at common law, is immaterial. In the present case, honesty and good intent are not a full defense. However honest the defendants may be (and their honesty is not called in question), the public have a right to be protected against the wrongful conduct of their servants, if there is carelessness amounting to a willful want of care in the discharge of their official duties, which injures the public. No error.

(116 N. C. 647)

WILSON COTTON MILLS et al. v. C. C. RANDLEMAN COTTON MILLS.

(Supreme Court of North Carolina. April 9, 1895.)

JUDGMENT OF JUSTICE—COLLATERAL ATTACK FOR FRAUD—ATTORNEY REPRESENTING BOTH PARTIES.

1. Defendant having made an assignment for the benefit of creditors, plaintiff, through its attorney, who was also acting as trustee under the deed of assignment, split up its account against the insolvent corporation so as to bring it within the jurisdiction of a justice's court, and obtained judgments thereon, defendant making no defense thereto by reason of representations made to it by such trustee. Held that, in its answer to a creditors' bill brought by plaintiff, defendant could, by counterclaim, impeach such judgments for fraud, and demand that they be vacated.

2. In such case, defendant need not set out formally the facts relied upon to show its right to equitable relief, if such right can be gathered from the whole answer.

3. Where the trustee under a deed of assignment was also acting as attorney for a creditor thereunder, a judgment against the maker in favor of the creditor, rendered on motion of such attorney, will be declared a fraud in law, though there was no fraudulent intent.

On rehearing. Dismissed.

For former report, see 20 S. E. 770.

J. N. Wilson, for appellants. H. G. Connor and B. F. Long, for appellee.

AVERY, J. It is contended for the plaintiffs that while this court correctly held that the judgment could not be vacated unless by "a direct proceeding to set it aside for fraud," and that courts of equity must "refuse aid in cases when their action would be tantamount to appellate jurisdiction" exercised in the correction of errors of law, it erroneously concluded in violation of that principle that they should not be permitted "to have a preference over other creditors." It is a general rule that equity will, in the distribution of a fund among creditors, respect "priorities theretofore acquired." Is the cause before us an exception to that rule? Is it consistent with this doctrine to leave a judgment that constitutes a lien upon realty unimpeached, and yet to so interpret the maxim that he who seeks equity must do equity, as to compel the holder of such prior lien to take ratably of the fund arising from such realty with those who had not obtained judgment prior to the filing of the creditors' bill? We think it is clear that, if the judgments rendered by the justice of the peace are allowed to remain unimpeached, they must have priority, at least, in the distribution of the fund arising from the sale of the real estate of the defendant company. The controversy is therefore narrowed down to the single point whether in such an action as that before us the defendant could, by way of counterclaim, set up allegations sufficient for the purpose, and directly impeach for fraud the judgments which are the foundation of plaintiff's bill. If it be conceded that the judgments could have been assailed for irregularity only by way of defense in the justice's court, why cannot the superior court entertain a bill in the exercise of its equitable jurisdiction to set them aside for fraud? If it can, is it not in consonance with the leading purpose in establishing the code practice to treat like an original bill a sufficient statement of the grounds of impeachment in an answer founded upon them, and brought by the judgment creditor against the judgment debtor, and to allow the latter to set up, by way of counterclaim, any matter growing out of the same transaction, and upon which he might have maintained an independent action? In *Dougherty v. Sprinkle*, 88 N. C. 300, Justice Ruffin, in a well-considered opinion, announced, as the mature conclusion of the court, that, "according to all authorities, the court of a justice of the peace is but a common-law court, and that his jurisdiction does not embrace causes of a peculiarly equitable nature." That doctrine has been approved in many later cases, and has thus received abundant support from succeeding courts, if the very statement of it did not carry with it the conviction of its soundness. *Patterson v. Gooch*, 108 N. C. 506, 13 S. E. 186; *Long v. Rankin*, 108 N. C. 335, 12 S. E. 987; *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998; *Bevill v. Cox*, 107 N. C. 177, 12 S. E. 52. The nu-

merous cases, therefore, in which it has been settled that a justice's judgment cannot be assailed or impeached for irregularities which a court of common-law jurisdiction had the power to correct, except by the tribunal in which it was rendered, have no bearing upon the question before us. *Cannon v. Parker*, 81 N. C. 322; *McKee v. Angel*, 90 N. C. 60; *Morton v. Rippey*, 84 N. C. 611; *Birdsey v. Harris*, 68 N. C. 92.

If the defendant had sought to set aside the judgment on the ground that its assent to the rendition of it was procured in such a way as to render it voidable for fraud in law, it would have been compelled to invoke the aid of a court of equity when law and equity were administered in different courts. Now that both are administered in the same court, and often in the same action, if the equity is sufficiently alleged, either in a complaint or by way of counterclaim in an answer to a cause of action founded upon the judgment, the party seeking the relief may, upon proof of the averments relied upon to establish the fraud, demand that the judgment be vacated. If the defendant company had the right to bring an independent suit to impeach the judgment, it might have instituted it within the time prescribed in section 155, subsec. 9, of the Code, and the plaintiff could not forestall the assertion of such right by first commencing the suit upon the judgment. As was intimated by Justice MacRae, the action afforded the first and an early opportunity to the defendant to set up its equity in its answer to the creditors' bill. It was not material that the facts relied upon to establish the right to equitable relief should have been formally set out. It is sufficient if they can be gathered from the whole answer, and appear to have been proven before and found as facts by the referee. *Geer v. Geer*, 14 S. E. 297. The court say in the opinion: "We are bound by the findings of fact. The findings of fact of the referee will show that plaintiff's attorney, who was at that time a trustee in the deed of assignment, had access to the books of the defendant corporation, to compare the accounts of his clients; the Wilson Cotton Mills, with the accounts stated in defendant's books; that he split up said accounts against defendant, a large part of which had been settled by acceptance; that he represented that by so doing, and reducing the same to judgments, he only desired to reduce the Wilson Cotton Mills' claims to judgment, in order to put them on an equal footing with the indebtedness due banks, and to prevent their running out of date. It is found in sections 24 and 25 that, while the representations made to Sharpe were not made with the intent that they should be communicated to defendant's president, Worth, they were so communicated, and no defense was made to the action before the justice." The further facts that are material and that may be gathered from the admissions and the

findings of the referee may be summed up as follows: On December 10, 1890, the defendant company, at a meeting of its stockholders, directed its president to execute an assignment, and that on the following day, 11th of December, 1890, the deed was prepared, naming T. C. Worth as sole trustee, but, at his own request, the name of S. A. Woodard, plaintiff's attorney, was inserted as cotrustee. Woodard thereupon immediately accepted the trust, in order that he might protect his client, the plaintiff company, and continued to be a trustee until the 21st of January, 1891, two days before this action was brought, on the 23d of January, 1891. Both Worth and Woodard were ultimately appointed by the court receivers, on the 5th day of February, 1891, and gave bond and assumed control in that capacity. Meantime the trustee Woodard had obtained, as attorney for the plaintiff, as set forth in the opinion, about 36 judgments, by splitting up seven accounts (all for sums in excess of \$200) and a draft for \$2,992.82, and had caused all of the judgments to be docketed in the superior court of Randolph county, either on December 22, 1890, or January 24, 1891. B. C. Sharpe was the duly-constituted agent of T. C. Worth, trustee, and president of defendant company, and as such took charge of the books and supervision of the business for Worth. These facts will appear by reference to findings Nos. 13, 14, 15, 16, 19, and 21.

The rights of the defendant which grow out of these transactions are in no way impaired or affected by the fact that S. A. Woodard departed from his instructions in accepting the place of trustee, or in any way exceeded his authority as attorney for plaintiff. When the books were examined and the accounts were split up and reduced to judgment, he was still cotrustee of Worth, and was acting also in the antagonistic capacity of attorney for the plaintiff. He was known to Worth, his associate in the trust, to be an attorney, as sufficiently appears from the findings; and when Worth received, through his agent Sharpe, the assurance that Woodard's purpose was only to place the claims of his client on an equal footing with the debts due banks, their relations were such that Worth was warranted in trusting to him as an attorney to protect the interests represented by both. Woodard was one of the trustees at the time. In possession of the property, and accountable for it to the assignor and the creditors, and sustained such relations to the defendant company as entitled its president to expect that, while such relations continued, he would refrain from taking, as an attorney of an adversary party, any judgment that would bind its property. Though an attorney acts in good faith for both plaintiff and defendant in any action or proceeding in the courts, it is well settled that any judgment entered upon his motion against either party, for whom he appears as an attorney, and in favor of the oth-

er will be set aside, on the ground that it is a fraud in law. *Molyneux v. Huey*, 81 N. C. 106; *Arrington v. Arrington* (decided at this term) 21 S. E. 181; *Moore v. Gidney*, 75 N. C. 34. However innocently or honestly Mr. Woodard may have acted in his zealous efforts to advance the interests of his original clients, until he placed himself at arm's length, by notice that he had ceased to act as trustee, Worth was excusable for being misled by his representations that he would so manage the claims of the plaintiff as to leave the assets of the insolvent company to be distributed as provided in the deed under which both were acting as trustees. *Gooch v. Peebles*, 106 N. C. 411, 11 S. E. 415. Knowing his associate to be a lawyer, Worth was justified in confiding more implicitly in any assurances as to the legal effect of his proposed conduct of the suits before the justice of the peace. No man can maintain a suit against himself even in his fiduciary capacity, and it was upon this principle that the law placed the claim of a personal representative against the decedent, of whose estate he had charge, on an equal footing with a judgment for demands of the same kind held by other creditors. Where two adversary parties to an action are both warranted in trusting to an attorney to protect their interests involved in the controversy, as occasion may demand, a judgment rendered on motion of such attorney, though he may have no actual fraudulent intent (as seems to be conceded in this case), is deemed fraudulent in law. *Arrington v. Arrington*, supra. We think that the reason upon which this doctrine is founded requires its application to a case where an attorney is counsel for a plaintiff who is suing the attorney as a trustee or those he represents in his fiduciary capacity, and seeking to gain an advantage over both the trustor and cestui que trustent. It is not material that Worth was sued as president of the defendant company when he was acting in the dual capacity of trustee and president. It was equally his duty as trustee and president, as far as possible, to see that the purpose of the assignor, the defendant company, as expressed in the deed, until that was set aside by the court, was carried into effect by preventing the plaintiff company from acquiring a lien that would give it priority. Knowing that the other trustee had accepted a trust which imposed upon him the same duty, Worth was warranted in relying upon him to carry out the purpose expressed to Sharpe, and communicated subsequently to him.

We forbear, because it is needless to do so, to enter upon the discussion of the other question suggested on the first argument of the cause,—whether an assignment by a corporation which provides for a ratable distribution of the proceeds arising from the sale of all of its property should not be upheld as valid, on the ground that it is not within the spirit, if within the letter, of the statute. Code, § 685. While, therefore, we arrive at

the conclusion upon a different principle, we think that it was correctly held that the assets should be ratably distributed. But, in order to allow that, the court below should have vacated the justice's judgment in favor of the plaintiffs, on the ground that facts sufficient to warrant such a decree were alleged and proven by the defendant company. The petition is dismissed.

(116 N. C. 708)

**WILCOX v. ARNOLD et al.**

(Supreme Court of North Carolina. April 16, 1895.)

**NOTE OF MARRIED WOMAN—VALIDITY—RATIFICATION AFTER WIDOWHOOD.**

1. A note made by a married woman, purporting neither to charge her separate estate nor to be for her benefit, is invalid.

2. The bare promise of a widow to pay a note executed by her during coverture, and void, is not binding.

Appeal from superior court, Ashe county; Allen, Judge.

Action by J. O. Wilcox against Thomas Arnold and Nancy Arnold. From a judgment for defendants, plaintiff appeals. Affirmed.

Geo. W. Bower and R. A. Daughton, for plaintiff.

**MONTGOMERY, J.** The defendant Nancy Arnold, while she was the wife of Joseph Tyre, executed, together with him, the note upon which suit was brought before a justice of the peace, and which constitutes the basis of this action. It purports neither to charge her separate estate, nor to be for her benefit; and, if it had, the court of a justice of the peace would have had no jurisdiction in the matter. *Dougherty v. Sprinkle*, 88 N. C. 300. The note, as an executory contract, had no validity. In *Farthing v. Shields*, 106 N. C. 295, 10 S. E. 998, this court said (Justice Shepherd delivering the opinion): "It is well settled by the uniform decisions of this court that, except in the cases mentioned in the Code, §§ 1828, 1831, 1832, 1836, a feme covert is, at law, incapable of making any executory contract whatever. Accordingly, it has been determined that the Code, § 1826, requiring the written consent of the husband in order to affect her real or personal estate, did not confer upon her (even when such written consent was given, or when the liability was for her personal expenses, etc.) the power to make a legal contract. Its object was to require the written consent of her husband, in order to charge, in equity, her statutory separate estate, on the same principle which requires the consent of the trustee when the separate estate is created by deed of settlement. *Pipplin v. Wesson*, 74 N. C. 437; *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567." The cases of *Vick v. Pope*, 81 N. C. 22, and *Neville v. Pope*, 95 N. C. 346, have no bearing on this case. In both of them the femes covert made no defense to the actions, and allowed judgment to go against them by default. They became bound by the judgments.

The attempt of the plaintiff to hold the defendant liable on a new promise cannot be successful. His testimony and that of Goodman on this point was not sufficient to go to the jury; and, if the promise had been proved, it would be nudum pactum, for the reason that there was no present consideration for the promise, and the consideration of the note was not for the benefit of her sole and separate estate. There is no error in the ruling of the court below, and the judgment is affirmed.

(116 N. C. 631)

**BLAIR et al. v. BROWN et al.**

(Supreme Court of North Carolina. April 2, 1895.)

**FRAUDULENT CONVEYANCE—SUIT TO SET ASIDE—EVIDENCE—DECLARATIONS OF ASSIGNOR—CONSPIRACY.**

1. In an action by creditors to set aside a deed of assignment made to secure an alleged indebtedness to the assignee, and other debts, the evidence showed that while the deed was being withheld from record the debtor purchased, with the knowledge of the assignee, a large quantity of goods from parties with whom he had not previously dealt; that during the same time the assignee represented to a mercantile agency that the debtor was solvent, and was doing a large business; that shortly before the assignment, and while the assignee held unrecorded mortgages on the debtor's property for \$5,500, both the debtor and the assignee represented to dealers that the debtor was solvent and prosperous. It also appeared that the indebtedness of the assignee was much less than alleged in the deed, and that a large quantity of personal property had been conveyed to the debtor as exempt, although the deed stipulated that the assignee was to pay him \$500 in lieu of such exemptions. Held sufficient evidence of a conspiracy to defraud the creditors to admit evidence of declarations of the debtor made after the assignment.

2. Where the only evidence of the loss or destruction of a telegram was the statement of the operator that he had "searched for it, but could not find it"; that some of the original telegrams "are destroyed, and some sent to headquarters"; and that "no search has been made at headquarters" for this one,—oral evidence of its contents was properly excluded.

3. A charge that the jury should find a deed of assignment fraudulent and void if any part of the debts preferred in such deed were fictitious, and the fact was known to the assignor and assignee, was not error.

4. It was error to charge that, if the jury should find that the deed was fraudulent as to one creditor, they should find it fraudulent and void as to all.

5. A charge that, if the jury should find that the assignor executed the deed of assignment with a view to becoming indebted, they should find it fraudulent and void, was error.

6. A provision in the deed of assignment that the assignee should sell the property conveyed, and pay the assignor \$500 as his personal property exemption, was not, per se, evidence of a fraudulent intent upon the part of the assignor, but should be considered with the other evidence relating to such intent.

Appeal from superior court, Moore county; Armfield, Judge.

Action by Harvey Blair & Co. and others against L. T. Brown and others. From a judgment for plaintiffs, both parties appeal. On plaintiffs' appeal, affirmed. On defendants' appeal, reversed.

On the 26th of November, 1890, the defendant L. T. Brown, a merchant residing in Moore county, executed a paper writing purporting to be an assignment of his goods, wares, credits, etc., to the defendant S. D. Jones to secure the payment of a sum of \$5,500 to the said S. D. Jones, and then all outstanding claims against the assignor, naming some of them. The debtor reserved to himself \$500, as his personal property exemption, and provided for the expenses of executing the trust before any of the debts should be paid. This action is instituted by the unpreferred creditors for the recovery of judgments against the defendant Brown for their debts against them, and also to have the deed declared fraudulent and void. It is charged that the assignment was executed in pursuance of a conspiracy between the assignor and the assignee to hinder, delay, and defraud the plaintiffs, and that such was the intent of the assignor, and that the assignee knew of it and participated in it at the time of its execution. The defendant Brown died after the action commenced, and his administrator, J. E. Caviness, has been made a party defendant. The answer denies the material allegations of the complaint, except his indebtedness to the plaintiffs. The following are the issues submitted to the jury, and their responses thereto: "(1) Was the deed of assignment from Brown to Jones, assignee, executed with intent to hinder, defeat, delay, or defraud the creditors of L. T. Brown? Ans. Yes. (2) Is the defendant J. E. Caviness, administrator of L. T. Brown, indebted to the plaintiffs? If so, in what amount? Answer. Yes; as alleged in the admissions filed." The court thereupon rendered judgment "declaring the deed of assignment executed by L. T. Brown to S. D. Jones fraudulent and void as to the plaintiff creditors of L. T. Brown, and that said deed be set aside as to plaintiffs, and further adjudged that the plaintiffs recover of J. E. Caviness, administrator of L. T. Brown, the several amounts alleged in the complaint as due to the creditors therein named, aggregating the sum of \$5,331.49 and interest, and further adjudged that the plaintiffs recover of the defendants the costs of the action, to be taxed by the clerk of the court. His honor further ordered and adjudged that, upon the admissions in the pleadings, that this cause be referred to Frank McNeill, referee, to ascertain and report to the next term of this court what property and effects of L. T. Brown, deceased, and the value thereof, came or should have come into the hands of S. D. Jones, trustee, by virtue of the said fraudulent deed of assignment, and said referee was further directed to report any other facts which he may deem essential to a full adjustment of the matters in controversy, and this cause was retained for further orders and directions. The plaintiffs excepted to his hon-

or's refusal to render judgment against the said S. D. Jones, trustee, and the sureties on the said undertaking, and for the error alleged the plaintiffs appealed to the supreme court." From the judgment rendered upon the verdict against the defendants, both parties appealed to this court.

Douglass & Spence and Shaw & Scales, for plaintiffs. Black & Adams, for defendants.

#### Defendants' Appeal.

MONTGOMERY, J. During the progress of the trial, the plaintiffs introduced evidence tending to show: That the deed of assignment from Brown to Jones was preferred and executed on the 21st day of November, 1890, and withheld from record till the morning of the 27th of November, 1890, and that after the execution of said deed, and before the recording thereof, the assignor, Brown, executed and delivered to one J. M. Monger the following power of attorney: "This is to certify that John M. Monger is our agent to contract for us for the purchase of goods, collect all amounts due us, and generally to do and act for us in as full a manner as if we gave our consent to each individual act of his. L. T. Brown. November 21, 1890." That said Brown, at the time of the execution of the deed of assignment and said power of attorney, had on hand a large assortment of goods, the greater part of which he had purchased within the 30 days prior to the assignment, and that said J. M. Monger, immediately after the execution of the said power of attorney, went South, and in a section in which the said Brown had not heretofore purchased goods, and purchased goods for the said Brown, on credit, to the amount of \$6,000, and that said Jones, assignee, knew of these transactions. There was also evidence introduced by plaintiffs tending to show that one Terrell, agent for R. G. Dun's Mercantile Agency, called on Jones, assignee, who was doing business in Sanford, N. C., and in the same town in which the said Brown was doing business, between the 21st and 27th of November, 1890, and informed him (Jones) of his agency, and that he was seeking information of the standing, etc., of the business men of Sanford, for his firm, and that said Jones informed him that the said Brown was, in his opinion, worth about \$5,000; that he (Brown) was doing a very good, straightforward business; and that his store was one of the largest in the town. Plaintiffs also introduced evidence tending to show that one J. S. Harper, traveling salesman of Harvey Blair & Co., one of the plaintiffs, during the month of October, 1890, called on the defendant Jones for information as to the financial standing of the said Brown, and in response thereto Jones informed said Harper that Brown was worth about \$5,000, and that at said time, and at the time of the information given by Jones to Terrell

as aforesaid, said Jones held unrecorded mortgages on all the real and personal property of said Brown to secure an alleged indebtedness of \$5,500. The defendant Jones testified upon cross-examination by the plaintiffs that a short time prior to November, 1890, he (Jones) had disposed of all of his property with intent to defraud one of his creditors. There was also evidence tending to show that the true indebtedness from Brown to Jones was not \$5,500, the amount preferred in the said deed of assignment, but was a sum much less than that amount. There was also evidence tending to show that a short time before the execution of the deed of assignment, and while the said Jones held the unrecorded mortgages on all the real and personal property of the said Brown, said Brown represented to Sweetzer, Pembroke & Co., of New York, that he was worth from \$5,000 to \$7,000 over and above all exemptions and liabilities, and that he purchased goods on a credit upon the faith of these representations. There was also evidence tending to show that though the assignee, Jones, was authorized in said deed of assignment to pay Brown, assignor, \$500 in money in lieu of his personal property exemptions, upon an execution issued against said Brown after the execution of the deed of assignment, said Brown demanded, selected, and had allotted to him his personal property exemptions in property, to a large extent, not conveyed in the deed of assignment. The plaintiffs then insisted that there was before the court sufficient evidence of a combination and conspiracy between the assignor and assignee to defraud the creditors of the assignor to admit the declarations of the assignor made subsequent to the deed of assignment. His honor was of that opinion, and so ruled. Upon this the plaintiffs introduced as a witness for themselves J. M. Brown, who testified as follows: "I am a brother of L. T. Brown. I had a talk with him at my house after the assignment,—the next spring after it was made. He said the assignment was all a damned fraud, and that he would not come to court, because it would ruin him and injure Mr. Jones. He told me this a dozen times." To all of which the defendants excepted. The plaintiffs then introduced as a witness one N. B. McBride, by whom they proposed to prove a conversation that he had with the assignor after the execution of the deed of assignment. The defendants objected. Objection overruled. Defendants excepted. This witness was then permitted to testify as follows, to wit: "I had a conversation with Brown, assignor, after the assignment. It was at Greensborough, in April, 1892. He said he wanted to go home to see Jones, and if Jones would give him his house and lot back he would let things go on as they were, and if they did not he would go on the stand and burst it up, for it was a fraud from beginning to end; that

he was due Jones \$2,000; and that he made the assignment to pay that debt. He said to Mr. Douglass that if Jones did not come to terms he was going to employ some one to burst it up. Mr. Douglass told him to stop, when he began to talk, for he was employed on the other side." To this the defendants excepted. The plaintiffs then introduced as a witness one M. B. Buchanan, by whom they proposed to prove similar declarations of Brown, the assignor, after the assignment. The defendants objected. Objection overruled. Defendants excepted. The witness was then permitted to testify as follows, to wit: "I heard a talk between Brown and McDonald. Brown said he owed Jones some money, but not so much as he claimed, and, if he did not give him back his house and some money, he would go on the stand and break the infernal fraud; that he was strapped, and had nothing. This was at Greensborough, in the spring after the assignment."

The defendants excepted to the ruling of his honor on the sufficiency of the testimony going to show the conspiracy, and they also objected to the introduction of the declarations made by the assignor after the execution of the deed of assignment. The court did not sustain the exception, and overruled the objections to the testimony, and in so doing committed no error. "In order to make the declarations of the assignor after the assignment competent evidence, it must be shown that the assignor and the assignee are combined in a common conspiracy to defraud the assignor's creditors, and this common purpose must be established by evidence other than the declarations themselves." *Burrill, Assignm.* § 362, and the cases there cited.

The defendants introduced as a witness J. G. Bynum, who testified that on the 27th of November, 1890, and after said deed of assignment had been executed, to wit, on the night of the same day, he sent a telegram to one J. M. Monger. The defendants then introduced one G. E. White, who testified as follows, to wit: "I am agent of the railroad, and telegraph operator. I sent a telegram to Monger. It has been destroyed or burned. I have searched for it, and it cannot be found. Some are sent to headquarters, and some are destroyed. I don't know what became of this one. All commercial telegrams are sent to headquarters. No search has been made at headquarters." Upon this evidence the defendants offered to prove the contents of said telegram, purporting to contain a declaration of said Brown, assignor, made to said Bynum subsequent to the execution of the said deed of assignment, and in his own interest, supporting said deed. The said J. M. Monger, to whom it was claimed said telegram was sent, was present, in attendance upon the trial of this cause, at the time the defendants offered to prove the contents of said telegram by said



White, having been subpoenaed as a witness by both plaintiffs and defendants, and was not offered by the defendants to prove the receipt or contents of said telegram. The plaintiffs objected. Objection sustained. Evidence excluded. Defendants excepted. His honor committed no error in refusing to let the witness White testify as to the contents of the alleged telegram. He did not show its loss or destruction, and what he said about it was confused and conflicting. Secondary evidence of the contents of telegrams is admissible on the testimony of the clerk of the telegraph company that the original telegrams have been destroyed. *Steamship Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485; *Smith v. Easton*, 54 Md. 188. In response to plaintiffs' prayer for instructions, his honor, among other things, charged the jury as follows: "(1) If the jury shall find that the deed was made to secure bona fide debts, but for the mere purpose of giving ease to the debtors, it is fraudulent and void, and the jury should so find. (2) That if the jury should believe from the evidence that any part of the debts preferred in the deed of assignment were fictitious, and this fact was known to the assignor, Brown, and the assignee, Jones, then the deed is fraudulent and void, and the jury should so find. (3) If the jury should find that there was an agreement between said Brown and Jones that they or either of them should falsely represent said Brown to be solvent, and upon this representation purchase goods so as to have a sufficient quantity on hand to save said Jones harmless by making the deed of assignment, and upon these representations the said Brown did purchase from the creditors herein, then the deed is fraudulent and void, and the jury should so find." The defendants, in apt time, excepted to the foregoing instructions numbered 1, 2, and 3, and his honor proceeded to instruct the jury as follows, without objection or exception: "(4) Every debtor in failing circumstances has the legal right to make an assignment of his property for the benefit of his creditors, and has the legal right to prefer such of his creditors as he may wish to pay, to the exclusion of the others. (5) The test as to whether a conveyance is fraudulent is not whether in fact it hinders or delays a creditor in the collection of his claim, but whether or not it was made with intent so to hinder or defraud his creditors. If there be no such intent in the mind of the assignor at the time the conveyance is executed, it matters not what effect the execution of the conveyance may have. (6) Although the jury should believe that the assignor, Brown, made false representations to sundry parties in the fall of 1890, for the purpose of obtaining goods, this is not sufficient to vitiate the assignment, and should not be considered by the jury, except as a circumstance to assist them in discovering the assignor's

intent at the date of the assignment. (7) The fraudulent intent must have existed in the assignor's mind when the deed was executed and delivered, and although he may have previously intended to assign his property to defraud his creditors, still, if the deed was bona fide, and no such intent existed in the assignor's mind at the time of its execution and delivery, the deed would not be fraudulent, and the plaintiffs would not be entitled to recovery. (8) If the jury should find that the execution of the deed of assignment operated to the ease, comfort, or benefit of the assignor, Brown, and to the injury of creditors, this would not make the deed fraudulent or void, unless made with that intent on the part of Brown that it should so operate. (9) If the jury should find that the assignor, Brown, or the assignee, Jones, before the date of assignment, made false representations to various parties with a view of obtaining goods to enable said Brown to continue his business, or for any other legal or legitimate purpose, and not for the purpose of hindering, delaying, or defrauding creditors, the deed of assignment is not for that reason void." In further response to the plaintiffs' prayers for instructions, the judge instructed the jury as follows: "(10) If the jury shall find that said deed is fraudulent as to one creditor, they should find that the deed is fraudulent and void as to all. (11) If the jury should find that L. T. Brown executed the deed with the view to becoming indebted, said deed would be fraudulent and void, and the jury should so find. (12) If the evidence is sufficient to produce a belief in the minds of the jury, and the jury should believe it, and are satisfied, that the deed of assignment was executed with intent to defraud, defeat, delay, or hinder the creditors of L. T. Brown, then they should find in favor of the plaintiffs, and answer the issue 'Yes.' (13) In cases when fraud is alleged, the jury are to consider circumstances connected therewith, and to give each its proper weight; and if, upon the whole testimony, the jury believes that the deed of assignment was executed with intent to defraud any one of his creditors, then they should find in favor of the plaintiffs, and answer 'Yes' to the first issue." In the foregoing instructions numbered, respectively, 10, 11, 12, and 13, the defendants excepted in apt time.

The defendants prayed the following instructions: "(1) Although the jury should believe that the defendant S. D. Jones indorsed for his assignor, Brown, or loaned him money, and said Brown promised to save him from loss on account of said loan or indorsement, and in his deed of trust, and in fulfillment of said promise, preferred said Jones for the amount of said indebtedness, this transaction would not make the conveyance fraudulent per se (nor is it evidence of fraud, to be submitted to the jury)." So much of said prayer as is in-

cluded in the parentheses was excluded. Defendants excepted. "(2) If the jury believe that the deed of assignment was drawn November 21, 1890, retained by the assignor, and not delivered till November 26, 1890, this, per se, is no evidence of fraud on the part of the assignor, Brown." His honor refused to so instruct the jury, but instructed them that this was a circumstance which they might consider with its surroundings. To this the defendants excepted. "(3) The fact that the assignor did not include all of his property in the deed of assignment is not, per se, evidence of fraud." His honor refused to so instruct the jury, but directed them to consider this circumstance with its surroundings, and weigh it with the other evidence in the case. "(4) The fact that the deed of assignment requires the assignee to sell the property conveyed, and pay the assignor \$500 as his personal property exemption, does not render the assignment fraudulent or void upon its face (nor is it, per se, evidence of a fraudulent intent upon the part of the assignor)." His honor refused to charge the clause inclosed in parentheses, and defendants excepted. His honor then proceeded to instruct the jury that they might consider the fact that the assignor required the assignee to sell the property conveyed, and pay him (assignor) \$500, his personal property exemptions, with the other evidence in the case bearing thereon, and give it such weight as in their judgment it was entitled, bearing upon the question of the fraudulent interest of the assignor at the time he executed the deed of assignment. "(5) If the jury should find that some of the debts named in the deed of assignment were feigned and fictitious, and the others good and valid, it is the duty of the jury to sustain the deed as to the valid debts in any event." Refused, and the defendants excepted. "(6) The law presumes the deed of assignment valid. The burden of showing that it is fraudulent rests upon the plaintiffs (who must satisfy the jury by strong, clear, and convincing proofs that it is fraudulent; otherwise, it is the duty of the jury to sustain the assignment as valid)." The clause inclosed in parentheses was refused and the following was given instead thereof: "Who must satisfy the jury, fully, clearly, and completely, that it is fraudulent; otherwise, it is the duty of the jury to sustain the assignment as valid,"—and defendants excepted.

The following issues were submitted to the jury: "(1) Was the deed of assignment from L. T. Brown to Jones, assignee, executed with intent to hinder, defeat, delay, or defraud the creditors of L. T. Brown? Answer. Yes. (2) Is the defendant J. E. Caviness, administrator of L. T. Brown, indebted to the plaintiffs? If so, in what amount? Answer. Yes; as alleged in the admissions filed."

Motion for a new trial. Motion denied.

Judgment. Appeal by defendants to the supreme court.

There is nothing in defendants' exception to No. 2 of plaintiff's prayer for instructions, which was given by the court; and, while Nos. 1 and 3 might have been fuller on the points they touched, yet there is no error in them, when taken in connection with the rest of the charge.

There is error in the court's having given the plaintiffs' prayer numbered 10. The doctrine laid down in *Stone v. Marshall*, 7 Jones (N. C.) 300, was overruled by *Morris v. Pearson*, 79 N. C. 253. There is error, also, in his honor's having given No. 11 of plaintiffs' prayer for instructions. We are also of the opinion that No. 4 of defendants' prayer should have been given, with the explanation and limitation which followed that part of it which his honor did give. No. 5 should also have been given, with the qualification that such would not be the law if there was a conspiracy between the assignor and the assignee to hinder, delay, and defraud the creditors of the assignor at the time of the execution of the deed of assignment. There is error in the particulars set out in this opinion, and the defendants must have a new trial.

#### Plaintiffs' Appeal in Same Case.

There is no error in that part of the judgment from which the plaintiffs appealed. "After the institution of the action the plaintiffs, on or about the 16th day of February, 1891, applied to Judge Armfield, then holding the courts of the Seventh district, at chambers in Rockingham, N. C., on affidavits filed, for an injunction and appointment of a receiver therein, and upon the hearing his honor made the following order: "It is adjudged that the prayer for an injunction be refused, the restraining order heretofore granted be dissolved, and the petition for the appointment of a receiver be denied, upon the defendant S. D. Jones, trustee, filing an undertaking in the sum of \$5,000, conditioned as required by law, to be approved by the court. R. F. Armfield, Judge Superior Court." In pursuance of said order the defendant S. D. Jones, trustee, then and there executed, delivered, and filed an undertaking as follows: "Whereas, the plaintiffs in the above-entitled action have applied for and obtained from the court an order restraining S. D. Jones, assignee of L. T. Brown, from further disposing of the goods, wares, and merchandise which came into his hands as assignee, and from otherwise interfering with the assigned estate, and have applied to the court for the appointment of a receiver to take charge of the assigned property of the said L. T. Brown: Now, therefore, we, S. D. Jones, D. N. McIver, J. W. Scott, and J. R. Jones, of Moore county, undertake, pursuant to the statute (chapter 94. Laws of 1885), that the said S. D. Jones shall pay to the plaintiffs in this action all such amounts as may be recovered and adjudged against him upon the final determination of

this action, not to exceed \$5,000. S. D. Jones. [Seal.] D. N. McIver. [Seal.] Jno. W. Scott. [Seal.] J. R. Jones. [Seal.]" That, among other things in the complaint, the plaintiffs allege "that the plaintiffs applied for an injunction and receiver in this cause, upon the trustee, S. D. Jones, executing an undertaking in the sum of \$5,000, conditioned to pay any judgment that the plaintiffs may recover in this action, which said undertaking was duly executed by S. D. Jones, trustee, with D. N. McIver, John W. Scott, and J. R. Jones as sureties thereto. That said S. D. Jones accepted the aforesaid trust, and has collected a large sum of money and other property from the assets of his assignor, amounting in all to the value of over \$5,000." The defendant trustee and the sureties to said undertaking, who were preferred creditors in said deed of assignment and defendants in this action, admitted, in their answers filed, the said allegations. One of the plaintiffs' prayers, in their complaint, was for judgment against L. T. Brown and S. D. Jones, trustee, and the sureties on the aforesaid bond, for the sum mentioned therein. At December term, 1894, this cause came on to be tried before his honor, R. F. Armfield, judge, and a jury, upon the following issues submitted to the jury: (1) "Was the deed of assignment from L. T. Brown to Jones, assignee, executed by Brown with intent to hinder, defeat, delay, or defraud the creditors of L. T. Brown?" The jury responded to said issue, "Yes." (2) "Is the defendant indebted to the plaintiffs? If so, in what amount?" To which the jury responded, "Yes; as alleged in admissions filed." Which admitted indebtedness of L. T. Brown to the creditors amounted to the sum of \$5,331.40 and interest. That upon the verdict of the jury, the allegations in the complaint, and the admissions thereof by the defendants in their answers, the plaintiffs asked for judgment against said Jones and sureties upon said undertaking in the sum of \$5,000. The court refused to give judgment as requested, to which the plaintiffs excepted. The allegation that the defendant assignee, Jones, had received of the assets of the assignor, Brown, more in value than the amount of the assignee's bond, to wit, \$5,000, is denied by the defendants in their answer, and an account would be necessary to discover the true amount for which the assignee would be liable. But as a new trial has been granted to the defendants the reference cannot be proceeded with, and the plaintiffs' appeal is dismissed.

(43 S. C. 448)

LEAKE v. ANDERSON et al.

(Supreme Court of South Carolina. April 2, 1895.)

FRAUDULENT CONVEYANCE—EVIDENCE—ASSIGNMENT FOR CREDITORS—SEPARATE CONVEYANCES—VERBAL ERROR IN "CASE"—PRESUMPTIONS.

1. Where, in an action to set aside a transfer as in fraud of creditors, the decree sustaining

the transfer, as printed in the case, recites that the evidence does not show that the transferee had any "interest" to delay or hinder any other creditors, it will be presumed that the word "interest," due to a misprint, was used for "intent."

2. The fact that a debt due from a husband to his wife was barred by limitations does not render it insufficient to sustain a conveyance as against his creditors.

3. The fact that a mortgage is dated on Sunday is not sufficient, in an action to set it aside as in fraud of creditors, to show that it was antedated for some fraudulent purpose.

4. In an action to set aside certain conveyances and confessed judgments as being intended to transfer the debtor's property to the favored creditors, to the exclusion of others, in violation of the assignment law, the evidence showed that all the transactions were executed within a period of 45 days; that one mortgage was executed in pursuance of an agreement made several years before; that another was given a creditor in order to secure an extension of time, and that a transfer to the wife of the equity of redemption was made to satisfy an honest debt of long standing; that certain confessions of judgments were made to save costs on bona fide claims; and that sufficient property to satisfy the claim of the creditor attacking the transactions was still retained by the debtor. *Held*, that each conveyance was a separate and distinct transaction, and they should not be set aside.

5. Where the case is tried to the court, error in the admission of evidence is not ground for reversal, when the clearly competent evidence sufficiently sustains the decree.

6. The question of the relevancy of evidence is within the discretion of the trial court.

7. The fact that the wife, at an execution sale of her husband's land, notified the bidders of the fact that she held a deed from her husband thereto, does not render a sale to her fraudulent as against creditors, in that such notice chilled the biddings.

8. In an action to set aside conveyances and confessed judgments as in fraud of creditors, as being parts of one transaction entered into to avoid the assignment laws, all the transactions stand or fall together; and therefore it is proper, on sustaining the transactions with regard to the defendants appearing in the action, on the ground that all the transactions were separate and distinct, to refuse to vacate a confessed judgment in favor of a defendant failing to appear.

Appeal from common pleas circuit court of Laurens county; T. B. Fraser, Judge.

Action by J. W. Leake against George B. Anderson and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

The decree of the lower court was as follows:

"This cause was heard by me at the term of the court held in September, 1894, on the pleadings, the testimony taken by a referee, and on oral argument of counsel. The action has been brought by the plaintiff for himself and such other creditors of George B. Anderson who will come in for the purpose of setting aside (1) a mortgage of certain real estate executed about the 13th day of December, 1891, to secure the payment of \$1,200, for which D. R. Anderson was surety; (2) two mortgages to Frick & Co., dated about 28th December, 1891, of certain real estate therein described, to secure the pay-

ment of \$1,561 and \$1,940, respectively; (3) a deed to Mrs. H. M. Anderson, wife of George B. Anderson, dated December, 1891, for the real estate described in said mortgages; (4) a confession of judgment to O. P. Wood and Alice C. Ferabout of \$200, entered up 25th January, 1892; (5) a purchase made by Mrs. H. M. Anderson at a sale made by the sheriff in January, 1893, of George B. Anderson's interest in the Limekiln tract of land, the same being a portion of the real estate covered by the said mortgages and deed to Mrs. H. M. Anderson. The plaintiff stated two causes of action, though not stated separately: (1) That all these mortgages, the deed, the confession of judgment, and the sale by the sheriff are void for actual fraud, under the statute of Elizabeth. (2) That they all constitute a scheme by which certain creditors have secured preference, and, taken together, constitute an assignment with preference, in violation of our statutes on that subject. Rev. St. 1893 (New) §§ 2146, 2147.

"(1) It seems clear now, in the light of subsequent developments, that at the time of these transactions, whether George B. Anderson knew it or not, he was insolvent. I am satisfied, however, that all of these creditors were bona fide; that they had no notice of the insolvency of George B. Anderson, nor were they affected with such notice; and that the evidence does not show that either of them had any interest to defeat, delay, or hinder any other creditor in the efforts to secure their own debts which resulted in the mortgages, the deed, the confession, and purchase at sheriff's sale above referred to. I therefore hold that none of these transactions are void under the statute of Elizabeth.

"(2) Has there been any assignment, or series of transactions amounting to an assignment, with preference, and therefore void under our statutes? In order to contravene the provisions of these sections, there must be either an assignment, or a series of transactions conveying substantially the whole estate of the insolvent debtor, and intended to operate as such. It appears from the testimony, a large part of which has been drawn by the plaintiff from the defendants and their counsel, there was, as estimated by them at the date of these transactions, some \$1,800 worth of property not included by the debtor in any of these transfers. No rule has been suggested by the act or by the courts as to what, in these cases, constitutes substantially the whole estate. The only paper which, standing by itself, could be called an assignment, is the deed to Mrs. Anderson; and all the others are independent transactions between creditors and their debtor, in which each creditor undertook to secure as best he could, and in good faith, his own claims, without any reference to others. Let us assume that this deed to Mrs. Anderson was such a transfer of the whole estate as would

amount to an assignment. These mortgages and the confession of judgment were made within ninety days before the execution of the deed to Mrs. Anderson, but, in order to make them void, the mortgagees and the judgment creditors must, in the language of section 2147, 'have had reasonable cause to believe' George B. Anderson to have been at the time insolvent, and that they were made in fraud of the provisions of the assignment law. Parties may be affected with notice on account of knowledge which had at the time of the transaction come in fact to their agents or attorneys, but they cannot be affected with notice simply because, in some other capacity, their agents were in such a position that their principal would have been bound even if they had failed to take notice of what they ought to have known, and in fact they did not know. A bank may be affected with notice, even if its officers do not know what is on their books; but I fail to see how any outside person for whom a director may be an agent or attorney can be bound, in any event, unless in fact such agent or attorney had actual notice of the facts. I think, therefore, that none of these creditors either had notice, or were affected with notice, of the insolvency of George B. Anderson, and that these mortgages and the judgment were not in fraud of the provisions of the assignment law. When parties have a claim to property offered for sale by a public officer, either at an execution sale or judicial sale, it is usual to give public notice of such claims at the sale. My own judgment is, it is a proper and fair practice, and tends to prevent the unwary from being entrapped into a purchase in which there is at least a disputed title, to their great loss. Parties having conflicting claims, especially those who bring on the sale, ought to be able to protect themselves. My conclusion, therefore, is that the transactions herein impeached are not void either under the assignment law, or for fraud, under the statute of Elizabeth. It is therefore ordered and adjudged that the complaint be, and the same is hereby, dismissed."

N. B. Dial, for appellant. Ferguson & Featherstone and B. A. Morgan, for respondents.

McIVER, C. J. The plaintiff brings this action, for himself as well as all the other creditors of the defendant George B. Anderson who will come in and contribute to the expenses of the action, for the purpose of having certain transactions between the said George B. Anderson and others of his creditors set aside. These transactions are (1) a mortgage to the defendant D. R. Anderson on certain real estate, bearing date the 13th of December, 1891, to secure the payment of a note for \$1,200 given by George B. Anderson to one Glenn, with said D. R. Anderson as surety; (2) two mortgages on

certain real estate, bearing date the 24th December, 1891, given by said George B. Anderson to the defendant the Frick Company, the one to secure the payment of \$1,561, and the other to secure the payment of \$1,940; (3) a deed to Mrs. H. M. Anderson, the wife of said George B. Anderson, bearing date the 26th of December, 1891, for the real estate described in the above-mentioned mortgages; (4) a confession of judgment to the said O. P. Wood, whose executors are parties hereto, entered 29th of January, 1892, for about the sum of \$200; (5) a confession of judgment to the defendant Alice C. Ferguson, entered 29th of January, 1892, for about the sum of \$1,000; (6) a purchase made by Mrs. H. M. Anderson of the interest of the said George B. Anderson in the Limekiln tract of land when the same was offered for sale by the sheriff under executions against said George B. Anderson, which tract of land was covered by some of the mortgages above referred to, as well as by the above-mentioned deed to Mrs. Anderson. These transactions are assailed as void for actual fraud, under the statute of Elizabeth, as well as upon the ground that these transactions, taken together, amount to an assignment with preferences, in violation of the assignment law. The testimony, as taken by the referee and reported to the circuit court, is fully set out in the case, and will be referred to as occasion may require. Upon this testimony and the argument of counsel, the case was heard by his honor, Judge Fraser, who rendered his decree (which should be incorporated in the report of the case), holding that the transactions impeached by this action are not void, either under the assignment law, or (for fraud) under the statute of Elizabeth, and he therefore rendered judgment dismissing the complaint. From this judgment plaintiff appeals, upon the numerous grounds set out in the record; but they need not be specifically stated here, as the counsel for appellant, in his argument here, has classified them as presenting the following questions: "(1) Was the defendant George B. Anderson insolvent at the dates of the execution of the papers sought to be set aside? (2) Did the papers cover his entire property or virtually all of it? (3) Did he intend to give these favored creditors an undue preference over his other creditors? (4) The intention of his creditors in accepting these papers. (5) Was the property transferred or incumbered to the other creditors' detriment?" Now, while, in justice to counsel for appellant, we have thus stated the questions which he supposes are presented by this appeal, we are not prepared to admit that all such questions fairly arise upon this record, nor—what is more important—that they are all material to the inquiry whether there is any error in the judgment appealed from. We shall therefore consider the case in the light in which it presents itself

to our eyes, without following, in their order, the questions proposed. It seems to us that two general questions are presented by this appeal: (1) Whether the transactions sought to be impeached are void under the statute of Elizabeth. (2) If not, whether they are void under the assignment law.

The first question involves the inquiry whether there was an intent to hinder, delay, or defeat the claims of the other creditors of George B. Anderson. This is a question of fact, and has been solved, by the finding of the circuit judge, adversely to the contention of the appellant; and under the well-settled rule this finding of fact will be accepted by this court, unless it is without any evidence to sustain it, or is contrary to the manifest weight of the evidence. The circuit judge thus expresses himself upon this point: "It seems clear now, in the light of subsequent developments, that at the time of these transactions, whether George B. Anderson knew it or not, he was insolvent. I am satisfied, however, that all of these creditors were bona fide; that they had no notice of the insolvency of George B. Anderson, nor were they affected with such notice; and that the evidence does not show that either of them had any *intent* to defeat, delay, or hinder any other creditors in the efforts to secure their own debts which resulted in the mortgages, the deed, the confession, and purchase at sheriff's sale above referred to. I therefore hold that none of these transactions are void under the statute of Elizabeth." It is true that in the circuit decree, as printed in the case, the word "intent," which we have underscored in the foregoing quotation, is printed "interest," and one of the grounds of appeal is based upon the assumption that the word used was "interest," and not "intent"; but we must suppose that this was a misprint, for, while it is manifest that the word "intent" was appropriate to the thought expressed in the passage quoted, the word "interest" would be entirely inapplicable to the idea clearly intended to be conveyed. The statute of Elizabeth does not declare a transaction void where it was to the interest of the parties entering into it to avoid it, but the declaration is that a transaction entered into with an intent to hinder, delay, or defeat other creditors shall be void. Besides, the question does not turn upon the inquiry whether it was to the interest of the parties to hinder, delay, or defeat other creditors, but it does turn upon the inquiry whether the transaction sought to be impeached was entered into with an intent to hinder, delay, or defeat other creditors. Indeed, we suppose it is always to the interest of one among several creditors of an insolvent debtor to obtain, by any lawful means, a priority over these competing creditors; and whether the means he resorts to are lawful depends, not upon the question whether it is his interest to obtain priority,

but upon the question as to his intent in resorting to such means. So that we do not see that it makes any real difference, so far as the result is concerned, whether the word "interest" or the word "intent" was actually used, though we feel no hesitation in assuming, in justice to the circuit judge, that there is a misprint. If this finding of fact can be sustained, then it is clear that there was no error in holding that these transactions are not impeachable under the statute of Elizabeth. Without undertaking to go into any detailed examination of the testimony, it is sufficient for us to say that we think the finding of fact by the circuit judge is sustained by the evidence. In the first place, while, as the event proved, George B. Anderson was insolvent at the time, yet there is much in the testimony tending to show that neither George B. Anderson nor any of his creditors believed at the time that he was insolvent. George B. Anderson himself testifies that he did not then think that he was insolvent; and his whole conduct shows that he was honestly of that opinion, for otherwise he would not have been making such strenuous exertions to get time on his debts, and thereby be enabled "to pull through," as he expressed it. Even the intelligent counsel for appellant, zealous in the protection of his client's rights, frankly says in his testimony that he could not say that he then regarded Anderson as insolvent. To the same effect is the testimony of other intelligent counsel, actively engaged in securing the claims of other creditors whom they represented. The National Bank of Laurens seems to have discounted at least six notes, aggregating in amount the sum of \$1,755, of Anderson & Boyd,—the latter of whom soon afterwards made an assignment,—between the 20th of November, 1891, and the 28th of December, 1891; and banking institutions are apt to be well informed as to the financial condition of their customers. There is certainly a great lack of testimony tending to show that George B. Anderson was actuated by any fraudulent intention in entering into any of the transactions here assailed. Indeed, as was suggested by one of the counsel for respondents, the fact that he postponed his own wife, who held a valid claim against him, the bona fides of which is not assailed by any testimony, is a strong circumstance to negative any fraudulent intent on his part; for the fact that a part or the whole of this debt was subject to the bar of the statute of limitations is not sufficient to show that the debt was not bona fide, especially when it was due by a husband, possessed of large property, to his own wife. As to the other creditors, so far as we can discover, there is but little if any testimony even tending to show any participation on their part in any fraudulent intent to defeat or hinder other creditors. Take the case of the defendant Dr. Anderson, for example. We are unable to discover any

shadow of testimony even tending to implicate him in any fraudulent intent. The mortgage given him was manifestly a mere substitute for a previous mortgage, given him as far back as 1888, to indemnify him against any loss which he might sustain by reason of his suretyship for his brother George B. Anderson on a debt to one Glenn, which debt Dr. Anderson was subsequently required to pay. The fact that the mortgage now held by him happens to be dated on Sunday cannot vitiate it, as was very properly admitted by counsel for appellant, but he relies upon that circumstance as an evidence that it was antedated for some fraudulent purpose. How that circumstance affords even a ground for suspicion, we are at loss to conceive, for no reason is suggested why the mortgage should have been antedated, as no advantage, so far as we can perceive, could be derived from antedating the paper. It seems to us easier, and much more natural, to suppose that it was just one of those mistakes in the day of the month which not unfrequently happen.

Our next inquiry is whether these transactions are assailable under the assignment law. Inasmuch as it is not, and cannot be, pretended that there was a formal deed assignment, this inquiry also turns upon a question of fact; for ever since the case of *Wilks v. Walker*, 22 S. C. 108, down to the case of *Mitchell v. Mitchell* (S. C.) 20 S. E. 405,—the last utterance upon the subject,—this court has uniformly held that while an insolvent debtor may, by a bona fide mortgage, which is intended merely as a security, prefer one creditor, yet if such mortgage is really designed, not as a security merely, but as a means of transferring his property to one or more of his creditors in preference to others, such a transaction, though not in form an assignment, comes within the mischief intended to be suppressed by the assignment law, and is therefore void. The same rule applies where the debtor, instead of a single mortgage, gives a series of mortgages, or enters into a series of transactions, for a similar purpose. Such transactions will be regarded as violative of the spirit of the assignment law, and therefore void. The doctrine is well expressed by the late Chief Justice Simpson in the case of *Lamar v. Pool*, 26 S. C., at page 446, 2 S. E., at page 322, where, after discussing the subject, he uses this language: "So that in all of these cases where the instrument assailed as contrary to section 2014 [now section 2146, Rev. St.] does not, in its form, violate that section, having earmarks that cannot be mistaken, the question must hinge upon the intent of the parties. Is the paper a bona fide mortgage, intended as a security, which the law allows, or was it intended as an assignment, in which the particular creditor is preferred, the form of the paper having been adopted to evade the act? This question, in such a case, becomes a question of fact, and such is

the case now before the court." So in *Melnhard v. Strickland*, 29 S. C., at page 496, 7 S. E., at page 838, where this matter was under discussion, we find the following language: "It is plain, then, that in cases of this kind the question is mainly one of fact, as to the intention of the parties. If the instruments employed were bona fide intended merely as security, and not as a means of evading the provisions of the assignment act, then they do not fall within the purview of that act. But if, on the contrary, the instruments resorted to, whatever may be their form, were intended, not merely as security, but as a means of transferring the debtor's property to the favored creditor, to the exclusion of others, with a view to evade the provisions of the assignment act, then they must be regarded as null and void, under the provisions of that act." Without multiplying quotations, we think it may be safely asserted that the same doctrine pervades all of the cases upon the subject. Now it is quite clear that there is no finding of fact that the several transactions here assailed were entered into for the purpose of evading the provisions of the assignment law, and we think it equally clear that the testimony would not warrant any such finding of fact. We agree with the circuit judge that these transactions were separate and independent transactions, having no connection with each other, and were not in pursuance of a common purpose to transfer all, or substantially all, of the debtor's property to some of his creditors, to the exclusion of the others. The mortgage to Dr. Anderson was given in pursuance of an arrangement entered into about three years previously to secure an honest liability. The mortgages to the Frick Company were obtained by the counsel of that company, by an arrangement for an extension of time on the debts due them, which does not look much like an assignment was intended. The deed to Mrs. Anderson, for what is usually termed the "equity of redemption" in the mortgaged premises, was given in satisfaction of an honest debt of long standing, and was practically the same thing as if George B. Anderson had sold his equity of redemption in those premises to a third person for cash, and applied the same to the payment of his honest indebtedness to his wife, as he unquestionably would have had the right to do; and the confessions of judgment to Wood and to Mrs. Ferguson were given to save costs on debts bona fide due to them. Besides, the circuit judge has found that the mortgages, deed, and confessions of judgment here assailed did not cover the whole, or practically the whole, of George B. Anderson's property; but that property, to the amount of about \$1,800, was not included therein,—an amount apparently more than sufficient to pay plaintiff's judgment,—

and we do not hear of any other creditors uniting in these proceedings. It is true that appellant insists that, after deducting George B. Anderson's homestead exemption, the amount would not be so large. Still, the excess would be considerable. But this matter of the homestead does not seem to have been presented to or decided by the circuit judge, and is not, therefore, properly before us. But, even if it were, it is more than questionable whether it could have any effect upon our conclusion, under the case of *Bank v. Harbin*, 18 S. C. 425, if for no other reason.

We have not deemed it necessary to discuss any of the exceptions to the competency of the testimony, as that matter was not pressed in the argument here. Besides, we may add that we think the testimony,—at least, the most of it,—was competent, and whether it was relevant or not was a matter within the discretion of the circuit judge. But as we think that, even if all the testimony objected to were ruled out, quite enough would remain to sustain the views which we have adopted, it is unnecessary to discuss the question of the competency of the evidence objected to.

The objection to the purchase at the sheriff's sale of the Limekiln tract of land by Mrs. Anderson, which seems to be a distinct and separate matter, based upon the ground that she, by giving notice at the sale that she held a deed for that land, chilled the bidding, is untenable. So far as we can discover, she did no more than what is often done, and properly done,—gave notice at the sale that she held a title for that land, which was true. Indeed, she did no more than give actual notice of a fact of which the public had already constructive notice, by reason of the fact that her deed had been duly recorded. This, so far from being objectionable, was rather commendable, as it tended to prevent an unwary bidder from "buying a lawsuit."

Finally, it is contended that the circuit judge erred in not setting aside the judgment of Wood and Mrs. Ferguson, as they had not answered the complaint. It is true that the circuit judge does not, in his decree, make any ruling as to these judgments, specifically. This was probably because he took the view that these judgments were not assailed upon the ground of fraud or want of consideration in either of them, but solely because, it was alleged, they were parts of the same general transaction, entered into for the purpose of evading the assignment law, and hence must stand or fall with such general transaction; and, as the attack upon such transaction failed, there was no ground shown which would warrant the setting aside of those judgments. The judgment of this court is that the judgment of the circuit court be affirmed.

(44 S. C. 81)

**NEW ENGLAND MORTGAGE SECURITY CO. v. BAXLEY.<sup>1</sup>**

(Supreme Court of South Carolina. April 15, 1895.)

**USURY—BURDEN OF PROOF—EVIDENCE—AGENCY.**

1. Usury is an affirmative defense, the burden of proving which is on the party setting up the defense.

2. Agency cannot be proven by the declarations of the alleged agent.

3. The fact that a person applying to a broker to procure a loan agrees to pay him an exorbitant commission does not taint the loan with usury, where the lender, doing business in a sister state, is unaware of such agreement.

Appeal from common pleas circuit court of Barnwell county; J. J. Norton, Judge.

Action by the New England Mortgage Security Company against Martha A. Baxley and others. From a judgment for defendant Baxley on her plea of usury, but denying part of her counterclaim, both parties appeal. Reversed.

The decree of the court below was as follows:

"This is an action for the foreclosure of a mortgage of real estate, and was begun on 19th October, 1891, and came on to be heard by me at the March term, 1894, for Barnwell county. The complaint alleges that on the 10th April, 1886, the plaintiff, at the request of the defendant Martha A. Baxley, lent her the sum of \$300, and that to secure the payment of said sum the defendant Martha A. Baxley made and delivered to the plaintiff her principal note, dated 10th April, 1886, and payable on 10th April, 1891, for \$300, besides coupons for the interest, which is stipulated in the note to be at the rate of eight per centum per annum; that in order to secure the said note and the covenants contained in the mortgage, the said Martha A. Baxley executed and delivered to the plaintiff her mortgage, dated 12th April, 1886, and covering the lands described in the complaint. The complaint further alleges that the defendants W. D. Stinson, L. B. Baxley, and H. M. Duncan claim to have interests or liens upon the premises therein described that arose subsequently to the lien of plaintiff's mortgage. The answer of Martha A. Baxley admits the making of the papers, but pleads usury, and sets up a counterclaim for twice the amount of usurious interest alleged to have been received by the plaintiff. The answer of the defendant H. M. Duncan admits the allegations of the complaint, except as to the amount due on plaintiff's mortgage, and alleges her lien on the premises to be a mortgage covering same, executed to her by the defendant Martha A. Baxley on the 30th May, 1886, to secure her note of even date therewith for \$100, payable one day after date, with interest at rate of ten per cent. per annum, payable annually. This answer was duly served upon the defendant Martha

A. Baxley. To the counterclaim of the defendant Martha A. Baxley the plaintiff replies, denying that there was usury, but, if adjudged otherwise, then pleads the statute of limitations in bar of any recovery under the counterclaim. The cause was referred to W. Gilmore Simms, clerk, as special master, to take the testimony, and now comes on to be heard before me on the pleadings, the testimony so taken and reported by the special master, the testimony taken by commission, the testimony of the witness J. F. F. Brewster, taken at the trial, and the exhibits.

"Numerous objections were made and noted by the plaintiff to the relevancy and competency of the testimony adduced on the part of the defendant Martha Baxley to establish the agency relied on by her, and urged in argument at the hearing, but, in the view I take of the case, it will not be necessary to pass upon them. Of the \$300, Mrs. Baxley received \$215 cash, \$25 was paid to W. H. Duncan for preparing abstract of her title, and \$60 was retained as brokerage commissions for Duncan and the Corbin Banking Company. The decisions in our own state and elsewhere, under circumstances which are not distinguishable from those proven in this case, hold the transaction usurious. I was more impressed by the witness Brewster that he was thoroughly convinced that the scheme to obtain excessive interest was impregnable than by any statement of fact which would distinguish this from the well-considered cases above alluded to. It is conceded that Mrs. Baxley is chargeable with the \$215 she received. She is also chargeable with the \$25 paid Duncan for preparing her abstract of title. The work was for her, and the price paid for it has not been shown to be excessive. The enormous commissions, under the circumstances, render the transaction obnoxious to our usury laws. The defendant Martha Baxley has paid \$87.33 as interest, of which \$63.33 was paid prior to 6th August, 1889, and \$24 since that date. The counterclaim was served on 6th August, 1892. The statute of limitations bars the recovery in this case of the penalty for receiving more than lawful interest prior to 6th August, 1889, but not since that date. The result of the above findings is:

Note sued on.....	\$300 00	
Less amount called commissions .....	60 00	\$240 00
Less interest paid... ..	\$87 33	
Less twice difference between interest on \$300 and \$240 for one year, \$24, less \$19.20—\$4.80x2 ..	9 60	96 93

Amount plaintiff entitled to recover \$148 07

"The contract to pay costs and counsel fees is not valid under the usury laws

<sup>1</sup> Petition for rehearing denied. See 21 S. E. 885.



There is no contention as to the validity or the amount due on the note and mortgage of the defendant H. M. Duncan. The testimony shows that on this note and mortgage there has been paid on 1st March, 1890, the sum of \$40, and, allowing this credit, I find the amount due on this note and mortgage up to and including the 11th May, 1894, to be the sum of \$148.49. \* \* \*

Plaintiff's exceptions were as follows:

"The plaintiff excepts to the decree of his honor, Judge J. J. Norton, on the following grounds:

"(1) Because his honor erred in refusing to pass upon the objections made by plaintiff, and noted in the case, to the relevancy and competency of the testimony adduced for the defendant Martha A. Baxley, tending to prove the agency of Duncan and the Corbin Banking Company with the plaintiff for the purpose of making the loan.

"(2) That his honor erred in not ruling out, on the objection of plaintiff, the following evidence as incompetent and irrelevant, the same being an attempt to prove agency by the acts and declarations of the very person whose agency is the question at issue: (a) All testimony of the defendant Martha A. Baxley and of her son, L. B. Baxley (objected to by plaintiff), of declarations and statements of W. H. Duncan as to where he expected to obtain the money on the application, and his methods in obtaining the same. (b) All testimony of the said Martha A. Baxley and her son, L. B. Baxley, as to any statements or agreement by or with the said W. H. Duncan that the loan could be renewed at its expiration. (c) All testimony of W. A. Holman as to the occupation and financial standing of the late Col. W. H. Duncan, and as to his methods of conducting his business, and as to the agency of the said Col. Duncan with the plaintiff company, the same being conclusions and deductions drawn from transactions *res inter alios acta*, and from the acts and declarations of the person whose agency is sought to be established.

"(3) That his honor erred in holding the contract herein sued on usurious.

"(4) Because his honor, having found that sixty dollars were retained by Duncan and the Corbin Banking Company as brokerage commissions, erred in holding that such commissions alone rendered the transaction usurious in this case.

"(5) Because his honor erred in holding that 'the decisions in our own state and elsewhere, under circumstances which are not distinguishable from those proven in this case, hold the transaction usurious,' whereas he should have held the clear distinction rests upon the fact of the agency of the intermediaries with, and the knowledge of their charges by, the lender, and the evidence of the absence of these facts being clear, positive, and uncontradicted, he should have held the transaction valid.

"(6) Because his honor erred in holding that

'the enormous commissions, under the circumstances, render the transaction obnoxious to our usury laws,' whereas he should have held that, unless the excessive commissions were shown to have been charged by the agent of the lender, and with his knowledge, the transaction would not be obnoxious to the usury laws of this state.

"(7) Holding the loan to be usurious, he erred in deducting the sixty dollars commissions from the face of the loan, to obtain the principal amount or value which defendant is chargeable with, to wit, \$240, the same not having been received as interest, and not withheld by, nor participated in by, the lender.

"(8) In not holding that the 'principal sum, amount, or value so lent or advanced,' which, under the terms of the act of 1882, is 'to be deemed and taken as the true legal debt or measure of damages,' is the amount actually paid or advanced by the lender, and not the amount received by the borrower.

"(9) In deducting all interest paid from the amount received by the defendant, and thereby holding that the penalty, under the first section of the act of 1882 (18 St. p. 35), is a forfeiture of all interest that has been paid on the usurious contract.

"(10) In not holding that the penalty prescribed by the first section of said act is a forfeiture of unpaid interest only, together with all costs.

"(11) Because his honor erred in confining the bar of the statute to the penalty imposed by the second section of the usury act, and in not holding that it barred the recovery, by set-off or otherwise, of all sums paid to or retained by the plaintiff or the intermediaries prior to 6th August, 1889.

"(12) Because his honor erred in holding that the contract in the mortgage to pay counsel fees in case of foreclosure is not valid under the usury law, and in not allowing the counsel fee provided for."

Defendant's exceptions were as follows:

"(1) His honor erred in holding defendant liable for \$300, it being conceded that she actually received only \$215.

"(2) His honor erred in not deducting from the \$215 (the amount actually received) all charges made against defendant, whether called commissions, interest, or attorney's fees.

"(3) That in ascertaining the amount of unlawful interest received by plaintiff his honor erred in not deducting the interest on \$215 at eight per cent., for three years, seven months, and twenty days, from the amount charged defendant, whether called commission, interest, or attorney's fees; and defendant was entitled to double the difference between the two,—\$176.83.

"(4) His honor erred in holding that the counterclaim of defendant was barred by the statute after three years, whereas the counterclaim should have been allowed entire, and the calculation should have been as follows:

"Section 1, usury act 1882:

"Note sued on, \$300.00.

Amount actually received.....	\$215 00
Commission .....	\$ 60 00
Interest .....	87 33
Attorney's fee.....	25 00
	<hr/>
	\$172 33
	<hr/>
	172 33

Balance due plaintiff..... \$ 42 67"

"Section 2:

Plaintiff entitled to interest on \$215 for 3 years, 7 months, 20 days, at 8 per cent. ....	\$ 62 53
Charged defendant commission, interest, and fees .....	172 33
	<hr/>
	109 75x2
	<hr/>
	219 50

Difference ..... 109 75x2 219 50

Defendant entitled to..... \$176 83"

John T. Sloan, Jr., Allen J. Green, and Halcott P. Green, for appellants. J. J. Brown, for appellee Martha A. Baxley.

McIVER, C. J. The only question presented by this appeal is whether the circuit judge erred in holding that the contract which constitutes the basis of the action was tainted with usury, involving incidentally questions as to the competency of the testimony. It is true that the exceptions, both on the part of the plaintiff and on the part of the defendant Martha A. Baxley, present various other questions, which, however, cannot arise unless the plea of usury should be sustained, and, as we do not think that the plea of usury has been established, these other questions need not be considered or stated. It appears that on the 10th of April, 1886, the defendant Baxley executed her note, whereby she promised to pay to the plaintiff, five years after the date thereof, the sum of \$300, with interest thereon at the rate of 8 per centum per annum, the interest being represented by coupons attached to the note; and to secure the payment thereof the said defendant, on the same day, executed a mortgage to the plaintiff on certain real estate situate in the county of Barnwell, S. C. All of the interest coupons except the last seem to have been paid, and this, together with the principal, still remaining due and unpaid, this action was commenced on the 19th of October, 1891, to foreclose said mortgage. The defendant Martha A. Baxley answered, admitting the execution of the note and mortgage, but pleaded usury, and set up a counterclaim for twice the amount of the usurious interest alleged to have been received by the plaintiff. To this counterclaim the plaintiff replied, denying that there was any usury in the transaction, but, if it should be adjudged otherwise, the statute of limitations was pleaded in bar of any recovery under the counterclaim. The testimony was taken by a special master appointed for that purpose, and reported to the court, and the case was heard upon the

testimony so reported, as well as certain testimony taken by commission, together with the exhibits and the testimony of the witness Brewster, taken at the trial, all of which is set out in the "case" by his honor, Judge Norton, who rendered his decree sustaining the plea of usury, and sustaining the plea of the statute of limitations to so much of the counterclaim as arose prior to the 6th of August, 1889, and rendered judgment in favor of plaintiff for the amount ascertained by him to be due, without costs or counsel fees, which he held invalid under the usury law. From this judgment both plaintiff and defendant Martha A. Baxley appeal upon the several grounds set out in the record. The circuit judge, in his decree (which, together with the exceptions thereto, should be incorporated in the report of the case), uses this language: "Numerous objections were made and noted by the plaintiff to the relevancy and competency of the testimony adduced on the part of the defendant Martha A. Baxley to establish the agency relied on by her, and in argument on the hearing, but, in the view I take of the case, it will not be necessary to pass upon them. Of the \$300 Mrs. Baxley received \$215 cash, \$25 was paid to W. H. Duncan for preparing abstract of her title, and \$60 was retained as brokerage commissions for Duncan and the Corbin Banking Company. The decisions in our own state and elsewhere, under circumstances which are not distinguishable from those proven in this case, hold the transaction usurious. I was more impressed by the witness Brewster that he was thoroughly convinced that the scheme to obtain excessive interest was impregnable than by any statement of fact which would distinguish this from the well-considered cases above alluded to."

Before proceeding to consider the question raised by this appeal it may be as well to state certain undisputed facts appearing in the case, which may serve to render our subsequent discussion more intelligible. Mrs. Baxley, residing in Barnwell county, and owning real estate there, desiring to borrow money, applied to one W. H. Duncan, likewise a resident of that county, who was understood to be engaged in the business of procuring loans of money upon the security of the estate. Duncan agreed to undertake to procure a loan for her of the sum of \$300, and for this purpose filled out a blank application for such loan, and at the same time took from Mrs. Baxley her agreement on a separate piece of paper, whereby, after reciting that she had employed said Duncan to negotiate said loan to be secured by her note and mortgage, she agreed to pay said Duncan the sum of \$60 in full of his commissions and the commissions of those whom he employed to assist him in securing the said loan, and also agreed to furnish an abstract of title to the property she proposed to mortgage, and to pay the fees for record-

ing said mortgage. These papers were forwarded by Duncan to the Corbin Banking Company, a concern which had been for many years engaged in the city of New York in doing a general banking business as well as loan brokers. That company forwarded the application, but not the agreement to pay commissions to the plaintiff company, with an inquiry whether they would make the loan upon the terms mentioned in the application. The plaintiff company agreed to do so, and accordingly the note and mortgage, upon which this action is based, were executed by Mrs. Baxley and sent by Duncan to the Corbin Banking Company, who in turn sent them to the plaintiff, and thereupon the full amount called for by the note, \$300, was sent by plaintiff to the Corbin Banking Company, who, after deducting its share of the commissions under the arrangement between it and Duncan, forwarded the same to said Duncan, who applied \$25 of it to the payment of his fee for preparing the abstract of title, and \$15 to his share of the commissions under the arrangement between him and the Corbin Banking Company, and paid over the balance, to wit, \$215, to Mrs. Baxley, in cash. Under these undisputed facts it is clear that the plaintiff paid over to those who were acting for Mrs. Baxley in procuring the loan the full amount of money mentioned in the note, and neither charged nor received any interest in the excess of the rate allowed by law; indeed, did not contract for as great a rate of interest as the law then allowed, for, under the law as it stood at the time this contract was entered into, 10 per cent. interest could lawfully have been contracted for in writing, whereas in this contract the rate of interest was fixed at 8 per cent. It is very manifest, therefore, that this transaction, upon its face, does not show the slightest trace of usury.

But this does not conclude the inquiry, for if the borrower can show that, notwithstanding the fact that the contract, on its face, does not show usury, yet, as a matter of fact, there was usury in the transaction, he is at liberty to do so; but the burden of proof is upon the borrower to show this, for it is well settled that usury is an affirmative defense, and must be pleaded and proved by the party who sets up such a defense. *Ex parte Monteith*, 1 S. C. 227; *Bank v. Miller*, 39 S. C. 193, 17 S. E. 592. The inquiry, therefore, is whether Mrs. Baxley, the defendant, has shown that there was any usury in the transaction. This she has undertaken to show by attempting to show that the excessive charge of commissions which she was required to pay and did pay to her agents, Duncan and the Corbin Banking Company, for their services in procuring the loan from the plaintiff was at least known to, if not participated in by, the plaintiff at the time the contract was entered into. We do not understand that it is claimed that this was estab-

lished by any direct testimony to that effect, for as matter of fact there was no such testimony, and, on the contrary, as we shall presently see, the testimony was exactly the other way. But it is contended that it must be presumed from the alleged fact that, while Duncan and the Corbin Banking Company may have been the agents of Mrs. Baxley in procuring the loan, they were also the agents of the plaintiff company in making the loan. It will be observed that the circuit judge makes no finding of fact upon this point. He simply says that "the decisions in our own state and elsewhere, under circumstances which are not distinguishable from those proven in this case, hold the transaction usurious," but he entirely omits to say what facts or circumstances were proven in this case, "and declines to make any ruling upon the competency of the testimony adduced on the part of the defendant Martha Baxley to establish the agency relied on by her." We are therefore left to form our own conclusions not only as to the competency of the testimony objected to, but also as to its effect, entirely untrammelled by any finding by the circuit judge.

First, as to the competency of the testimony offered to establish the fact that Duncan was agent of the plaintiff company, raised by plaintiff's second exception. We think it is too clear to admit of argument that the fact of agency cannot be proved by the declarations of the alleged agent, for, while it is true that after the fact of the agency has been established by evidence aliunde, the acts and declarations of the agent within the scope of his agency are binding on the principal, yet it is well settled that the declarations or acts of the alleged agent are not competent to prove the fact of agency. As is said in *Martin v. Suber*, 30 S. C., at page 535. 18 S. E. at page 125: "It would be a very dangerous doctrine to establish, that one person could be made liable for a debt contracted by another simply by the declarations of the person contracting the debt that he was acting as agent of the person sought to be charged." See, to same effect, 1 Greenl. Ev. p. 158, note b, and the cases there cited; also *Renneker v. Warren*, 17 S. C. 139. It seems to us that the objections to the testimony of Duncan's declarations relied on to establish the fact that he was agent of the plaintiff were well taken. Rejecting this incompetent testimony, there is literally no evidence either showing or even tending to show that either Duncan or the Corbin Banking Company were the agents of the plaintiff company. But, even if that testimony could be received, it would only tend to show inferentially, and that, too, by not very palpable inference, that they were such agents, while a careful examination of the testimony will show that such inference is completely rebutted, and the overwhelming weight of the evidence shows conclusively that the relation of agency never did exist between either Duncan or the Corbin Banking Company and the plaintiff. To this effect is

the clear, explicit, and positive testimony of the witness Cook, a member of the Corbin Banking Company, and of the witness Brewster, the president of the plaintiff company. It is somewhat difficult for us to understand what seems to be a slur cast upon the witness Brewster by the circuit judge when he says that he was "more impressed by the witness Brewster that he was thoroughly convinced that the scheme to obtain excessive interest was impregnable than by any statement of fact which would distinguish this from the well-considered cases above alluded to." In view of the palpable fact that this witness testified distinctly and positively, and as, in justice to him, we must add, with apparent candor and truthfulness, that he never knew, or even heard, that what is called "excessive interest" in the shape of commissions had been charged by the Corbin Banking Company and Duncan until more than a year after the loan had been negotiated, and the money paid over, and his statement to this effect, fortified by the letters,—written testimony,—which will be presently more particularly mentioned, it is impossible for us to conceive of any just ground for the insinuation that Mr. Brewster was anxious to make it appear that the "scheme" referred to was "impregnable,"—a scheme in which neither he nor his company had any interest, and knew nothing of, except what he heard on the trial of this case. For although, having heard a rumor that such a charge of commissions was being made by the Corbin Banking Company, this witness immediately—on the same day—wrote a letter, under date of 31st of October, 1887, more than a year after this loan was effected, inquiring whether there was any foundation for such a rumor, to which he received a prompt reply, assuring him that "the whole thing is a fabrication."

Our next inquiry is whether the facts of this case, as thus set forth, bring it under the decisions upon which the circuit judge relies to sustain his conclusion. It will be observed that he refers to no case by name in his decree, but simply says "decisions in our own state and elsewhere"; but he manifestly alludes to the case of *Brown v. Brown*, 38 S. O. 173, 17 S. E. 452, and the cases therein cited. We think that this case differs widely from the case of *Brown v. Brown*, for the very fact upon which that case rested is absent here. There the loan in question was made by the American Freehold Land Mortgage Company, a company doing business in London, England, and therefore likely to employ agents in this country; while here the loan was made by a different company, doing business in Boston, Mass. This, it is conceded is not a very marked difference between the two cases, and, perhaps, if it was the only difference, might not be sufficient to distinguish the one case from the other. But the other differences to which we shall refer are marked and fundamental. In *Brown v. Brown* it was found as matter of fact, and it

is mentioned in the opinion of this court as a material fact, that the agreement to pay the exorbitant commissions was forwarded to the lenders with the application for the loan, before it was made; while here there is no such finding, and not only no evidence upon which to base such a finding, but the evidence is the other way. Again, in the *Brown Case* the circuit judge found as a matter of fact that both Duncan and the Corbin Banking Company were acting as the agents of the plaintiff company, and that the lenders not only knew of, but actually participated in, the benefits of the exorbitant commissions exacted; while in this case there is not only no such finding of fact, but no evidence to warrant any such finding. On the contrary, the overwhelming weight of the evidence shows conclusively that neither Duncan nor the Corbin Banking Company ever were agents of the plaintiff company, and that the plaintiff knew nothing whatever of the agreement on the part of Mrs. Baxley to pay Duncan, and those whom he might employ, the exorbitant commissions for their services; and certainly not a shred of testimony even tending to show that the plaintiff expected to receive, or did receive, any benefit whatever from such charge of commissions. It is very obvious that the court assumed as one of the facts in the *Brown Case* (whether correctly or not it is needless now to inquire) that the agreement to pay the \$1,500 commission was known to the lenders at the time they made the loan, for Mr. Justice McGowan, in delivering the opinion of the majority of the court, referring to that agreement, uses this language: "The above agreement was a part of the original application for the loan, which was forwarded and accepted, and the papers drawn in accordance with it were sent back and signed." He then proceeds to the inquiry whether the knowledge thus acquired by the lenders of the agreement to pay these exorbitant commissions would taint the loan with usury, and, after conceding that there was conflict of authority upon the point, concludes in these words: "If they (the lenders) knew the facts when the proposition was made and accepted, the loan will be held to be usurious," and cites several cases to sustain that position. So that it is apparent that the decision in that case rested upon the finding of fact by the circuit judge, accepted by the supreme court, that the lenders, at the time of making the loan, knew of the excessive charge of commissions. In the present case there has been no such finding of fact, and could not have been under the evidence; and hence the case of *Brown v. Brown* affords no authority whatever in this case. It may be proper to add that, although counsel for appellant asked and obtained leave to assail the decision in *Brown v. Brown*, this court, under the view which has been taken of that decision, does not deem it necessary to the decision of this case to enter upon that inquiry; but the writer of this opinion may be permitted to say

that, while he fully recognizes the authority of that case, he still adheres to the views expressed in the dissenting opinion in that case. The judgment of this court is that the judgment of the circuit court in this case be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry into effect the views herein announced.

(44 S. C. 46)

**BUIST v. MELCHERS et al.**

(Supreme Court of South Carolina. April 15, 1895.)

**EQUITY — ACCOUNTING BY CORPORATE DIRECTORS — PLEADING.**

1. Where, in an action by the receiver of a corporation against its directors for official negligence, the complaint shows that their alleged liability is not for a definite amount, and that some of the acts complained of were committed by some of the defendants when others were not officers, their proportionate liabilities can be determined only by an accounting in equity.

2. Under Code, § 181, providing that the court may require an indefinite or uncertain pleading to be made more certain by amendment, the proper remedy is not by a demurrer, but by a motion to make more definite.

3. In an action based upon the primary liability of corporate officers, the objection that their liability, if any, is secondary, may be interposed as a defense, but is not a ground for demurrer.

4. Whether certain facts alleged in a complaint by a receiver of a corporation against its directors show contributory negligence or estoppel on the part of the corporation cannot be determined on an appeal from an order overruling a demurrer.

Appeal from common pleas circuit court of Charleston county; James Aldrich, Judge.

Action by George Lamb Buist, as receiver of the Assistance Building & Loan Association, against Alexander Melchers and others. Appeal by both parties. Affirmed.

The following are the complaint, answer, order transferring the case from calendar 1 to calendar 2, order overruling demurrer, and exceptions of both parties:

**Complaint.**

"Plaintiff above named, complaining of the above-named defendants in the above-entitled action, alleges:

"First. That heretofore, to wit, on or about the 9th day of September, A. D. 1892, in a certain cause depending in this honorable court, to wit, in the court of common pleas for the county of Charleston, in said state, entitled *E. M. Moreland v. Assistance Building & Loan Association*, the plaintiff herein, G. L. Buist, was duly appointed receiver for said association, and by said court authorized and empowered to take charge of, all and singular, the assets of said corporation, and to bring, and continue if already brought, all actions of any kind and description, and to prosecute the same in such manner as he may be advised by his counsel, and shall, whenever in the judgment of his counsel, or either of them, it be deemed expedient and

proper, bring such action or actions against either the president and directors, or any one or more of them, for any alleged charges of negligence or otherwise, for and on behalf of said association, if he be requested so to do. Said G. L. Buist duly entered upon the discharge of his duties as such receiver, having qualified as required by said order, and ever since has been, and is now, the duly-appointed receiver of said association, and has brought this action in conformity with the provisions of said order, and as requested so to do.

"Second. That under and by virtue of an act of the legislature of the state of South Carolina entitled 'An act to incorporate the Assistance Building and Loan Association of Charleston,' approved on 21st day of December, A. D. 1892, the Assistance Building & Loan Association was created a body politic and corporate for the purpose of making loans of money secured by mortgage on real estate or personal property, or by conveyance of the same to their members and stockholders, the capital stock of said association to consist of two thousand five hundred shares, but, as soon as one thousand shares were subscribed, said association to organize and commence operations; said shares to be paid by successive monthly installments of one dollar on each share.

"Third. By said charter it was further enacted that said corporation shall have power and authority to make any such rules and by-laws for its government as are not repugnant to the constitution and laws of the land; shall have members and succession of members and officers as shall be ordained and chosen according to their said rules and by-laws made or to be made by them; shall have and keep a common seal, and may alter the same at will; may sue and be sued, plead and be impleaded, in any court of law or equity in this state; and shall have and enjoy all and every right and privilege incident and belonging to corporate bodies, according to the laws of the land.

"Fourth. By said charter it was further enacted that the funds of said corporation shall be loaned to the members and stockholders upon the security of real and personal estate, and used in the purchase of real and personal estate, for the benefit of its members and stockholders, on such terms, and under such conditions, and subject to such regulations, as may from time to time be prescribed by the rules and by-laws of said corporation.

"Fifth. By said charter it was further enacted that whenever the funds of said corporation shall have accumulated to such an amount that, upon a fair and just valuation thereof, each stockholder and member shall have received, or be entitled to receive, the sum of two hundred (\$200) dollars, or property to that value, for each and every share of stock by him or her so held, and when such distribution and division of the funds shall have been so made, then this corpora-

tion shall cease and determine. All of which provisions of said charter will more fully appear by reference thereto in 18 St. S. C. p. 5.

"Sixth. Pursuant to the provisions of the said charter, the Assistance Building & Loan Association was duly organized and commenced operations on or about the 7th day of August, 1883, and made rules and by-laws for its government. A copy of said rules and by-laws is hereto annexed, and made a part hereof, and marked 'Exhibit A.'

"Seventh. That during the times hereinafter mentioned the defendants, Alexander Melchers (president), Daniel Ravenel, Patrick Darcy, Jacob Kruse, J. Orrin Lea, Lee Loeb, A. F. C. Cramer, W. H. Welch, Robert Martin, F. W. Cappelmann, J. Alwyn Ball, and B. Feldmann, were duly elected and qualified directors of said Assistance Building & Loan Association,—that is to say, the said Daniel Ravenel, from the organization of said association to November, A. D. 1890; the said J. Orrin Lea, from the organization of said association to the — day of September, 1890; the said Lee Loeb, from the — day of September, 1890, to the present time; the said J. Alwyn Ball, from the organization of said association to the — day of September, 1885; the said Robert Martin, from the — day of July, 1891, to the present time; the said F. W. Cappelmann, from the — day of January, 1891, to the present time; the said B. Feldmann, from the — day of September, 1889, to the present time; the said Alexander Melchers, from the organization of said association to the present time; the said Patrick Darcy, from the organization of said association to the present time; the said Jacob Kruse, from the organization of said association to the present time; the said A. F. C. Cramer, from the organization of said association to the present time; the said W. H. Welch, from the organization of said association to the present time. Said defendants, directors, during their said respective terms of office, were charged with all the duties, and subject to all the responsibilities, attached to said office of directors in said association under the charter and by-laws of said association and laws of the land.

"Eighth. That said defendants, and each and every of them, so carelessly, negligently, wrongfully, and unlawfully, from time to time, performed and omitted to perform the various duties pertaining to their said offices, as directors in said association, as to cause a loss to said association of the sum of fifty-eight thousand dollars.

"Ninth. That, among other acts of negligence of defendants which caused the said loss, plaintiff alleges that said defendants, and each and every of them, while in office as directors, failed and neglected to meet statutely on the 7th of each and every month, for the purpose of disposing of the funds and attending to the financial affairs of the corporation, as required by the by-laws of

said association. Said defendants, directors, while in office as aforesaid, also failed and neglected to hold on the fourth days after the monthly meetings the special and other meetings for the consideration of the securities offered for the loans of the funds of said association, as required by the by-laws of said association. Said defendants, directors, also failed and neglected from time to time, while in office as aforesaid, to inspect the books and accounts of the said association, and to audit the same, as required by law and by the by-laws of said association. Said defendants, directors, while in office as aforesaid, failed and neglected to have the annual statements properly audited by three members of the corporation, as required by the by-laws of said association. Said defendants, directors, while in office as aforesaid, failed and neglected to have orders on the treasurer of said association sanctioned by a majority of the board of directors, as required by the by-laws of said association. Said defendants, directors, while in office as aforesaid, failed and neglected to appoint a suitable and proper person as treasurer of said association, and failed and neglected to require said treasurer to give a proper and sufficient bond to said association, as required by the by-laws of said association. Said defendants, directors, while in office as aforesaid, allowed the funds of said association, from time to time, to accumulate in the hands of the treasurer of said association, instead of lending or distributing the same among the stockholders, as required by the charter and by-laws of said association. Said defendants, directors, while in office as aforesaid, made, reported, and published annual statements for the stockholders of said association, purporting to show the condition of the affairs of said association, which statements were incorrect, misleading, and misrepresented the actual condition of said association. Said defendants, directors, while in office as aforesaid, accepted, without verification by vouchers, incorrect and false statements from the treasurer of said association. Said defendants, directors, from time to time, certified and represented that large sums of money, aggregating in the total the sum of (\$67,272) sixty-seven thousand two hundred and seventy-two dollars, had been expended by them in the purchase and retirement of stock of said association, when in fact no such sum or sums was or could have been so expended; failed and neglected to verify alleged purchases of stock reported by the treasurer by calling for the production of the certificates of stock so alleged to have been purchased, and ascertaining that the same were purchased and properly canceled; allowed members of said association to be in arrears many months for their monthly dues, without enforcing the fines, forfeitures, sales, and penalties required by the by-laws of the association; did not verify the cash balance reported to the

credit of said association by its treasurer; allowed securities of said association to be surrendered without receiving adequate compensation therefor. By reason of the said several acts of negligence on the part of each and every of the said directors, defendants herein, the said association has sustained a loss of (\$58,000) fifty-eight thousand dollars, for which said defendants are jointly and severally liable.

"Tenth. In said action so brought by E. M. Moreland against the Assistance Building & Loan Association, it was alleged in the complaint, and admitted in the answer of said association, filed by its attorneys, Messrs. Mordecai & Gadsden (which answer was sworn to by the defendant herein, Alexander Melchers, as president of said association), that, on information and belief, about (\$50,000) fifty thousand dollars, funds of said association, had been misappropriated by its treasurer, R. F. Burnham, and used for other purposes than those of the association; that it would be necessary to continue the operations of said association for about forty-five months from the 1st day of August, 1892, to replace said loss; that said association owned no assets, except a small amount of cash, and the official bond of said treasurer, in the penal sum of (\$5,000) five thousand dollars, which bond was alleged to be in litigation and contested, and the bonds and mortgages or other collaterals of borrowing members of said association, which said bonds, mortgages, and collaterals were so alleged and admitted as assets, notwithstanding the allegation and admission in said complaint and answer that said association should have wound up and dissolved on the 1st day of August, 1892, and notwithstanding the fact that the said funds so alleged to be misappropriated were lost to said association through the negligence of defendants herein, the president and directors thereof, the restoration of which sum by said defendants, president and directors, would have enabled said association to wind up its affairs prior to the said 1st day of August, 1892, without the further collection of any monthly dues from the stockholders of said association, and without the foreclosure of mortgages or sales of collaterals belonging to any of said stockholders.

"Eleventh. That although the alleged defalcation of the treasurer of said association was ascertained by, and the alleged insolvency of said association was known to, the board of directors of said association on 25th day of March, 1892, yet the defendants, directors, failed to notify the stockholders of the fact until the 30th day of June, A. D. 1892, when the defendant Alexander Melchers, as president of said Assistance Building & Loan Association, called a conference of the stockholders of said association at Harmony Circle Hall, in the city of Charleston, at which conference plaintiff alleges, on information and belief, the defendants Alex-

ander Melchers, A. F. C. Cramer, Lee Loeb, P. Darcy, F. W. Cappellmann, and B. Feldmann were present. At said conference the announcement was made for the first time to the stockholders of said association that said association was hopelessly insolvent, and had, at the instance of the defendants, directors, been placed in the hands of receivers, one of whom was the defendant director, Lee Loeb, and that the directors of said association made no resistance to an order of injunction restraining the association and its stockholders from enforcing the provisions of its charter and by-laws. At said conference questions were put to the defendants, directors, who were present, by stockholders, in relation to the affairs of the association, the answers to which questions revealed the fact that said defendants were totally ignorant of the condition of said association, they not even being able to give the income of said association approximately for any given month or year. The defendant Lee Loeb then and there stated that, of the 1,250 shares which had composed the association up to August 1, 1891, there had been bought by the association 519 shares; that since August, 1891, and up to April, 1892, some shareholders, representing 109 shares, had bought themselves out of the association at 108 months, received satisfaction of their bonds and mortgages, and had their shares canceled; that there were outstanding 293 shares unborrowed on and 330 shares borrowed on. Subsequently, on the 9th day of July, 1892, J. H. Loeb, acting secretary of the association, and subsequently clerk for said receivers of said association, who preceded plaintiff herein, furnished the information that there were 623 shares outstanding, 330 borrowed on, 293 unborrowed on, and also furnished a statement of the names of the stockholders, and the number of shares held by each, a true memorandum of which statement is hereto annexed, as a part hereof, marked 'Exhibit B.' Said statement was made, or claimed to have been made, from an examination of the books of said association made for plaintiff's predecessors in office, and for the use and benefit of said association, and said services and examination were paid for out of the funds of said association. Said statement so furnished is at variance and irreconcilable with and contradictory to the annual statements published by the defendants, directors, as will appear by said annual statements, copies of which are hereto annexed and made a part hereof, reference to which is prayed, and marked 'Exhibits C, D, E, F, G, H, I, K.'

"Twelfth. Plaintiff alleges that on or about the — day of December, 1887, the guaranty or surety company which had up to that date been upon the official bond of R. F. Burnham, treasurer of said association, withdrew therefrom; that an examination of the books, accounts, and vouchers was then made by the defendants, directors, who

reported the same in good order and correct, and thereupon B. A. Muckenfuss qualified as surety upon the said treasurer's bond in lieu and stead of said surety company; that said official bond is only in the penal sum of five thousand dollars,—a sum totally inadequate to meet the losses sustained through the negligence of the defendants, as hereinbefore alleged. Plaintiff herein has instituted a suit upon said bond against the principal and surety thereon, the said R. F. Burnham and the said B. A. Muckenfuss, but the said R. F. Burnham is insolvent, and all liability thereon is contested by the defendants in said suit. Even if said sum of \$5,000 be recovered in said suit, it will not replace the loss caused to said association through the negligence of defendants, by the sum of \$53,000. Plaintiff further alleges that suits have been instituted by him upon bonds, and for the foreclosure of mortgages, against the borrowing members of said association; but the order appointing this plaintiff receiver expressly provides that no decree in such suits shall be carried into effect until there shall be a decision of the supreme court in a test case brought to determine whether there be any further liability whatever to plaintiff on the part of the said borrowing members. And plaintiff alleges that the liability of defendants herein is to plaintiff, acting for all the members of said association,—borrowers as well as nonborrowers,—and is a primary liability to that of the borrowing members, if any such liability there be; and, if the liability of defendants herein be speedily enforced, it will put an end to said suits against the borrowers, and avoid the necessity of all questions as to the respective liabilities of the members of said association, the one to the other.

"Thirteenth. Plaintiff alleges that the said association is insolvent, the only assets now in existence, and the property of said association, being the sum of \$826.96 in cash, in the hands of this plaintiff, and the said official bond of the treasurer, now in suit and contested, as hereinbefore alleged, and that there are outstanding and unsatisfied about 298 shares of stock unborrowed on, upon which there is now due by said association to the holders thereof the sum of \$43,950, with interest thereon from the 7th day of March, 1892, upon which date said association should have wound up and dissolved.

"Fourteenth. Plaintiff alleges that said several acts of negligence of said defendants herein were committed and omitted notwithstanding that said defendants were more than once notified, and matters were brought to their attention, and dissatisfaction expressed to them on the part of certain stockholders, as to the condition of the affairs of said association, all of which should and ought to have produced such action upon their part as would have averted a large part of the loss so sustained through their negligence.

"Wherefore, plaintiff prays judgment against

said defendants in the sum of fifty-eight thousand dollars, with interest and costs."

#### Order Transferring Cause.

"This case was placed for trial by the plaintiff's attorneys, on calendar 1, at the present term of this court, and on the call of that calendar the defendants' attorneys moved to transfer the same to calendar 2, as the proper calendar; claiming that the pleadings showed that the case was an equity case, and should therefore be placed upon calendar 2. After carefully reading and examining the complaint, and after hearing argument of counsel, the court having come to the conclusion that the case is an equity case, and should be disposed of as such, now, on motion of Messrs. Mordecai & Gadsden, Asher D. Cohen, J. N. Nathans, John C. Millar, J. Ancrum Simons, Simons, Siegling & Cappelmann, W. Henry Thomas, and Huger Sinkler, after hearing Messrs. Fitzsimons & Moffett and Henry E. Young, for the plaintiff, it is ordered that this case be, and is hereby, transferred from calendar 1 to calendar 2"

#### Exceptions of Plaintiff.

"The circuit judge erred in transferring this action from calendar 1 to calendar 2 by his order made herein on 14th day of March, 1893, (1) because it is error to deny the right of trial by jury in an action for damages; (2) because it is error not to place a case involving issues of law and fact upon calendar 1; (3) because the circuit judge erred in holding that 'the case is an equity case, and should be disposed of as such'; (4) because the issues of fact in an action for the recovery of money only must be tried by a jury."

#### Answer.

The defendants Alexander Melchers, Patrick Darcy, W. H. Welch, and A. F. C. Cramer severally filed an answer as follows:

"The defendant, answering the complaint herein, says: (1) That he denies each and every allegation in said complaint contained not hereinafter specifically admitted. (2) He admits the allegations of the complaint, as stated in the 1st, 2d, 3d, 4th, 5th, and 6th paragraphs thereof, and denies the allegations contained in the 8th, 9th, 10th, 11th, 12th, 13th, and 14th paragraphs thereof; and, answering the 7th paragraph of said complaint, this defendant admits that he was elected a director of said association at the time of the organization thereof, and that he served as such up to about the 12th day of March, 1892, but as to all the other allegations contained in said paragraph, except as herein admitted, he denies any knowledge or information sufficient to form a belief, and prays strict proof thereof. (3) And, further answering the complaint, this defendant says that it appears upon the face of the complaint that the alleged causes of action therein set forth did not arise within six years previous to the commencement of this action.



(4) For a further defense this defendant says that none of the causes of action alleged in the said complaint accrued within six years before the commencement of this action. (5) And for a further defense this defendant says that the plaintiff ought not to be permitted to allege, as in said complaint complained, because that, even if said loss was caused to said association as therein alleged, the same was caused by the wrongful act of an agent or officer of the said corporation, for whose acts, if causing loss or damage, each stockholder in said association must bear his proportionate share; and, further, because it appears from the complaint and the exhibits filed therewith and made part thereof that, whatever the wrongful act or acts of any such person may have been, the same was the wrongful act or acts of the corporation itself, committed by it through its committee of stockholders duly appointed, and for which this defendant is not liable. (6) For a further defense this defendant says that if the sum of fifty thousand dollars of the funds of the association, or any part thereof, was misappropriated by its treasurer, as alleged in the complaint, or if any other sum or sums of money were lost to the association, as in the complaint alleged, each and every of such losses accruing to the association were occasioned by the association itself, or contributed to it through its own negligence and wrongful acts, from time to time, as appears from the reports of its several committees of stockholders, duly appointed, which reports are among the exhibits of said complaint, and made part thereof. (7) And this defendant, for a further defense, says that actions are now pending in this honorable court to recover from the borrowing members of the said Assistance Building & Loan Association the sums of money respectively due by them, amounting in the aggregate to the sum of about thirty thousand dollars (\$30,000); the same being secured by bonds and mortgages of real estate, and other collaterals, the sales of which are being sought to be enforced in this honorable court, so that the respective proceeds of such sales shall be applied towards the payment of the respective sums due upon said bond, which, when so collected, will constitute assets of the said corporation applicable to the settlement and liquidation of its corporate affairs. (8) That there is also pending in this court another action against the said Robert F. Burnham and Benjamin A. Muckenfuss to recover five thousand dollars (\$5,000) for the breach of the official bond of the said Robert F. Burnham,—another asset of said corporation. (9) That there is still another action pending in this honorable court against the Paragon Building & Loan Association, a body corporate, for an accounting, and to recover a sum of money exceeding the sum of ten thousand dollars,—another asset of the Assistance Building & Loan Association,—reference to which said three pending actions brought by

the receiver, as above stated, is craved. And therefore this defendant says that this action has been prematurely brought, and could only be properly brought after the conclusion of all of said three actions, as until then it cannot be known whether there will or will not be any deficiency, or how much, if any, wherewith to charge this defendant and his codefendants herein, even if such deficiency could be properly chargeable against them, or any of them, which this defendant denies. Wherefore, this defendant asks that the complaint herein be dismissed, with costs."

The defendant Jacob Kruse filed a similar answer, except that in paragraph 2 the defendant admits that he was elected a director of said association at the time of the organization thereof; that he served only for about a year thereafter. The defendant F. W. Cappelmann filed a similar answer, except that in paragraph 2 the defendant admits that he was elected a director of said association on or about the — day of January, 1891, and that he served as such up to about the 12th day of March, 1892. The defendant Lee Loeb filed a similar answer, except that in paragraph 2 the defendant admits that he was elected a director of said association on or about the — day of September, 1891, and that he served as such up to about the 12th day of March, 1892. The defendant J. Orrin Lea filed a similar answer, except that in paragraph 2 the defendant admits that he was elected a director of said association on or about the organization of the same, and that he served as such up to about the — day of December, 1890. The defendant B. Feldmann filed a similar answer, except that in his answer he denies absolutely that he ever was elected or qualified as a director of the Assistance Building & Loan Association. The defendant Robert Martin filed a similar answer, except that in his answer he denies absolutely that he ever was elected or qualified as a director of the Assistance Building & Loan Association. The defendant J. Alwyn Ball filed a similar answer, except that he alleges that he was only a director of the association from the organization thereof up to the — day of September, 1885.

#### Order Overruling Demurrer.

"This cause having been, by order of court, transferred from calendar 1 to calendar 2 upon motion of defendants' attorneys, and said cause having come on for hearing on the 23d day of March, 1893, before his honor, Judge Aldrich, and an oral demurrer to the complaint herein having been interposed by the defendants upon the ground that the complaint does not state facts sufficient to constitute a cause of action, after full argument it is, on motion of H. E. Young and Fitzsimons & Moffett, plaintiffs' attorneys, ordered that said demurrer be, and the same is hereby, overruled; and, the defendants having given notice of intention to appeal, it is ordered that

this action be stayed till the determination of said appeal."

#### Exceptions of Defendants.

"The defendants Alexander Melchers, Patrick Darcy, Jacob Kruse, Lee Loeb, W. H. Welch, Robert Martin, B. Feldmann, T. W. Cappelmann, J. Orrin Lea, and J. Alwyn Ball hereby give notice of their intention to appeal to the supreme court from the order and decree of his honor, Judge Aldrich, dated 24th day of March, 1893, overruling the oral demurrer in this case, and, for the purposes of said appeal, make the following exceptions: First. That whilst it is true that the complaint alleges that the defendant directors named in the seventh paragraph of the complaint, for and during their said respective terms of office, were charged with all the duties and subject to all the responsibilities attached to said office of directors in said association under the charter and by-laws of said association and laws of the land, and whilst it further states in the eighth paragraph of the complaint that the said defendants, and each and every of them, so carelessly, negligently, wrongfully, and unlawfully, from time to time, performed and omitted to perform the various duties pertaining to their said office, as directors in said association, as to cause a loss to said association of the sum of fifty-eight thousand dollars, and whilst, in the ninth paragraph of the complaint, it sets out many different alleged acts of such negligence, by reason of which acts of negligence on the part of each and every one of said directors the association sustained a loss of fifty-eight thousand dollars, for which said defendants are jointly and severally liable, yet the complaint fails to state the time or times at which any of such alleged acts of negligence by omission or commission occurred, and further failed to state any directors or set of directors who were serving as such when any act or acts of negligence occurred. In other words, whilst acts of negligence are alleged, and damages flowing therefrom are charged, and all parties who ever were directors, from first to last, are named, the failure to state the time or times of the alleged acts of negligence, and who were the directors when such acts of negligence occurred, makes it impossible for any proper judgment to be rendered against the directors who would be liable for such acts of negligence, if any, but in fact charges that every director named, from the beginning to the last, is jointly and severally liable, and demands judgment against all, although one or more of them may not at the time have been a director of the association. Second. That the action is based upon the primary liability of the directors, whereas it is respectfully submitted that their liability, if any, is secondary, sounding in damages which can only be recovered after all the assets of the association have been exhausted, and actual loss thus adjudicated, whilst the

complaint herein shows upon its face the pendency of suits for the recovery of outstanding assets sufficient to pay any loss alleged to have been suffered from the negligence of the defendants. Third. That the exhibits filed with the complaint, and made part and parcel thereof, show upon their face that every act of omission or of commission alleged as negligence of the directors had been, in pursuance of the constitution and by-laws of the association, from time to time regularly passed upon, confirmed, and ratified by the association itself. Fourth. That all the annual statements of the secretary and treasurer complained of as false had been regularly approved, ratified, and confirmed by the association itself, as provided by its constitution and by-laws; that these are part of the complaint, and that the corporation, and consequently its representative, the receiver, is estopped from disputing the same; that this action is professedly brought in behalf of the nonborrowing as well as the borrowing stockholders, the object being to relieve borrowing stockholders from any further performance of their contract, seeking to substitute the liability of the directors in discharge of the same, whereas it is respectfully submitted that, inasmuch as at the annual meetings aforesaid all acts and doings of the secretary and treasurer, by reason of which it is sought to charge the defendants, were from time to time audited and confirmed by the association itself, the borrowing members, if any right they had to be relieved from their contract and to throw any loss upon the directors, they, the borrowing members, are estopped from complaining of the correctness of such statements, and must perform their contract, the performance of which, as shown by the complaint itself, would result in the establishment of no loss to the association, and no liability on the part of its directors, even if they had been guilty of said acts of negligence, and if damage had resulted therefrom. Fifth. That, under section 4 of article 5 of the constitution of said association, the directors were required to order a full statement of its affairs to be annually prepared at least seven days before the annual general meetings of the association, at which meeting such statement shall be submitted after having been first audited and signed by three members of the corporation selected by the board, and by article 10 of said constitution such statement is directed to be made by the secretary and treasurer, and that such annual statements, filed as exhibits to the complaint in this action, and made a part and parcel thereof, show upon their face that every act of omission or commission alleged as negligence of the directors had, in pursuance of said constitution, been passed upon and confirmed by the society itself, and that the accounts of the secretary and treasurer were from time to time, as shown by the exhibits to the complaint, duly audited and confirmed and signed by three

members of the association, and approved and ratified by the association itself, and in consequence thereof the board of directors are neither jointly nor severally responsible therefor. The eighteenth annual statement shows \$91,750.14, over twice enough to pay the indebtedness alleged in the thirteenth paragraph of the complaint, of \$43,950."

Fitzsimons & Moffett and H. E. Young, for plaintiff. Mordecai & Gadsden, for Alexander Melchers, Jacob Kruse, Patrick Darcy, and Lee Loeb. Asher D. Cohen, for W. H. Welch. J. N. Nathans, for A. F. C. Cramer. Simons, Siegling & Cappelmann, for F. W. Cappelmann. J. Ancrum Simons, for B. Feldmann. John C. Millar and Hunger Sinkler, for Robert Martin. Mitchell & Smith, for J. Alwyn Ball. W. Henry Thomas, for J. Orrin Lea.

GARY, J. This is an action brought by George Lamb Buist, as receiver of the Assistance Building & Loan Association, against the above-named defendants, to recover judgment for the sum of \$58,000, damages alleged to have been sustained by the said association on account of negligence on the part of said defendants in the discharge of their duties as president and directors of said association. The case was placed for trial on calendar 1, but, on motion of defendants' attorneys, was ordered, by the presiding judge, to be transferred to calendar 2, on the ground that the case was one in equity, and not at law. When the case was called for trial on calendar 2 the defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendants have appealed to this court on exceptions assigning error on the part of the circuit judge in overruling the demurrer; and the plaintiff has appealed because his honor, the presiding judge, ruled that this is an equity case, and ordered it transferred from calendar 1 to calendar 2. For a proper understanding of the questions in this case, it will be necessary to incorporate in the report of it the complaint, the answer, the order transferring the case from calendar 1 to calendar 2, the order overruling the demurrer, the exceptions of the plaintiff, and the exceptions of the defendants.

We will first consider the plaintiff's exceptions, which complain of error on the part of the circuit judge in deciding that this is a case in equity, and not an action at law.

At the time of the organization of the association, Alexander Melchers was elected president, and was from year to year re-elected to that office, and was president at the time of the appointment of the receiver mentioned in the complaint. Daniel Ravenel was a director of the company from its organization until September, 1890; J. Orrin Lea, from its organization until September, 1890; Lee Loeb, from September, 1890,

until the appointment of the receiver; J. Alwyn Ball, from its organization until September, 1885; Robert Martin, from July, 1891, until the appointment of the receiver; F. W. Cappelmann, from January, 1891, until the appointment of the receiver; Jacob Kruse, A. F. C. Cramer, Patrick Darcy, and W. H. Welch, from its organization until the appointment of a receiver. Therefore, taking the period of service by years, it stands thus: 1883: Alexander Melchers, president. Board of directors: Daniel Ravenel, Jacob Kruse, Patrick Darcy, A. F. C. Cramer, W. H. Welch, and J. Alwyn Ball. 1884: The same. 1885: The same, until September. 1886: Alexander Melchers, president. Board of directors: Daniel Ravenel, Patrick Darcy, Jacob Kruse, A. F. C. Cramer, W. H. Welch. 1887: The same. 1888: The same. 1889: The same. 1890: Up to September, the same, except that B. Feldmann became a member of the board in September, 1889. 1891: Alexander Melchers, president. Board of directors: Patrick Darcy, Jacob Kruse, A. F. C. Cramer, W. H. Welch, Robert Martin, F. W. Cappelmann. 1892: Alexander Melchers, president. Board of directors: Lee Loeb, Robert Martin, F. W. Cappelmann, B. Feldmann, Patrick Darcy, Jacob Kruse, A. F. C. Cramer, and W. H. Welch.

The ninth paragraph of the complaint sets forth the particular acts of negligence alleged to have been committed by the defendants, which are as follows: That the defendants failed to meet monthly, as required by the by-laws of the association, in order to dispose of funds. Failed to hold the stated meeting to pass on loans; to inspect the books and accounts of the association; to have annual statements properly audited; to see that drafts on the treasury were properly signed; to require a proper bond from the treasurer. Allowed the funds to accumulate in the hands of the treasurer, instead of lending them out. Put forth yearly incorrect and untrue statements, and misrepresented the condition of the association. Did not verify by vouchers the false and incorrect statements of the treasurer. Certified and misrepresented that \$67,272 had been spent in buying and retiring shares of the association, when this was false. Failed to verify the alleged purchases of stock, and call for the production of the scrip so alleged to have been bought, and have it canceled, and did not enforce the penalties for nonpayment of installments when due.

It appears upon the face of the complaint that the alleged liability on the part of the defendants is not one and the same, by reason of the fact that some of the alleged acts of negligence were committed by some of the defendants at a time when others of the defendants were not members of the board of directors of the association; that the alleged liability of the defendants is not for a defi-

nite and fixed amount; that as the liability of the defendants is founded upon their alleged negligent discharge of official duties, and some of the defendants did not hold office, as directors, from the organization of the association until the appointment of a receiver, they are not equally guilty, nor equally liable for damages, by reason of each and every of said alleged acts of negligence. The defendants are therefore only liable for their proportionate parts of the damages alleged to have been sustained by their negligent acts committed at different times, and, in order to ascertain the proportionate amount for which each was liable, it was necessary to resort to a court of equity. The proportions in which the defendants are liable can only be determined by an accounting of their acts and doings as officers of the association, and to make such an accounting is peculiarly the province of a court of equity. Having reached the conclusion that the defendants are only liable for their proportionate parts of the loss sustained by reason of their alleged acts of negligence, and that the proportions in which they are liable can only be determined by an accounting as to their official acts, it would seem to be unnecessary to cite authorities to show that a court of equity is the proper forum for such accounting, and the adjustment of proportions in which they are liable. The distinction where the liability of the directors is for a fixed and definite amount, and where they are only liable for a proportionate part, which can be determined only by an accounting, is pointed out in a number of cases, among which we may mention *Hornor v. Henning*, 83 U. S. 228; *Pollard v. Bailey*, 20 Wall. 520; *Terry v. Tubman*, 92 U. S. 156; *Stone v. Chisholm*, 113 U. S. 302. 5 Sup. Ct. 497,—all cited with approval in *Hall v. Klinck*, 25 S. C. 348. In support of our view that this is a case in equity, the following authorities are also cited: 3 Pom. Eq. Jur. §§ 1088-1091, 1094; 3 Cook, Stock, Stockh. & Corp. Law, § 701; *Brinkerhoff v. Bostwick*, 105 N. Y. 567, 12 N. E. 58; *Latimer v. Railroad Co.*, 39 S. C. 51, 17 S. E. 258. The plaintiff's exceptions are overruled.

We come now to a consideration of the defendants' exceptions.

The first exception of the defendants complains that while acts of negligence are alleged, and damages flowing therefrom are charged, and all parties who were ever directors, from first to last, are named, the failure to state the time or times of the alleged acts of negligence, and who were the directors when such acts of negligence occurred, makes it impossible for any proper judgment to be rendered against the directors who would be liable for such acts of negligence, if any, but in fact the complaint charges that every director named, from the beginning to the last, is jointly and severally liable, and demands judgment against all, although one or more of them, at the time,

may not have been a director of the association. Section 181 of the Code provides that "when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent the court may require the pleading to be made more definite and certain by amendment." The remedy in such cases is not by demurrer, but by motion to make more definite. *Mobley v. Cureton*, 6 S. C. 49; *Childers v. Verner*, 12 S. C. 6; *Hellams v. Switzer*, 24 S. C. 39; *Dowle v. Joyner*, 25 S. C. 123; *Holland v. Kemp*, 27 S. C. 623, 3 S. E. 83; *Chapman v. City Council*, 28 S. C. 373, 6 S. E. 158; *McCown v. McSween*, 29 S. C. 130, 7 S. E. 45; *Westlake v. Farrow*, 34 S. C. 270, 13 S. E. 469; *Cartin v. Railroad Co.*, 20 S. E. 979. The first exception is overruled.

The second exception raises the objection to the complaint that the action is based on the primary liability of the defendants, whereas their liability, if any, is secondary. This objection may be interposed as a ground of defense in the answer, but does not subject the complaint to demurrer. It is simply an equity which the defendant may assert if he sees proper. *Moss v. Bratton*, 5 Rich. Eq. 1. The second exception is overruled.

The third, fourth, and fifth exceptions will be considered together. Whether we regard these exceptions as raising objections to the complaint because it shows upon the face that the association was guilty of contributory negligence, or as stating facts constituting an estoppel, in neither case can it be sustained. Whether certain facts constitute contributory negligence depends upon the inference drawn from such facts, which is not within the province of this court where the case comes up on an appeal from an order overruling a demurrer. Nor can this court, under such circumstances, determine whether the facts alleged in the complaint make out an estoppel. For this court, under these circumstances, to determine whether the facts stated in the complaint constitute contributory negligence or an estoppel would be to pass upon the facts of the case in the first instance, thus usurping the powers of the court below. The distinction must be kept in mind between the cases where facts are alleged from which the admission is sought to be inferred. These exceptions are overruled. It is the judgment of this court that the orders appealed from be affirmed.

(34 Ga. 201)

**MAYOR, ETC., OF CITY OF MACON v. MACON CONSTRUCTION CO.**

(Supreme Court of Georgia. July 30, 1894.)

**TAXATION OF CORPORATE STOCK.**

The municipal government of the city of Macon has no authority of law to levy and collect from a business corporation having an office and doing business in the city a tax upon the capital stock, as such, of the corporation itself. The authority given to the mayor and council by the act of December 11, 1871, "to levy and

collect a tax upon all property, real and personal, within the limits of the city; upon banking, insurance and other capital employed therein, etc.,—authorizes the taxation by the city of all property a corporation may actually own, and of all capital it may actually employ, within the limits of the city; but this power does not extend to the taxation of the capital stock of the corporation, as a part of its property or assets,—the stock being, so far as the corporation is concerned, a liability.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. M. Griggs, Judge.

Action between the city of Macon and the Macon Construction Company. From the judgment rendered, the city brings error. Affirmed.

Dessau & Hodges, W. M. Wimberly, and C. L. Bartlett, for plaintiff in error. Gustin, Guerry & Hall, for defendant in error.

LUMPKIN, J. The only question in this case is whether or not, under that provision of the charter of Macon authorizing the mayor and council "to levy and collect a tax upon all property, real and personal, within the limits of the city; upon banking, insurance and other capital employed therein,"—the municipal government has a legal right to levy and collect from a business corporation having an office and doing business in the city a tax upon its capital stock, as such. There can be no doubt that under the act of December 11, 1871, from which the above quotation is taken, the municipal government of the city of Macon may tax all property owned by the Macon Construction Company, and all the capital that company may actually employ, within the limits of the city; but the capital stock of the company is neither property owned by it, nor capital which it employs. The stock issued by a corporation is not property owned by it. Such stock is in no sense assets, but, on the contrary, is a liability. Stock in an incorporated company is held and owned by the stockholders. As to them, it is property, and may or may not be subject to municipal taxation; but, relatively to the corporation itself, it is not property at all. Neither a natural nor an artificial person can properly be said to own a chose in action, or written instrument of any sort, which merely evidences the fact that he or it is liable to or indebted to another. Judgment affirmed.

(94 Ga. 202)

WESTERN UNION TEL. CO. v. WATSON.  
(Supreme Court of Georgia. July 30, 1894.)  
DELAY IN DELIVERY OF TELEGRAM—REMOTE DAMAGE.

Where the plaintiff's alleged damages resulted, not from loss dependent on the state of his contract with his customer as that contract actually existed at the time of default by the telegraph company, but by reason of failure to obtain a modification of that contract according to a proposition which the plaintiff in-

tended to make, and which the customer would have accepted if it had been made, neither of them in fact knowing of the other's state of mind on the subject until it was too late to make the modification or agree upon it, the damages were too remote and uncertain to be the basis of a recovery for delay in delivering a telegram, and for exposure of its contents to the customer before delivery, thus causing the customer to take action contrary to the plaintiff's probable interest which otherwise he would not have taken.

(Syllabus by the Court.)

Error from superior court, Oconee county; N. L. Hutchins, Judge.

Action by J. W. Watson against the Western Union Telegraph Company. From the judgment rendered, defendant brings error. Reversed.

Following is the official report:

Watson sued the telegraph company for damages. The nature of his claim will appear from the report of the evidence hereinafter made. He obtained a verdict for \$180. Defendant moved for a new trial, and the court passed a judgment that a new trial be granted unless plaintiff would write off all of the verdict in excess of \$120.90. Such excess was written off, and defendant excepted. The grounds of the motion were that the verdict was contrary to law, evidence, without evidence to support it, and decidedly and strongly against the weight of the evidence. Upon the trial, Watson testified: "Am agent of the Brown Cotton-Gin Company of New London, Conn., and as such sold to C. L. Pitner two seventy-saw gins, feeders, and condensers about the last of July or first of August, 1892, for \$595. My commission on the sale would have been \$238. I told Pitner the gins had been shipped; that I had a letter from the Brown Cotton-Gin Company, stating they would be shipped in a day or two. On September 2, 1892, I telegraphed them asking why the gins had not come, and in reply received the following telegram: 'Owing to press of orders, impossible to ship before Monday next. Will that answer?' signed by them. [The telegram in question.] When I read this telegram, I went at once to see Pitner at his mill, and there learned that he knew what was in the telegram, and had gone to Athens to buy other gins. I went to Athens that night, to see him in regard to the gin, and to make arrangements with him to allow me to put in a new gin I had on hand, to be used by him until the gin I sold him came; and he agreed to it, provided he could countermand the orders for gins he had made in Athens after he got there that evening. Before going to Athens to see Pitner, I went to the depot, and asked Gay, the agent, why he told Pitner what was in that telegram, and he said, 'The devil! I never thought about it being any harm.' I lost \$238 by Gay, agent of defendant, telling Pitner what was in the telegram; or, if the telegram had been delivered within a reasonable time after it was received in the

office at Watkinsville, I could have seen Pitner, and could have made arrangements with him to wait until the gins came, and would not have lost my commission, as I did, by reason of the contents of the telegram being divulged and the delay in its delivery." There was further evidence for plaintiff, showing that the telegram was delivered at plaintiff's store between 2:30 and 3 o'clock p. m., September 2d; and that plaintiff had been to Athens that day, and got back to Watkinsville, to his store, by half past 2 o'clock, and went over to his house, where he was when the telegram was delivered at the store; ate his dinner, and came back to the store, and his son gave him the telegram. For defendant, Gay testified: "Pitner came to me on September 2, 1892, and asked me if the gins had come that Watson had ordered for him. I told him, 'No.' I was both depot agent and telegraph agent. Just before he came in, I had received the telegram, copied it out, put the copy in an envelope on the table, and the original I put on file. I did not divulge its contents to Pitner, and did not call his attention to it. If he saw it in my office, I did not know it. The message was received by me at 1:15 o'clock. I took telegram, and went at once to Watson's place of business, about half mile from the telegraph office, and delivered it to his son. I did not take the time of delivery, though the rules of the company require it. I never do take it down in any case." Pitner testified: "Bought two gins from Watson the latter part of July or first of August. No time was specified for them to be delivered. He was to divide his commission with me. Do not remember what that was. Do not think I was to pay over \$450 or \$500 for the gins, feeders, and condensers. I went to Watson, and asked him about the gins, and he said they had been shipped, as he had a letter from the gin company to that effect. I became impatient about the gins, as the season was upon me, and went to the depot on September 2d, to know if they had come. When I asked Gay if they had come he said, 'No,' and then my attention was called in some way by him to the telegram which was lying on the table. I picked it up, and read it. He did not show it to me, but called my attention to it in some way. When I read it, he shut up the office, and we went outside, and had a conversation about the gins. I then went down to the gin house, and had my horse hitched up, and went to Watson's store, and asked where he was, and was told by his son that he was out. I then went to Athens, and bought two gins. If I could have seen Watson before I went to Athens, I would have accepted his proposition to put in the new gin, to be used until the gins I bought from him came, and would not have bought other gins in Athens or elsewhere, for I agreed to take his gins that night, provided I could countermand

the orders with the parties from whom I had purchased in Athens. I went to see them the next morning, and they would not let me out of the trade. If I had not seen the telegram, I would not have gone to Athens and bought gins from other parties."

Dorsey, Brewster & Howell and Geo. Dudley Thomas, for plaintiff in error. W. M. Smith and Thomas & Strickland, for defendant in error.

**SIMMONS, J.** Under the facts in this case, which will be found set out in the official report, the damages were too remote and uncertain to be the basis of a recovery for delay in delivering the telegram and for exposure of its contents to the plaintiff's customer before delivery. The damages did not result from any loss dependent on the state of his contract with the customer as the contract actually existed at the time of the default by the telegraph company. Pitner, the customer, was to take from Watson two gins of the Brown Cotton-Gin Company of New London, Conn. Pitner had waited for some time for the gins to be delivered to him, but had been disappointed. When the telegram was disclosed to him, he went to Athens, and purchased another gin from a different person. This action is based on the theory that if the telegram had not been shown Pitner, Watson would have made a different arrangement with him,—that he would have induced Pitner to consent to use another gin until the gins he was expecting to receive should arrive,—and thus get his commission on the sale of those gins. In order to do this it would have been necessary to obtain the consent of Pitner, and Pitner might or might not have made the new arrangement with Watson. It is true. Pitner says now that he would have made it, but we cannot tell whether he would have done so or not. He might have been in a different state of mind then from the state of mind he was in at the trial of the case. He might have consented to it or might not have done so. On the whole, we think the damages are too remote and uncertain to be the basis of a recovery. Judgment reversed.

(94 Ga. 203)

#### **BOWERS v. KANADAY.**

(Supreme Court of Georgia. July 30, 1894.)

##### **CERTIORARI—APPLICATION BY MINOR.**

1. A minor who has sufficient discretion, not only to understand an oath and its obligation, but to form and entertain a rational opinion as to his own rights and interests, is competent to make an affidavit verifying a petition for certiorari brought for him by a guardian ad litem; and in the affidavit he may depose to his own inability, by reason of poverty, to pay costs and give security.

2. The minor being the real party, and the guardian ad litem his representative, the letter of the statute (Code, § 4056) is not quite adjusted to the precise case; and hence an affida-

vit made by either could be regarded as a substantial compliance with its requirements.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; C. J. Wellborn, Judge.

To property levied on under execution in favor of A. G. Kanaday as that of L. Greenman, John H. Bowers, guardian ad litem of William A. Greenman, interposed a claim of ownership. To review an adverse judgment, the guardian brought certiorari, and from an order dismissing that writ he brings error. Reversed.

J. J. Kimsey, M. G. Boyd, and W. S. Huff, for plaintiff in error J. W. H. Underwood, for defendant in error.

**LUMPKIN, J.** An execution in favor of Kanaday was levied upon a yoke of oxen as the property of L. Greenman. A claim was interposed by Bowers, as guardian ad litem of William A. Greenman, a minor about 20 years of age, alleging that the property belonged to the latter. On the trial the property was found subject, and Bowers, as such guardian ad litem, sued out a writ of certiorari. The petition was verified by the oath of William A. Greenman in forma pauperis. The court, on motion, dismissed the certiorari, upon the ground that the oath verifying the petition was not made by Bowers. This was error. William A. Greenman was the principal witness in his own behalf upon the trial of the case. His evidence, as brought up in the record, in connection with the fact that he had nearly attained his majority, shows with certainty that he had sufficient discretion, not only to understand an oath and its obligation, but to form and entertain a sensible opinion as to his own rights and interests. He being the real party claimant, we think he was competent to verify the petition for certiorari, although it was brought for him by his guardian ad litem. Indeed, it would seem that the young man himself was better qualified than any other person to depose concerning his inability, by reason of poverty, to pay the costs and give security, and no reasons occur why he should not likewise be regarded as competent to make the general verification of the petition required by statute. This view is entirely consistent with the ruling of this court in *Hadden v. Larned*, 83 Ga. 636, 10 S. E. 278, holding that a claim may be interposed under the act of 1870 upon an affidavit in forma pauperis made by the claimant himself, but not upon a like oath made by his agent. In the case before us, as has been shown, the affidavit was in fact made by the real claimant, and he was old enough and intelligent enough to make it advisedly. Had he been a child of tender years, and for that reason incompetent to depose as to the facts contained in the affidavit, it would have been more appropriate for the verification to be made by the guardian ad litem. The truth is the

language of section 4056 of the Code is not precisely adjusted to a case like the present, and, in view of the facts, we think the verification by the minor was a substantial compliance with its requirements. Judgment reversed.

(94 Ga. 215)

# WARREN v. BLEVINS.

(Supreme Court of Georgia. July 30, 1894.)

WRIT OF ERROR—WHEN LIES.

Where, in an action for the recovery of land, the parties went to trial, not upon the whole case, but upon the single question of the jurisdiction of the court, the same depending upon whether any part of the premises lay in the county in which the action was brought, and the jury found in favor of the plaintiff, and the defendant, without making a motion for a new trial, brought a writ of error upon various rulings of the court made during the progress of the trial, the reversal of none of which would operate to terminate the case, but would leave it still pending in the court below, the writ of error was premature, and for that reason is dismissed, with direction that the plaintiff in error be allowed to enter his bill of exceptions on the minutes of the court below as exceptions taken pendente lite.

(Syllabus by the Court.)

Error from superior court, Dade county; T. W. Milner, Judge.

Action in ejectment by J. W. Blevins against W. L. Warren. From a judgment on the trial of a preliminary question as to jurisdiction, defendant brings error. Dismissed.

H. P. Lumpkin and R. J. & J. McCamy, for plaintiff in error. McCutchen & Shumate, for defendant in error.

**LUMPKIN, J.** An action of ejectment was brought by Blevins against Warren in the superior court of Dade county. The defendant filed a plea alleging that the court had no jurisdiction over the subject-matter of the suit, for the reason that the land sued for lay in Walker county, and that the superior court of that county alone had jurisdiction of the case. The parties went to trial upon the single question of the jurisdiction of the court, and upon this issue the jury found for the plaintiff, but there was no recovery by him of the premises in dispute, and for this reason the main case is still pending in the court below. Without moving for a new trial, the defendant sued out a bill of exceptions, alleging error upon various rulings made by the court during the progress of the trial. After a careful examination of these rulings, we find that the reversal of none of them would operate to make a final termination of the case. For this reason, the writ of error, under section 4250 of the Code, was prematurely brought, and must be dismissed. For the purpose, however, of allowing the defendant to take advantage of the exceptions he has made, in the event it should in the end become necessary for him to do so, we have directed that he be allowed to enter his

bill of exceptions on the minutes of the court below as exceptions taken pendente lite. We do not mean to say that these exceptions are meritorious, or that they are not. We give the direction indicated simply for the purpose of preserving the rights of the defendant until the final hearing; this being, in our judgment, under the circumstances, a proper disposition to make of this case. Writ of error dismissed, with direction.

(94 Ga. 224)

**STARLING v. WESTERN UNION TEL. CO.**

(Supreme Court of Georgia. July 30, 1894.)

**FIRST NEW TRIAL—DISCRETION OF COURT.**

The case having been very loosely managed by counsel for the plaintiff below as to pleading, and apparently also as to evidence, and it not appearing that a new trial may not further the ends of justice, the general rule applicable to the first grant of a new trial by the presiding judge should control.

(Syllabus by the Court.)

Error from superior court, Chattooga county; W. M. Henry, Judge.

Action by B. J. Starling against the Western Union Telegraph Company. From a judgment granting a new trial, after a verdict for him, plaintiff brings error. Affirmed.

Ennis & Starling and G. A. H. Harris, for plaintiff in error. McHenry, Nunnally & Neel, for defendant in error.

**LUMPKIN, J.** This was an action against the telegraph company for the statutory penalty. It resulted in a verdict for the plaintiff below. The defendant moved for a new trial on several grounds, and a new trial was granted by the presiding judge. An examination of the record shows that the case for the plaintiff below was very loosely managed,—certainly as to the pleading, and most probably as to the evidence. Another hearing may further the ends of justice. At any rate, it does not appear that a new trial will not have this result. This is a case to which the general rule relating to the first grant of a new trial is applicable, and accordingly this court will not closely scrutinize the grounds of the motion, but will allow that rule to control. Judgment affirmed.

(94 Ga. 260)

**MOORE v. BREWER et al.**

(Supreme Court of Georgia. Aug. 6, 1894.)

**ATTACHMENT—AMENDMENT OF WRIT—DISMISSAL—STRIKING OUT EVIDENCE—VERDICT.**

1. Although, upon the trial of a traverse of the ground of an attachment, the burden of proof be on the plaintiff, yet, where he successfully carried the burden, a charge of the court that the burden was upon the defendant was harmless.

2. An attachment being amendable, the affidavit and bond may be looked to in aid of the writ itself, when it is wanting in certainty as to the person against whom it was intended the writ should issue; and where, with such aid,

the identity of the person can be ascertained beyond all doubt, the attachment should not be dismissed because it merely describes the debtor as having in his possession the property to be seized, and does not designate him as a debtor or as the defendant in the proceeding.

3. The sheriff's return of levy does not negative the possession of the defendant in attachment by stating that the property was seized at a specified railroad depot.

4. A motion to rule out evidence, without stating upon what specific ground the motion was rested or what objection was made to the evidence, is not for review. A statement that the evidence was "illegal," without disclosing why it was illegal, is too general.

5. The evidence warranted the verdict, both as to the ground of the attachment and as to the main case.

6. Where the attachment suit and the traverse to the ground of attachment were tried together, and the verdict found for the plaintiff a specified sum for principal and another for interest, and against the traverse, the signature of the foreman following both findings, but separated from the latter about one inch in space, and the two findings themselves being separated by a like space, the signature was sufficient to authenticate the whole verdict, nothing appearing which indicates or suggests that it was not meant to apply to the whole.

(Syllabus by the Court.)

Error from city court of Carroll; W. F. Brown, Judge.

Action in attachment by H. Brewer & Co. against J. P. Moore. Plaintiffs had judgment and defendant brings error. Affirmed.

The following is the official report:

Attachment was issued in favor of H. Brewer & Co. against J. P. Moore for the purchase money of a brick machine sold by plaintiffs to defendant. The affidavit for attachment alleges that "said brick machine is at this present time in the possession of said J. P. Moore," and that "affiant makes this affidavit that an attachment may issue against said No. 8 mold brick machine, made by said H. Brewer & Co., for said purchase money." The attachment issued upon this affidavit commands the levying officers "to attach and seize, for the purpose of making \$616 and interest, purchase money, and all costs, one No. 8 brick mold machine manufactured by H. Brewer & Co., of Tecumseh, Michigan, at present in the possession of J. P. Moore," etc. The levy was made upon the property so described "at the old C., R. & C. depot, as the property of the defendant J. P. Moore." The defendant filed "a traverse of the ground of said attachment," and for cause of traverse alleged "that it was not true that he was in possession of said machine at the time of suing out said attachment, nor ever has been." At the trial, defendant's counsel (his client being absent) moved to dismiss the attachment, on the grounds (1) that it was against the machine, and not against the defendant; (2) that it appeared by the sheriff's return that the machine was not in the possession of the defendant. Error is assigned on the overruling of this motion. Further error is assigned in that the court charged the jury that on the traverse "the burden of proof is on the defendant, and you will determine from the



evidence before you whether or not the traverse has been sustained." Plaintiffs introduced in evidence two promissory notes executed by defendant under seal, dated October 5, 1892,—one for \$316, due January 1, 1893; the other for \$300, due July 1, 1893,—both payable to the plaintiffs; also, a written order to plaintiffs, signed by defendant, dated at Carrollton, Ga., March 5, 1892, for a brick machine of certain dimensions, with specified appurtenances, to be shipped to him at once, by the route they consider best and cheapest, "for which I agree to pay you the sum of \$616 on board cars at Tecumseh, Mich., as follows: \$308 cash, and to execute approved notes for \$308, payable on the 1st day of November, 1892," etc. An agent of plaintiffs testified: "I took the notes October 5, 1892. They were signed in my presence, in settlement for the No. 8 machine, etc. The trucks were no part of the consideration. He refused to settle for them, on the ground that he did not want them; and, they being sold to his approval, I consented to take them back. I do not know positively how long he had been in possession of said machine when I took said notes, but about six months: He found no fault with the machine, but expressed a willingness to settle for it if I would give him time to raise the money, and, to accommodate him, I extended the time as stated in the notes. He told me he had purchased another yard, because there was not sufficient demand for two, and he was forced to buy the other yard; that this purchase had taken his ready money that he should have paid the plaintiffs with. I understood from the railway agent and Mr. Moore that the trucks were stored with the machine in a warehouse belonging to the railway company. Several months after the machine had been received, shipped, and stored by Mr. Moore, the plaintiffs instructed me to go to Carrollton, and secure a settlement from Mr. Moore." To the last two statements the defendant's counsel objected, on the ground that they were illegal. The court ruled out the testimony in reference to what the witness understood from the railway agent, but refused to rule out the last statement, on which ruling defendant assigns error. The jury returned the following verdict: "We, the jury, find for plaintiffs: Prin., \$616.00; int., \$58.69; and cost of suit." Below this was a space of an inch or more on the paper, and then: "We, the jury, find against the traverse." Then followed a similar space, and then appeared the signature of the foreman of the jury. Whereupon plaintiffs' counsel entered up general judgment for the principal, interest, and cost, to be first levied on the brick machine. Defendant excepts, alleging that there was no legal verdict on which to base this judgment; the contention being that the foreman's signature applied only to the finding against the traverse, and that the finding of the sums sued for was not signed.

G. W. Austin, for plaintiff in error. Sidney Holderness, for defendants in error.

LUMPKIN, J. When read in connection with the facts, which are stated by the reporter, the head notes will be sufficiently intelligible and distinct. The correctness of the propositions of law announced in them is manifest enough, we think, without elaboration or discussion. It required more labor to master the record in order to arrive at a clear understanding of the points involved than was necessary to decide the case. In doing both, we have given the case the proper attention, and do not think further notice or comment necessary. Judgment affirmed.

(94 Ga. 225)

### COULTER v. LUMPKIN.

(Supreme Court of Georgia. July 30, 1894.)

#### ALIMONY—ENFORCEMENT OF DECREE—PRIORITY OF LIEN.

1. A decree for a specific sum of money, but giving time to perform, partly by paying money, and partly by executing a promissory note with security, may be enforced by execution, without further order, after the time limited for discharging the recovery in the way specified has expired, and if the defendant is still wholly in default.

2. A judgment or decree for alimony has only the lien of ordinary general judgments for money, as to any property of the defendant not specifically dealt with and described in the judgment or in the pleadings.

3. A creditor of the husband, who, while a suit is pending against the latter for alimony, takes, bona fide, without fraud on his part, or any notice of a fraudulent object by his debtor, or any reasonable grounds of suspicion, a mortgage upon property not embraced in the pleadings of the pending suit, to secure a pre-existing debt, has priority over the lien of the judgment or decree for alimony subsequently rendered, the same as he would have over the lien of a judgment in favor of an ordinary creditor of the mortgagor, notwithstanding he knew when he took the mortgage that the suit for alimony was pending. The mere pendency of such a suit will not disable the defendant therein from making a bona fide mortgage or conveyance of unincumbered property, over which the court has not taken, nor been asked to take, any direct jurisdiction, in order to administer or secure it for application to the claim for alimony.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Action by H. P. Lumpkin against W. H. Coulter to cancel a mortgage on land. Plaintiff had judgment, and defendant brings error. Reversed.

C. P. Goree, I. E. Shumate, and R. M. W. Glenn, for plaintiff in error. Lumpkin & Shattuck and Copeland & Jackson, for defendant in error.

SIMMONS, J. Clara Coulter and her husband, O. L. Coulter, separated, and she brought an action against him for alimony. A consent decree was taken, in the following terms: "By consent of parties to the above stated case, \* \* \* it is ordered, adjudged,

and decreed by the court that complainant, Clara Coulter, recover from respondent, O. L. Coulter, one hundred and seventy-five dollars, for alimony, and thirty-four dollars, costs of suit, to be discharged as follows: Said O. L. Coulter is to pay into court instant such sum as he may now be prepared or able to pay, and the remainder by August term, 1886, of this court, or to settle in full the decree by his promissory note, with J. A. Coulter or other like good security, to said Clara Coulter, for said remainder; said note to become due 25th day of August, 1886. Upon compliance with the above conditions, or either of them, the said Clara Coulter agrees in open court, as aforesaid, to disclaim any other or further alimony against said O. L. Coulter, and relieve said O. L. Coulter from any and all obligation, legal, equitable, or otherwise, to support, maintain, or provide for her, said Clara Coulter, under his marital obligations. Upon complying with the foregoing conditions in full or part of said O. L. Coulter, ordered and adjudged by the court that this decree be final, and in full settlement of said case." The husband failed to comply with the terms of the decree, and an execution was issued thereon January 30, 1888, and levied upon several lots of land; among them, a sixth interest in lot No. 169 in Walker county. This land was exposed for sale by the sheriff, and bought by H. P. Lumpkin, he being the highest and best bidder, and a deed was made to him by the sheriff. In November, 1885, prior to the consent decree of April, 1886, O. L. Coulter executed a mortgage to his brother, W. H. Coulter, upon an undivided sixth interest in lot 169, with power given therein to the mortgagee to sell the same, after properly advertising it as prescribed in the mortgage, in case the note for which it was given as security was not paid at maturity. The note not being paid at maturity, the mortgagee advertised it for sale, in accordance with the power given in the mortgage; and Lumpkin filed his petition in equity, setting up that the mortgage was given after the separation of the husband and wife, and was therefore void, and also that it was given for the purpose of defrauding the creditors of the mortgagor. Coulter, the mortgagee, answered the petition, denying that the mortgage was fraudulent, and insisting that the mortgagor had a right to execute the mortgage for the purpose of securing a bona fide debt which the mortgagor owed him, and that the fact that the husband and wife had separated did not make the mortgage illegal. It further appears that the property in dispute was not embraced in the application for alimony. On the trial of the case, Lumpkin tendered in evidence the execution, which was objected to by the defendant on the ground that the judgment or decree did not authorize the issuing of a fi. fa., that the sale thereunder was void, and that it showed on its

face that it was to be satisfied only in the way specified therein. The court overruled the objection, and this ruling is made one of the grounds of the motion for a new trial.

We think the court was right in overruling the objection. It will be observed that the decree is for a specific sum of money, but allows the defendant to satisfy the decree by paying a part thereof in cash, and giving his note, with security, for the balance. This, doubtless, was for his benefit. When, therefore, he failed to comply with the terms of the decree the plaintiff had a right to enforce it by having an execution issued for the specific amount of money mentioned in the decree, and this could be done without any further order or decree of the trial judge.

2. The application for alimony not describing specifically any property of the husband, the judgment or decree granting the application had only the lien of an ordinary general judgment for money. It did not fix a lien on the property of the husband superior to all other liens.

3. Section 1721 of the Code declares that: "After a separation, no transfer by the husband of any of the property, except bona fide, in payment of pre-existing debts, shall pass the title so as to avoid the vesting thereof, according to the final verdict of the jury in the cause." It was contended by the defendant in error that this section applies to all cases of separation between husband and wife, and that, therefore, the mortgage made by the husband to his brother after the separation was void thereunder. That would be true, in our opinion, if the separation was followed by proceedings for a divorce; but where no such proceeding is instituted, but there is simply an application for alimony, and where the application does not set out a schedule of the property of the husband, this section does not apply. Even a decree for alimony, rendered in a suit for divorce, has no retroactive effect, except as to property embraced in the schedule.

4. If this is true, the mortgage given by the husband to his brother, if taken by him bona fide, and without fraud on his part, or notice of a fraudulent intent, or reasonable ground for suspicion, upon property not embraced in the pleadings, to secure a bona fide, pre-existing debt, it would have priority over the judgment or decree for alimony obtained prior to the rendition of that judgment, just as much as if a creditor had sued the brother and obtained judgment after the execution of the mortgage; and this is true although the mortgagee may have had notice of the pending suit. The pendency of the suit would not prevent the defendant therein from making a bona fide mortgage upon property which the court had not taken, or been asked to take, jurisdiction of in order to administer or secure it for the wife in payment of her alimony. The wife not claiming in her pleadings any lien superior

to other liens, and not specifying or describing any particular property therein, and the court not having rendered any judgment decreeing a special and superior lien, her judgment is necessarily a general judgment, and inferior to any bona fide lien created before its rendition. Judgment reversed.

(94 Ga. 199)

GRIFFETH et al. v. MOSS et al.

(Supreme Court of Georgia. July 23, 1894.)

RELEASE OF SURETY BY CONCEALING COLLATERAL SECURITY.

Where a promissory note, signed by a principal and sureties, was further secured by a mortgage on personal property executed by the principal, and the creditor, after foreclosing the mortgage, ordered the sheriff, who was about to levy on a portion of the mortgaged property then within his reach, not to do so, and thereafter this property was removed by the mortgagor so that the sheriff could not again find it, and the mortgage *fi. fa.* was thus rendered unproductive to the extent of the value of the property so removed, the sureties were discharged *pro tanto* from their liability on the note. The creditor was not merely inert or passive, but interfered actively in preventing seizure of the mortgaged property and bringing it to sale.

(Syllabus by the Court.)

Error from city court of Jackson; W. W. Starke, Judge.

Action on a note by R. L. Moss & Co. against William Griffeth and others. Plaintiffs had judgment, and defendants bring error. Reversed.

W. I. Pike, for plaintiffs in error. Robt. S. Howard and Erwin, Cobb & Woolley, for defendants in error.

LUMPKIN, J. Moss & Co. brought an action against Martin, as principal, and Griffeth and others, as sureties, upon a promissory note, which was further secured by a mortgage on personalty executed by the principal. The sureties, among other things, pleaded that the payees, after foreclosing the mortgage, had ordered the sheriff, who was about to levy on a portion of the mortgaged property then within his reach, not to do so; that thereafter this property was removed by the mortgagor, so that the sheriff could not again find it; that the mortgage *fi. fa.* was thus rendered inoperative to the extent of the property so removed; and that by this act on the part of the creditors the risk of the sureties was increased, and they were consequently discharged from all liability on the note. This plea was sustained by sufficient evidence. The case was tried by the judge without the intervention of a jury, who rendered a judgment in favor of the plaintiffs without making any deduction on account of the removal of the mortgaged property, as above stated. The sureties moved for a new trial on the general ground that the judgment was contrary to law and the evidence, and their motion was overruled. We think a new trial should have been granted. The

act of Moss & Co. was certainly one which increased the risk of the sureties, and exposed them to greater liability; and therefore, under section 2154 of the Code, they were at least discharged to the extent of the value of the property which the sheriff failed to seize and sell. The conduct of the creditors amounted to something more than a mere failure to sue as soon as the law allowed, and was not simply negligence in prosecuting with vigor their legal remedies, for it distinctly appears that they interfered actively in preventing a seizure and sale of the mortgaged property, the proceeds of which would have reduced the amount for which the sureties would be ultimately liable. The true doctrine seems to be "that if, when the execution is issued, it becomes a valid lien on property of the principal without any levy being made, and such lien is lost in consequence of the return of the execution without a levy, by procurement of the creditor, and the surety is thereby injured, he is discharged *pro tanto*." 2 Brandt, Sur. § 438, and cases cited. This statement of the law is in accord with justice and common sense, and is, we think, within the spirit, if not the very letter, of the section of our Code above cited. The finding of the judge, under the evidence submitted, was therefore wrong, and a new trial is ordered. Judgment reversed.

(94 Ga. 206)

LAMB v. DILLARD et al.

(Supreme Court of Georgia. July 30, 1894.)

FALSE IMPRISONMENT—ARREST IN ANOTHER COUNTY.—DUTY OF ARRESTING OFFICER—EVIDENCE.

1. Under section 4721 of the Code it is the duty of the sheriff who makes an arrest under a magistrate's warrant from another county to carry the accused, with the warrant under which he was arrested, to the county in which the offense is alleged to have been committed, for examination before a judicial officer of that county. This he must do although the accused offers to waive examination, and tenders to the sheriff a bond, with security, approved by a magistrate of the county in which the arrest is made, and although the bond may in every respect be appropriate and sufficient were there any legal authority for its approval, tender, and acceptance. There being no such authority, the tender counts for nothing.

2. The mandate of the statute being imperative, the arresting officer must comply with it himself or by his deputy, and cannot legally detain the accused in jail until information of the arrest has been communicated to an officer of the county in which the offense is alleged to have been committed, and until that officer can reach the place of detention, and there receive the prisoner from the officer who made the arrest.

3. There was no error in excluding evidence offered by the plaintiff to show that the grand jury returned no bill touching the matter to which the warrant related; but it was error to admit evidence that the plaintiff had been indicted for another offense, and was at the time of trial a fugitive from the state, to avoid arrest.

(Syllabus by the Court.)

Error from superior court, Rabun county; C. J. Wellborn, Judge.

Action for false imprisonment by William S. Lamb against A. L. Dillard and another. Defendants had judgment, and plaintiff brings error. Reversed.

W. S. Paris and J. J. Kimsey, for plaintiff in error. W. F. Findley, H. Thompson, F. M. Johnston, and W. C. Glenn, for defendants in error.

**SIMMONS, J.** 1, 2. Lamb sued Dillard, the sheriff, and McConnell, deputy sheriff, of Rabun county, for false imprisonment. It appears from the evidence that the plaintiff was arrested by the defendants in Rabun county, under a warrant issued by a magistrate of Polk county, charging him with cheating and swindling, and that they placed him in the jail of Rabun county, where he was kept until an officer of Polk county came for him, and carried him to that county, seven days after the arrest; that he offered, when arrested, and subsequently while in jail, to waive a preliminary trial, and give bond, if the sheriff would carry him before some justice of the peace, and allow him to do so; but the sheriff would not allow him to be carried before a justice, and refused to accept a bond, with security, for his appearance at the next term of the superior court of Polk county to answer any indictment which the grand jury of that county might find against him for cheating and swindling, which had been approved by a magistrate of Rabun county, who came to the jail, and before whom the plaintiff waived a preliminary hearing. Under the Code (section 4721), where an arresting officer of any county in the state arrests a person charged with crime, under a warrant issued by a judicial officer of another county, it is "the duty of such arresting officer to carry said accused, with the warrant under which he was arrested, to the county in which the offense is alleged to have been committed, for examination before any judicial officer of that county." It was, therefore, the duty of the sheriff of Rabun county as soon as practicable after the arrest, to carry the accused to Polk county. There was no law requiring an officer of Polk county to go to Rabun county after the accused. The statute, it is true, is hard upon the arresting officer in requiring him to carry the accused to a distant county, without any provision being made for the payment of his expenses; but he takes his office with that burden, and must execute the law until it is changed or modified. We think the sheriff was right in declining to accept the bond which was tendered him. There is no law authorizing the approval, tender, and acceptance of such a bond in a different county from that in which the crime was committed and must be tried. There being no such authority, the tender counts for nothing. Upon this subject, see 2 Am. & Eng. Enc. Law, "Bail," p. 5; *State v. Collins*, 19 La. Ann. 145, 146.

3. At the trial the plaintiff offered evidence to show that the grand jury of Polk county had made a return of "No bill" touching the matter to which the warrant related. The court excluded the evidence, and we think was right in so doing. The merits of the charge against the plaintiff were not open to investigation in this suit. Whether he was guilty or innocent of that charge could have no bearing upon the issue in the case on trial. Evidence that the plaintiff had been indicted for another offense, and was at the time of the trial a fugitive from the state, to avoid arrest, was equally irrelevant, and the court erred in admitting such evidence. Judgment reversed.

(91 Va. 286)

**WARING et ux. v. BOSHER'S ADM'R.**<sup>1</sup>  
(Supreme Court of Appeals of Virginia. March 28, 1895.)

**WILL—GENERAL BEQUEST—CONTROL BY PARTICULAR BEQUEST.**

After certain specific legacies to his two daughters, testator devised to them also "all income from the ferry and all other sources during their natural lives." By another clause in his will, he left "the city and marine stocks" to certain other persons named. *Held*, that the daughters were not entitled to the income of such stocks.

Appeal from circuit court, King William county.

Bill by Thomas L. Waring and Ella F. Waring against Thomas J. Bosher. Judgment for defendant, and plaintiffs appeal. Reversed.

Pollard & Sands, for appellants. W. R. Aylett, for appellee.

**KEITH, P.** The last will and testament of William Bosher, which was probated in the county court of King William county, February 23, 1885, devises by the first clause thereof a tract of land to his daughter Martha Ann Dabney. By the second clause he provides for his daughters Mary Jane Smoot and Margaret R. Bosher, by giving to them, or the survivor of them, the plantation on which he resided, with all his household and kitchen furniture, money on hand, horses, cows, and farming tools, and "all income from the ferry and all other sources during their lives, they to pay all my debts, and all claims either may have against me to be canceled as paid." "Third. At the death of my daughters M. J. Smoot and M. R. Bosher, I give to my daughter Martha Ann Dabney, and Gabriella Scott and their children, the ferry and lots in Old Hanover Town." The fourth clause of the will is as follows: "I give unto my sons George L. Bosher and Charles M. Bosher and Thomas J. Bosher my house and lot in Richmond, they to have the bones of my children buried there to be removed to my family burying ground in

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

King William county. I hold of T. J. Bosher notes and am security for him on two notes, if he pays them (his notes I give to him). The city and marine stocks I give to C. M. Bosher's two children, William and Gabriella Bosher, and George L. Bosher's daughter, Ella F. Bosher, the city stock to William and Gabriella and the marine stock to Ella F. Bosher. If it is necessary for my daughters Mary J. Smoot and Margaret R. Bosher to have trustees, they will name them." By a codicil to his will he declares that "all given to M. J. Smoot and Margaret R. Bosher I give in fee simple to do as they please with. [Signed] William Bosher"; and, as this codicil in no wise affects the question to be decided, it need not be again adverted to. This bill was filed by Thomas L. Waring and Ella F., his wife, who was Ella F. Bosher. They complain that Thomas J. Bosher, administrator of William Bosher, deceased, has refused to pay over to Ella F. Waring the Virginia Fire & Marine stock bequeathed by the will, but that he has since the death of the testator paid over the annual dividends upon said stock to Mary Jane Smoot and Margaret R. Bosher, claiming that it was a part of the income of the testator's estate, and passed to them under the second clause of the will above referred to. It seems that Mary Jane Smoot is dead, and that Margaret R. Bosher is a lunatic. The case was duly matured for hearing in the circuit court of King William county, and that court decided that the administrator's construction of the will was correct; that the income from this stock during the lifetime of Mary Jane Smoot and Margaret R. Bosher was payable to them, and that, Mary Jane Smoot being dead, one-half of the stock was to be delivered to the plaintiffs, and the other half was to be held under the control of the court in this cause, to be delivered to Ella F. Waring at the death of Margaret R. Bosher; that in the mean time the dividends thereon were to be paid to the committee of Margaret R. Bosher. It also gave Ella F. Waring a decree for so much of the dividends upon one-half of the said stock as had accrued since the death of Mary J. Smoot, which occurred on the 7th of September, 1886. From this decree Waring and wife obtained an appeal and supersedeas from one of the judges of this court.

The object of courts in construing wills is to arrive at the true intent of the testator, but that intent is to be gathered from the language used. "Conjecture," it has been said, "cannot be permitted to usurp the place of judicial conclusion, nor supply what the testator has failed sufficiently to indicate." *Wootton v. Redd*, 12 Grat. 206. "The intention must be collected from the words of the will, for the object of construction is not to ascertain the presumed or supposed, but the expressed, intention of the testator,—that is, the meaning,—which the words of the will, correctly interpreted, convey." *Hatcher v. Hatcher*, 80 Va. 171. "A clearly-expressed

intention in one portion of the will is not to yield to a doubtful construction in any other portion of the instrument." *Redf. Wills*, 434; *Schouler, Wills*, § 468. Applying these universal canons of construction and interpretation to the will in this case, and the question seems free from all doubt. The second clause of the will, as we have seen, after bequeathing to Mary Jane Smoot and Margaret R. Bosher certain real and personal property, further declares, "I give them all income from the ferry and all other sources during their lives, they to pay all my debts; all claims either may have against me to be canceled as paid." And just here it may be well to advert to a fact upon which the counsel for appellees dwell with great feeling and eloquence. It appears that Margaret R. Bosher has been sorely afflicted; that she is a lunatic, and at present confined within one of the asylums of this state. Her counsel claim that her condition made her the peculiar object of the tenderness and provident care of her father, and this perhaps should have been so, but it does not appear upon the face of the will. There is nothing in the will from which it can be gathered that William Bosher felt to her any greater sense of duty, or any greater sentiment of affection, than that which he manifested to his daughter Martha Ann Dabney and to her children. Mary Jane Smoot, another daughter, whose name is coupled with that of Margaret R. Bosher in the same clause of the will, appears to have shared equally with her unfortunate sister the affection and bounty of their father. There is no term of endearment used with respect to any of them, but, as far as the affection and duty of the father can be gathered from the terms of the will, it seems to have been extended in equal measure to all of his children, and to the descendants of such as were dead. The claim that he gave to Mary J. Smoot and Margaret R. Bosher "all income from the ferry and other sources during their lives" (if the word "income" is to have the latitudinous construction for which the counsel for appellees contends), proves too much. It would embrace as well the emoluments profits and returns derived from the subjects bequeathed to Mary Ann Dabney, George L. Bosher, Charles M. Bosher, and Thomas J. Bosher, as to the dividends upon the city and marine stocks bequeathed to William and Gabriella Bosher, and the plaintiff Ella F. Waring; but it nowhere appears that any claim has been asserted to the income or revenue derived from any of these sources, or that the administrator has felt himself bound to appropriate the rents of the house and lot bequeathed to him and his brothers to the support of his unhappy sister. There can be no doubt that the natural construction of the language used in the bequest to Ella F. Bosher of the marine stock vests in her an absolute interest from the time of the death of the testator. It has been done by clear, unambiguous, explicit words, and it is not to

be controlled by the mere inferences and arguments derived from the language in a former part of the will. If two provisions in a will are inconsistent, the latter must prevail, and, no matter in what order they may come between a general and a specific provision, the specific must prevail. We have, then, a general gift of "all income from the ferry and all other sources during their lives" to Mary Jane Smoot and Margaret R. Bosher. We have the specific bequest of the city and marine stocks to William and Gabriella Bosher and Ella F. Bosher; and, as though this language were not precise enough and positive enough to satisfy the testator, he goes on to make it more precise and more specific by providing that the city stock shall go to William and Gabriella, and the marine stock to Ella F. Bosher. Language so plain, precise, and unambiguous cannot be rendered more intelligible by any effort at interpretation. We are of opinion that the circuit court erred in the construction which it placed upon the will of William Bosher, deceased, and that its decree should have been that the 45 shares of the marine stock in the bill and proceedings mentioned should be transferred to the plaintiffs, who should also have recovered the dividends thereon since the death of the testator.

(91 Va. 272)

**AMERICAN MANGANESE CO., Limited, v. VIRGINIA MANGANESE CO.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. March 28, 1895.)

**COUNTERCLAIM — UNLIQUIDATED DAMAGES — CONSTRUCTION OF CONTRACT — CONDUCT OF PARTIES — PAYMENT AND DISCHARGE.**

1. Code 1887, § 3299, which allows a defendant to plead as a counterclaim "any other matter, as would entitle him either to recover damages at law from the plaintiff \* \* \* or to relief in equity," will not permit him to set up unliquidated damages, based upon breach of a contract other than that sued on.

2. Where the terms of a contract were not clear whether royalties on ore were to be computed when the ore was wet or dry, the acceptance by the mine owner for seven years of settlements on a dry weight, with full knowledge of the facts, estops him to claim a different construction.

3. If one owing an unascertained sum of money offers his creditor a sum, declaring that it is in full payment, the contract is discharged by the acceptance of such sum.

Error to circuit court, Albemarle county.

The plaintiff below, the American Manganese Company, brings error from a judgment rendered against it on a counter claim by the Virginia Manganese Company. Reversed.

Richard P. Bell, for plaintiff in error. Geo. Perkins and Thos. S. Martin, for defendant in error.

BUCHANAN, J. The first assignment of error in this case is to the action of the circuit court in overruling the demurrer of the

plaintiff in error, which was the plaintiff in the court below, to special plea No. 2, filed by the defendant.

The demurrer raises the question whether under our statutes (section 3299, Code), allowing special pleas of set-off to be filed, a defendant can set up a claim for unliquidated damages founded upon a contract other than the contract sued on by the plaintiff. The claim of the defendant that the contract sued on and the contract set up in its plea, for whose alleged breach it seeks damages, are parts of the same contract, cannot be sustained, as the pleadings show very clearly that they are separate and distinct agreements.

The defendant insists that the provision of section 3299 of the Code, which allows a defendant to plead "any other matter, as would entitle him either to recover damages at law from the plaintiff or the person under whom the plaintiff claims, or to relief in equity, in whole or in part against the obligation of the contract" sued on, is sufficiently broad to allow him to plead "any cause of action arising also on contract, express or implied, and existing at the commencement of the action, and such counterclaim may be either for liquidated or unliquidated damages."

If the term, "or any other matter," authorizes a defendant to make such a defense, is it not also sufficiently broad to authorize him to set up any claim for damages that may be due him arising out of tort as well as contract, and existing when plea is filed as well as when the action is brought? Why limit it to claims arising out of contracts, or to causes of action existing when the plaintiff institutes his action? There is nothing in the term "or any other matter" which justifies a construction which would include the one and exclude the other. The language of the term "or any other matter" is sufficiently broad, considered by itself, to include both of the defenses named; but, considered in connection with its context and tested by settled rules of construction, I do not think it includes either. One of these rules of construction is that general words may be limited to the same genus or class as the specific words which precede them.

In Sutherland on Statutory Construction (section 268) it is said that "when there are general words following particular and specific words, the former must be confined to things of the same kind."

In Broom's Legal Maxims (side page 651) the rule is laid down as follows: "Where a particular class [of persons or things] is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters ejusdem generis with such class; the effect of general words when they follow particular words being thus restricted."

Sedgwick, in his work on Construction of

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Statutes (page 361), says: "Where general words follow particular words, the rule is to construe the former as applicable to things or persons particularly mentioned."

The decisions of the court fully sustain the text-writers, that this is the true rule of construction in such cases, subject to certain limitations not necessary to be mentioned here. *City of Lynchburg v. Norfolk & W. R. Co.*, 80 Va. 237; *Iron Co. v. Riche, L. R. 7 H. L.*, at pages 664, 665; *Insurance Co. v. Hamilton*, 12 App. Cas. 484, 486; *People v. New York & M. B. Ry. Co.*, 84 N. Y. 565; *State v. McGarry*, 21 Wis. 496; *St. Louis v. Laughlin*, 49 Mo. 559.

Applying this rule of construction to the language under consideration, and the conclusion necessarily follows that unliquidated damages based upon breach of a contract, other than the contract sued on by the plaintiff, cannot be set up in a plea, under section 3299 of the Code. The particular defenses provided for in the preceding words of that section are: (1) Failure in the consideration of the contract; (2) fraud in its procurement; (3) breach of warranty of the title or the soundness of personal property, for the price or value whereof he entered into the contract.

Each of these defenses is based upon matters directly connected with, and injuries growing out of, the contract sued on. The "plain purpose" of the legislature in enacting that section of the Code, as it now stands, was, as Judge Moncure says in *Huff v. Broyles*, 26 Grat. 283, 285, "to give precisely the same measure of relief, on a plea filed under the same, as could be obtained in an independent action brought for the same cause, and to prevent one cause of action from being divided into two." The term, "or for any other matter," was added so that such purpose could be fully accomplished by allowing, not only the defenses particularly and specifically named in the preceding part of the section, but to allow all defenses of that character or kind based upon such contract, or for injuries growing out of it, to be disposed of in one case. This is the construction put upon it by Mr. Minor and Mr. Barton (4 Minor, Inst. p. 796; Bart. Prac. 514); and is, I think, clearly the true construction. The circuit court ought, therefore, to have sustained the demurrer to special plea No. 2.

The second assignment of error is as to the mode of ascertaining the damages resulting to the defendant for the alleged breach of the contract set up in special plea No. 2, but, since that question cannot arise upon the next trial of the cause, it is unnecessary to decide it.

The next and last assignment of error is that the jury upon the evidence in the cause ought not to have found that anything was due the defendant for royalties on manganese ore, as claimed by the defendant in special plea No. 1, and that the verdict of the jury

on this question was contrary to the evidence, and should have been set aside.

The contract of lease provided that the manganese ore taken from the leased premises should be weighed before it was shipped, but the contract is not definite and clear whether the ore was to be weighed as it came wet from the washer, and a royalty of \$2 per ton paid on that wet weight, or whether it was to be weighed after it had dried out, and the royalty paid on its dry weight. The evidence, considered as on a demurrer to evidence, shows that the ore as it came wet from the washer was about 3 per cent. heavier than it was 36 hours afterwards. The ore was weighed as it came wet from the washer, and was at once shipped by the railroad to Pennsylvania, and weighed by the railroad company when it reached its destination, and upon such railroad weight the freights were paid and the royalties adjusted at the beginning of each month for the ore shipped the preceding month, during the seven years the plaintiff operated the lease. A full statement of the ore shipped each month, the adjustment made as to weights, and the condition of accounts between the parties for such month, were furnished by the plaintiff to the defendant at the beginning of each month for the preceding month. With each statement a check was sent in payment of the balance appearing to be due for such month, and receipts taken every month by the plaintiff from the defendant in the following words, except as to dates and amounts:

"Received, March 9th, 1891, of the American Manganese Co., Limited, twenty-four hundred twenty-two  $\frac{62}{100}$  dollars in full for the above account.

"\$2,422.63."

The defendant does not seem to have been entirely satisfied with the plan of weighing adopted by the plaintiff, and made objections frequently to the deductions made on the net weights, but it continued during the whole seven years to receive these monthly statements, returns, and payments, and to give receipts in full for the balance due according to each monthly statement and return. If the defendant objected to the method adopted by the plaintiff for ascertaining the amount of manganese ore upon which it was to receive royalties, or had cause of complaint that the statements and returns made were incorrect for any cause, it was its duty to have made known and to have insisted on its objections to the plaintiff, and to have refused to make monthly settlements, receive payment, and give receipts in full, as it did.

Although the methods of ascertaining the weight of the manganese ore may not have been in accordance with the agreement of the parties, the long-continued acquiescence of the defendant in such methods, with full knowledge of all the facts, was a waiver of its rights to insist upon the terms of such

contract upon that point. If one owing a sum of money, the amount of which is not ascertained and fixed, offers his creditor a certain sum, declaring that it is in full for all that is owing him, which sum is accepted by the creditor, such acceptance is in full discharge of the demand. *Donohue v. Woodbury*, 6 Cush. 148; *McDaniels v. Lapham*, 21 Vt. 222, etc.; *McDaniels v. Bank*, 29 Vt. 230, etc.

Again, if the defendant knew of any irregularity or had ground of complaint at the time these monthly statements, returns, and payments were made, it was the duty of the defendant to have made known and insisted upon its objections then; but if instead of doing so it accepted such payments, and gave receipts in full for the amounts shown to be due by such settlements and returns, it is concluded by the original amounts as fully as if formal and final settlement of accounts had been made between the parties, and the defendant cannot now go behind such settlements and receipts in full without showing that there was fraud or mistake in weighing the ore or in making returns therefor according to the method actually adopted for weighing and making such returns. *Shillingford v. Good*, 95 Pa. St. 25-34.

The verdict of the jury was contrary to the evidence upon the issue made upon this plea, and the court ought to have set aside the verdict upon that ground, upon the motion of the plaintiff.

I am of opinion, therefore, that the judgment of the trial court should be reversed, the verdict set aside, and a new trial ordered, to be had in accordance with this opinion.

#### SHEPHERD'S ADM'R v. CHAPMAN'S ADM'R.<sup>1</sup>

(Supreme Court of Appeals of Virginia. March 28, 1895.)

#### BILL OF REVIEW — DECREE OF SUPREME COURT — AFTER-DISCOVERED EVIDENCE.

1. On a bill of review asking for the reversal of a decree for errors apparent on the face of the record, the court is confined to what appears on the face of the decrees, the opinion of the court, and orders and proceedings in the cause arising on facts either admitted by the pleadings or stated as facts in the decrees.

2. All decrees of the supreme court are a finality, and cannot be reviewed, except for after-discovered evidence.

3. Where a question has been adjudicated by the supreme court with a full knowledge of all the facts, the adjudication will not be disturbed, though it is apparently erroneous.

Appeal from circuit court, Orange county.

Proceedings for the settlement of the estate of William Shepherd, deceased. James Shepherd and Reynolds Chapman qualified as executors of said Shepherd. From a decree in favor of the administrator of said Chapman,

administrator of George Shepherd appeals. Affirmed.

W. W. Burgess, G. D. Gray, and J. W. Bell, for appellant. Jas. G. Field and J. G. Williams, for appellee.

KEITH, P. In 1849 a chancery suit was instituted in the circuit court of Orange county by Lewis B. Williams, administrator c. t. a. of George Shepherd, the general object of which was the settlement of the estate of which William Shepherd had died possessed some time about the year 1825. James Shepherd and Reynolds Chapman qualified as executors of the will of William Shepherd, deceased, giving separate bonds as such, and proceeded to administer the estate. At the time of the institution of this suit Reynolds Chapman had died, and Thomas T. Slaughter and John M. Chapman had qualified as his administrators, giving separate bonds. All the necessary parties were made to the suit, including the administrators of Reynolds Chapman, deceased, and when the case was ready for a hearing all proper accounts were ordered. The commissioner, Mr. Murray, settled the accounts of both Slaughter and Chapman, and among other items passed upon by the commissioner is one for the sum of \$2,400, which is the ground of contention in the present controversy. Among the assets which came into the hands of Slaughter and Chapman, as administrators of Reynolds Chapman, was a claim against Conway C. Macon and Ambrose Madison for a large sum. This claim was really a part of the estate of William Shepherd, deceased; and, while the fact does not distinctly appear, it may be inferred that it was evidenced by bonds or notes of Macon and Madison, made payable to James Chapman and Reynolds Chapman, executors of William Shepherd, deceased, and that, by the death of James Chapman, Reynolds Chapman became his surviving executor, and upon his death that they passed into the hands of his administrators. Certain it is that the claim was duly paid over to the administrators of Reynolds Chapman, deceased, in obedience to a decree of the circuit court of Spotsylvania county rendered at its May term, 1851. On page 151 of the "Old Record" the amount \$3,737.85 was charged by the commissioner to John M. Chapman, and he is credited on the other hand with certain fees, commissions, and costs attending its collection, leaving a net balance against him on this account of \$3,430.97. On page 79 of the "Old Record" occurs the following paragraph in the commissioner's report: "Your commissioner further reports that in the year 1851 the said John M. Chapman, administrator as aforesaid, let his coadministrator, Thomas T. Slaughter, have \$2,400 of the assets of the estate of Reynolds Chapman, deceased, which came to his (John M. Chapman's) hands. Your commissioner, however, has not charged this sum to the said

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



Slaughter, but has to the said Chapman, as it was a mere loan of money by the latter to the former." This report was returned to the court, divers exceptions were taken to it, but none affecting the question under consideration; and it came before the court at May term, 1860, when part of the exceptions were sustained, others overruled, and the report sent back to the commissioner to be reformed. He at the same term returned a report in conformity with the views of the court, which was confirmed without exception. From this decree an appeal was taken to this court, and after pending here until 1874 was decided, and the decree appealed from was, in every particular pertinent to the inquiry now before us, approved and affirmed. When the case went back to the circuit court of Orange county, Murray was directed to restate the accounts in those respects in which this court had found them to be erroneous, and on February 1, 1875, the commissioner filed his report. John M. Chapman appeared before the commissioner and represented to him that an error had been made by the commissioner in his report before referred to, greatly to his prejudice, in charging him with the whole of the money received from the Madison-Macon compromise; that in very truth Thomas T. Slaughter, his coadministrator, had received \$2,400 of that sum; and he exhibited Slaughter's bond to him dated January 25, 1864, which is an obligation on Slaughter's part to pay Chapman, or those who may be entitled thereto, as creditors of Reynolds Chapman, deceased, the sum of \$2,400, with interest from its receipt, and thereby to save Chapman harmless. The bond recites that Chapman, having received money from the suit in Fredericksburg, had immediately turned over, by his check, \$2,400 part thereof to Slaughter, and that he (Slaughter) should have been charged with it in the original report instead of Chapman. The commissioner seems to have felt that the decree of this court, under which he was acting, having confirmed the report as to this item, that the matter had passed beyond his control, and refers to *Campbell v. Campbell*, 22 Grat. 649, as authority for that position. He made, however, alternate statements upon the subject; and the court at its October term, 1876, entered a decree which is final in its character, so far as the liability of Thomas T. Slaughter and John M. Chapman is concerned. By that decree, notwithstanding the fact that Slaughter admitted his liability for this sum of \$2,400 and interest, and though both he and Chapman excepted to the report because it did not place the liability for it upon Slaughter, by whom both agreed it should in justice be borne, the principal report of the commissioner was confirmed, the alternate statements which stood as exceptions to his principal report were overruled, and Chapman was required to pay a sum which embraced this item of

\$2,400, and Thomas T. Slaughter was relieved from its payment as administrator. The court in this decree continued to treat it as a mere loan from Chapman to Slaughter,—a private transaction between them,—and, in pursuance of this view of the matter, gave Chapman a decree against Slaughter for the sum of \$2,400, with interest from the 29th of May, 1852. At July rules, 1876, an amended bill was filed, the object of which was to make Thomas Scott, surety on the administration bond of Thomas T. Slaughter, and John Willis, surety of John M. Chapman, parties defendant. The case proceeded against them, and at October term, 1890, a decree was entered declaring, among other things, that Thomas Scott, surety as aforesaid, was not liable for this sum of \$2,400 and interest. To this decree a bill of review was presented, praying that the decree complained of may be reviewed and reversed for error apparent on the "face of the record," and for after-discovered evidence.

I cannot think that the first ground is seriously relied on. There is certainly nothing upon the "face of the record," in the sense in which that term is used in this connection, which discloses error. We are confined to the consideration of what appears on the face of the "decrees, the opinion of the court, orders and proceedings in the cause, arising on facts either admitted by the pleadings or stated as facts in the decrees (or opinions of the court); and the evidence in the case cannot be looked into in order to show the decrees to be erroneous in the statement of the facts." *Thomson v. Brooke*, 76 Va. 160. Now, all that is apparent to us upon the "face of the record" was equally so to this court when the decree of 1874 was rendered, and it is well settled that a bill of review will not lie to a decree of this court for errors apparent. It is also well settled that all decrees of this court partake of the equality of finality, and that an interlocutory decree of this court can no more be reviewed in this or any other court for apparent errors than could a final decree. A bill of review, however, does lie to a decree of this court upon the ground of after-discovered evidence. It is material, therefore, to inquire what evidence has been before the circuit court of the county of Orange and the court of appeals at the time of the rendition of the several decrees in this cause. When Commissioner Murray stated the original report in this case, heretofore referred to, all the parties to the payment of the money arising from the compromise against Macon and Madison were alive. John M. Chapman and Thomas T. Slaughter were living, and were parties to this suit. Saunders, the administrator de bonis non of William Shepherd, deceased, was also a party to this suit; and Forbes and Marye, through whom this money was paid, were also living in the city of Fredericksburg, for there is a letter in the "Old Record"

from them at page 290. It is hardly necessary to say that these gentlemen, who are the only parties to the transaction, knew all the facts attending it. Indeed, the commissioner's report is conclusive proof that every fact material to the proper determination of the relative liability of John M. Chapman and Thomas T. Slaughter, with respect to the matter of the controversy, was known to the commissioner, and is substantially set forth in his report. John M. Chapman, with full knowledge of all the facts, and the parties interested as distributees with knowledge, or the means of knowledge, within their reach, deliberately stood by and permitted this account to be disposed of by the court, and that decree to be affirmed in this particular in this court without one word of objection. Such conduct is only explicable upon the hypothesis that it was in 1860 a matter wholly immaterial to those interested in the distribution of the fund whether the liability to them was imposed upon Slaughter or Chapman, one or both, as either was doubtless considered amply able to meet the obligations. The same consideration actuated John M. Chapman, but in 1864 he was aroused to the consciousness of his danger, and in the hope of averting it took a bond from Slaughter, which sets out the whole matter fully and frankly. The evidence particularly relied upon as after-discovered is found in the following paper:

"I, Thos. T. Slaughter, do make the following statement, to be used by Commissioner Murray as evidence in the statements of the accounts before him in the suit of *Shepherd's Administrator v. Chapman's Administrator* and others: 'In the year 1851, I, as the administrator of Reynolds Chapman, received a sum of money (\$2,400.00), and placed the sum as a charge to myself on my books, and am now due the same, with interest from the date of its receipt, and should be charged therewith as such administrator. Said money was received from John L. Marye and John M. Forbes under a decree of the circuit court sitting in Fredericksburg in the suit of *Madison and Macon v. James Shepherd and Reynolds Chapman, Ex'rs of Wm. Shepherd, Deceased.*'

"*Shepherd's Adm'r et al. v. Chapman's Adm'r. et al.* [Page 55:] The date of said receipt of money, being shown by referring to the record in the suit of *Shepherd's Administrators v. Chapman's Administrator* and others, is of July 17, 1851. Ths. T. Slaughter, Administrator of R. Chapman, Deceased. April 18, 1876."

"Orange County—to wit: This day Thos. T. Slaughter personally appeared before me, and made oath that the above statement is true to the best of his knowledge and belief. Witness my hand this 18th day of April, 1876. Richard Chapman, Commissioner Chancery, Orange County Court."

It appears by the affidavit of Judge John W. Bell and W. W. Burgess that they knew

nothing of this paper until November, 1890, when it was found in the records of this cause, which are very voluminous. Of course their statements are conclusive as to all matters set out in their affidavit, but the affidavit seems to me to be wholly insufficient, when examined by the light which this record affords. Upon its face the affidavit of Thomas T. Slaughter appears to have been sworn to before Richard Chapman, a commissioner in chancery of Orange county, as early as the 18th of April, 1876, and it introduces into the record no fact not fully known from the beginning. Commissioner Murray, and all the parties in interest, knew every fact attending this transaction from its inception, for they are spread at large upon the face of the commissioner's first report; not the details of it, it is true, but enough to have warranted, indeed, in my opinion, to have required, the court to hold Thomas T. Slaughter primarily responsible as between himself and John M. Chapman for the sum received by him. The statement, therefore, relied upon for the bill of review is not after-discovered evidence, and, at best, is merely cumulative in proof of facts as to the existence of which the record contains overwhelming evidence.

The decree of the court of appeals was rendered more than 20 years ago. It disposes of this precise point. It then became res adjudicata. It was again considered by the commissioner, and his report brought to the attention of the court on this very point by exceptions, and those exceptions were passed upon by the decree of the circuit court of Orange rendered October 5, 1876. That court, as we have seen, approved the report of the commissioner, and established the liability of John M. Chapman and Thomas T. Slaughter in accordance therewith; and I repeat that every fact material to this inquiry was known, or the means of knowledge were within the reach of every person concerned in it, from 1851, at every stage of this litigation, in the office of the commissioner, and in the courts, down to the time when the final decree was entered, October 5, 1876. From that decree no appeal was taken; no bill of review was ever filed. It exonerated Thomas T. Slaughter, the principal, from liability for this debt as administrator. It established, beyond the reach of further question or controversy, that the transaction between himself and John M. Chapman, by which \$2,400 of the assets of the estate of William Shepherd were paid to Thomas T. Slaughter, was, in the language of the commissioner, "a mere private transaction between them." The last decree entered in this cause on the 6th day of October, 1890, upon the amended bill, does not change in any respect the decree of October 5, 1876. It overrules the demurrer of Thomas Scott's administrator to the amended bill; establishes his liability for the sum of \$1,537.78, the amount found due by Thomas T. Slaugh-

ter by the decree of October 5, 1876; and exonerates the estate of the surety from any liability by Thomas T. Slaughter on account of the decree for \$2,400 and interest in favor of John M. Chapman against said Slaughter. How could the court have done otherwise? The case for 40 years has proceeded before the circuit court, and in the court of appeals, upon the theory that Slaughter was not liable, as administrator, for the sum of \$2,400, and it would have been extraordinary to have held the surety to be responsible for the default of his principal, when the principal himself had been fully acquitted and absolved. We are therefore of opinion that the decree of the circuit court of Orange county refusing leave to file a bill of review, and the decree of that court rendered October 6, 1890, must be affirmed.

### MILLER v. MILLER'S EX'R.<sup>1</sup>

(Supreme Court of Appeals of Virginia. March 28, 1895.)

#### PROMISE TO MAKE WILL—EVIDENCE—JUDICIAL SALE—PARTIES.

1. A court of equity will require the most convincing proof to sustain a claim that deceased agreed to make a will in favor of claimant, when he, in fact, did not do so.

2. In a suit to sell certain land, the beneficiary in a deed of trust upon the same, died after the appeal was perfected. The trustee in said deed was made a party, and all parties were before the court to enable it to distribute the proceeds of said sale except as above mentioned. *Held*, that the failure to make the executor of said beneficiary a party was not error.

Appeal from circuit court, Frederick county.

Proceeding by Maggie C. Miller, executrix, and Robert W. Miller, executor, of Thomas M. Miller, deceased, against Joseph A. Miller to enforce a land bond. Judgment for complainants, and defendant appeals. Affirmed.

Harrison & Byrd and Robt. M. Ward, for appellant. Holmes Conrad, for appellees.

HARRISON, J. Dr. Thomas M. Miller died, leaving a last will and testament, dated October 10, 1878, by which he gave his wife, Maggie C. Miller, his personal estate absolutely, and his real estate for life, with remainder in the real estate, to be divided equally among his three brothers or their children, and appointed his brother, R. W. Miller, executor of said will. By a codicil dated April 14, 1879, he confirmed the will, and appointed his wife, Maggie C. Miller, as executrix. On the 3d day of February, 1890, this will was admitted to probate in the county court of Frederick county, and administration granted with the will annexed to Maggie C. Miller and Robert W. Miller, the executrix and executor named therein. Among other assets which came to the hands of these representatives was the following bond:

"\$3,131.85. One day after — I promise and bind myself to pay to Dudley L. Miller the sum of thirty-one hundred and thirty-one dollars and eighty-five cents, for value received. This is the balance due Dudley L. Miller on the farm purchased of him. This land bond is secured in the deed, and bears six per cent per annum from date until paid. Witness my hand and seal this 2d day of November, 1880.

"[Signed] J. A. Miller. [Seal.]"

Indorsed as follows:

"I this day assign the within land bond to Thomas M. Miller for value received, Nov. 5th, 1880.

"[Signed] D. L. Miller."

Said bond has several other indorsements thereon, which acknowledge the payment of interest to April 1, 1884. This bond is secured by vendor's lien (reserved) in a deed from Dudley L. Miller, dated November 2, 1880, conveying to Joseph A. Miller a tract of land containing about 635 acres, lying in the county of Frederick, subject, however, to the lien of a certain trust deed upon the same tract, executed by the grantor, Dudley L. Miller, to William Byrd, trustee, dated October 15, 1878, to secure the payment of a bond of said Dudley L. Miller and Robert W. Miller, payable to Emily Funsten, for \$4,424. This debt due to Emily Funsten was also assumed by Joseph A. Miller, the purchaser of said land, as part of the price to be paid therefor.

The personal representatives of Thomas M. Miller, deceased, filed their bill in the circuit court of Frederick county to enforce the payment of this land bond, charging that the principal, with a large amount of accrued interest, was long since due and unpaid. The complainants also set forth the prior deed of trust debt due to Emily Funsten, and pray that there may be an ascertainment of the liens, and a decree for the sale of the land to satisfy the same.

Joseph A. Miller, the owner of the land, Dudley M. Miller, the assignor of the bond to Thomas M. Miller, Emily Funsten, the beneficiary under the prior deed of trust, and William Byrd, the trustee in said deed of trust, are made parties defendant to this suit, answers under oath being waived.

To this bill Joseph A. Miller files his demurrer and answer, which answer is treated as a cross bill, in which he admits the general allegations of the bill to be true, but, as matter of defense and set-off against the bond sued on, respondent avers that in the lifetime of his father, Thomas C. Miller, respondent, and his three brothers, Robert W. Miller, Dudley L. Miller, and Thomas M. Miller, and his father, had an understanding in regard to the division of their father's estate, among themselves, by which it was agreed that \$4,000 should be paid respondent Joseph A. Miller, which would be in full of his entire interest as heir in the estate of his father, and that \$2,000 should be paid Thomas M.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Miller, which would be in full of his entire interest as heir in the estate of his father; that Dudley L. Miller and Robert W. Miller were to pay these sums to Joseph and Thomas, respectively, when they would be entitled to the father's entire estate; that Dudley and Robert did pay respondent his \$4,000, and executed their bonds to Thomas for his \$2,000, which bonds were not to be paid until their father died; that when the father died they did pay Thomas M. Miller the \$2,000 due him. Respondent further avers that Thomas M. Miller agreed that in consideration of this disposition of his father's estate he (Thomas) would leave a will, giving to his three brothers \$8,000, which sum represented the entire amount he had received (including the \$2,000), by way of advancement or otherwise, as one of the heirs of his father. Respondent files with his answer and cross bill four exhibits, which he says relate to this alleged verbal understanding. Those exhibits are as follows:

Exhibit 1.

"Know all men by these presents that I, Thomas C. Miller, of this county of Frederick, state of Virginia, acknowledge, confess, and declare the sum of four thousand dollars (\$4,000.00), paid by R. W. and D. L. Miller, my sons, to J. A. Miller, paid on the morn from the receipt given to him by said R. W. and D. L. Miller, is the full and equitable amount due him, with the several amounts paid or caused to be paid, theretofore is the full amount due him as an heir of my estate. And I further declare, in order to more fully protect my sons R. W. and D. L. Miller, that any will or declaration conflicting with this acknowledgment made by me hereafter to be null and void. In witness whereof to the within I set my hand and seal this 7th of Feb., 1878. Thomas C. Miller. [Seal.]"

Exhibit 2.

"Know all men by these presents, that I, Thomas C. Miller of the county of Frederick, state of Virginia, acknowledge, confess, and declare that the bond (held by my son Thos. M. Miller, payable at my death, of the sum of \$2,000.00) two thousand dollars is the full amount due him as an heir of my estate, personal and real. And I further declare, in order to more fully protect my sons R. W. and D. L. Miller, that any will or declaration conflicting with this acknowledgment made by me hereafter is null and void. Feb. 9, 1879. Thomas C. Miller. [Seal.]"

Exhibit 3.

"Received of D. L. Miller one thousand dollars, the whole amount due me (from him) as heir of my father, T. C. Miller's estate (deceased), as per agreement dated Feb. 9th, 1879. Feb. 6th, 1889. Thomas M. Miller."

Exhibit 4.

"Received of R. W. Miller one thousand dollars, the whole amount due me (from him)

as heir of my father T. C. Miller's estate (dec'd), as per agreement dated Feb. 9, 1879. Feb. 6th, 1889."

Respondent further alleges that he had acquired from his two brothers, Dudley and Robert, their interest in this claim against Thomas, and asks that the amount due from Thomas on this account, with interest, should be ascertained, and so much thereof as might be necessary applied to the payment of the bond sued on by the personal representatives of Thomas M. Miller, and the balance be decreed to be paid to respondent.

To this answer, treated as a cross bill, Maggie C. Miller, executrix of Thomas M. Miller, and complainant in the original bill, pleads, demurs, and answers, denying all the allegations of said cross bill, and especially the allegation that Thomas M. Miller agreed to give his brothers \$8,000, or any other sum of money, at his death, and calls for full, clear, and positive proof of any such agreement. The cause was referred to a commissioner, who took the evidence offered in support of this alleged agreement, and made a report ascertaining that the deed of trust lien in favor of Emily Funsten, and the vendor's lien in favor of Thomas M. Miller's estate, were outstanding unpaid charges upon the farm of the defendant Joseph A. Miller; and that no valid set-off existed in favor of Joseph A. Miller against the bond held by the personal representatives of Thomas M. Miller. The defendant excepted to this report, and on the 21st day of November, 1892, the court entered a decree which declared that the claim set up by Joseph A. Miller, the defendant in his answer, was not sustained by the proofs, rejected the same, overruled the exceptions taken to the commissioner's report, confirmed the said report, and decreed a sale of the farm for the satisfaction of the two liens reported. From this decree an appeal was allowed to this court.

The four exhibits filed with the answer of the defendant Joseph A. Miller would seem to indicate that Thomas C. Miller and his four sons did agree upon a division of the former's estate among the sons. The chief object appears to have been to secure an equal division of the estate. The agreement of the father set forth in Exhibits 1 and 2 is practically observed by him in two wills subsequently made, which are filed in the record. The first is dated December 7, 1880, in which he gives his entire estate to his two sons, Dudley and Robert, and says he has given his other two sons, Joseph and Thomas, what he believes is their just and equitable share of his estate. The second will is dated September 11, 1884. It revokes the first, and disposes of the estate exactly as in the first will, except that it gives Dr. Thomas M. Miller \$1,200, and makes it a charge on the estate; and says that Dudley and Robert are each to pay one-half of the legacy to Thomas; and further says: "I have already advanced my son

Joseph A. Miller more than his full share in my estate, and on that account I do not now devise or bequeath him anything." Dudley Miller in his deposition explains this \$1,200 legacy to Thomas, by saying that his father came to the conclusion that the \$2,000 he and Robert had agreed to pay to Thomas was more than his share of the estate, and that his father intended by this legacy to cut the amount down to \$1,200, but that the \$2,000 for which they had executed their bonds was paid as agreed upon.

It would seem probable that, if the father had been a party to an agreement by which his son Thomas was to make a will, leaving to his three brothers \$6,000, all that had been advanced him by his father, he would have at least referred to it when making a will disposing of his property; and yet neither in the wills of Thomas C. Miller nor in the exhibits filed with respondent's answer is there one word to indicate the slightest evidence of an agreement on the part of Thomas M. Miller to leave in his will this or any other sum to his brothers. There is no mention of or reference to any such subject. The only other evidence offered in support of this claim of set-off is the testimony of Dudley L. Miller and Robert W. Miller. Their evidence was excepted to upon the ground that Thomas M. Miller, one of the parties to the alleged contract, being dead, rendered them incompetent. In order to qualify themselves, they made a gift of their interest in this alleged contract to their brother Joseph A. Miller. It was still insisted that they were liable as assignors and for costs. Joseph A. Miller then gave them a release from liability, by way of recourse or otherwise, on account of said transfer and assignment. A great many authorities are referred to on the question of the competency of these witnesses. In the view, however, taken by the court of this case, it is unnecessary to consider said authorities, or to pass upon that question; the court being of opinion that said evidence is wholly insufficient to sustain the claim set up by the defendant Joseph A. Miller.

The witness Dudley L. Miller, in answer to fourth question on cross-examination, says: "When the agreement was ratified, Robert, Joseph, and myself were present; Thomas was not." In answer to another question, he says: "I said the debt held by Thomas M. Miller is a just debt, and Joseph ought to pay it, and I say so yet." In answer to another question, witness says: "I may have said that Thomas had a right to will his property as he chose."

The witness Robert W. Miller is shown not to be reliable, because it appears from the evidence of his family physician, introduced by the defendant, that he is a person of unsound mind. His testimony does not, however, strengthen appellant's claims, but rather weakens it.

The debt asserted by the personal repre-

sentatives of Thomas M. Miller is not denied. The claim of set-off relied upon by the appellant is supported by evidence too slight for serious consideration. There is not a word to be found suggesting a reason why Thomas M. Miller should have agreed to give his brothers \$6,000 by his will,—a sum constituting the bulk of his estate, as appears from the record. There appears to have been no consideration for such a promise. The division of the father's estate appears to have been an equal one among his sons, and the pretension now set up by the appellant is without merit, and without proof to support it. It is a serious matter, when a man dies, for a claimant to come forward, and demand the estate, upon the ground that deceased had in his lifetime verbally promised or agreed to make a will giving his estate to said claimant, and that, too, in the face of a will which has given it to some one else. Such a claim naturally excites surprise, and a court of equity will always require the clearest and most convincing proof to sustain such a claim. Otherwise disappointed legatees could easily deprive the natural and chosen objects of a testator's bounty of the benefits he had seen fit to bestow.

Since this appeal was perfected, Emily Funsten, one of the defendants in the original suit, has died, and Robert M. Ward has qualified as her executor. It is insisted on behalf of this executor that the decree appealed from is erroneous, because the necessary parties have not been made to the suit. It appears that Joseph A. Miller, the owner of the land decreed to be sold, Dudley L. Miller, the assignor of the bond to Thomas M. Miller, William Byrd, the trustee in the deed securing the debt to Emily Funsten, and said Emily Funsten, are all made parties defendant; and, so far as it appears from this record, these are all the parties necessary to the suit. It enables the court to make a complete title to the land when sold, and to distribute the proceeds to the parties entitled thereto.

For the foregoing reasons the court is of opinion that there is no error in the decree complained of, and it must be affirmed.

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LENNIG'S EX'RS v. WHITE et al.  
(Supreme Court of Appeals of Virginia. April 4, 1895.)

On rehearing. Affirmed.

For opinion on appeal, see 20 S. E. 831.

Conrad & Conrad and Holmes Conrad, for appellants. John E. Roller and R. Taylor Scott, for appellees.

KEITH, P. At the November term, 1894, of this court a decree was entered in this cause, and a petition for rehearing was filed, which petition being presented to the Honorable Drury Hinton, he, on the 26th day of

December, 1894, indorsed thereon that, in his opinion, a rehearing should be granted, he being one of the judges who had heard and decided the case, and had united in rendering the decree. Upon this certificate a rehearing was awarded by the court at its January term, and the cause was restored to the privileged docket, and was again argued during the present term.

We are of opinion that the decision of this court at its November term, reversing the decree of the circuit court of Rockingham, was correct, and we therefore direct that it be now entered as a final decree of this court.

While we accept the conclusions of the court as expressed at its November term aforesaid in the opinion of Judge Richardson, which will be found in 20 S. E. 831, we do not wish to be understood as altogether concurring in all the views which he presents upon the several matters of law and fact discussed by him.

#### MORRISON v. WILKINSON.

(Supreme Court of Appeals of Virginia. April 4, 1895.)

On rehearing. Affirmed.

For opinion on appeal, see 17 S. E. 787.

Pollard & Sands, T. H. Edwards, and C. L. Morrison, for appellant. H. I. Lewis, W. R. Aylett and Isaac Diggs, for appellee.

KEITH, P. This cause was decided at the June term, 1893, of this court, at Wytheville, Judge Fauntleroy delivering the opinion. At that time a rehearing was allowed, and the cause was again argued and submitted at the present term. 17 S. E. 787. Without concurring in the opinion referred to, we think the conclusion reached is in accordance with the law and the evidence, and a decree will now be entered affirming the decree of the circuit court of King William county.

#### HOOVER v. BUCK.<sup>1</sup>

(Supreme Court of Appeals of Virginia. March 28, 1895.)

##### SPECIFIC PERFORMANCE.

Specific performance of a contract for the sale of real estate will be decreed when the contract is valid, unobjectionable in character, and capable of being enforced.

Appeal from circuit court, Rockingham county.

Bill by Elliott M. Buck against S. L. Hoover for specific performance. From a decree for plaintiff, defendant appeals. Affirmed.

Conrad & Conrad, for appellant. Strayer & Liggett, for appellee.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

KEITH, P. Elliott M. Buck filed a bill in the circuit court of Rockingham county alleging that he had sold a certain lot of land, situated in the town of Waynesboro, Augusta county, Va., to one S. L. Hoover, on the 27th of August, 1890, for the sum of \$1,000, payable one-third in cash and the residue in two equal payments, with interest thereon; he (the plaintiff) to execute to Hoover a deed, and Hoover to secure the unpaid purchase money by a deed of trust. Plaintiff states that he performed fully his part of the contract, by executing the deed as agreed upon, and delivering the same to D. L. Henkle, to be by him delivered to Hoover, the defendant, upon Hoover's executing the deed of trust provided for, and delivering the same to Henkle or the plaintiff, and at the same time making the cash payment provided for in the contract of purchase. The bill states further that the deed, bonds, and deed of trust were executed in conformity with this agreement, and were placed in the hands of Henkle, but that the cash payment was not made. It appears from the bill that the bonds and deed of trust have been lost, and that Hoover has been called upon to perform his part of the contract, by paying the cash payment and executing new bonds and deed of trust in the place of those lost. A new deed of conveyance having been tendered by the plaintiff for the lot of land, Hoover refused, and still refuses, to perform his contract, or to execute such new bonds or deed of trust. The plaintiff tenders with his bill a deed for the lot sold to S. L. Hoover, and prays that S. L. Hoover and D. S. Henkle may be made defendants to the bill, and that Hoover shall be required to specifically perform his contract, and to pay the amount of his purchase money, with interest from the 27th of August, 1890,—the whole of it being due at the filing of the bill,—and that the bonds and deed of trust may be set up; for the sale of the real estate; and for general relief. Hoover answered the bill, and denied every material averment, and thereupon depositions were taken by the plaintiff and defendant, and the case came on to be heard before the circuit court of Rockingham; and that court, after due consideration, being of opinion that the contract set out in the bill was established by the evidence, and that the plaintiff was entitled to have the same specifically executed, decreed that the complainant recover of the defendant, S. L. Hoover, \$1,000, with interest from the 27th of September, 1890, and his costs, and providing for the sale of the lot mentioned in the bill unless the sum decreed, with interest, should be paid within 60 days. To this decree a supersedeas was allowed by one of the judges of this court.

We are of opinion that the evidence establishes the contract set out in the bill, and it appearing that the plaintiff has at all times been ready to execute the contract upon his part, and has been prompt in asserting his rights, and that the remedy at law would

not be so beneficial as that in equity, the court is further of the opinion that the plaintiff is fully entitled to the relief sought. It is well settled that "when a contract concerning real estate is valid, unobjectionable in its nature and in the circumstances connected with it, and capable of being enforced, and it is just and proper that it should be fulfilled, it is as much a matter of course for a court of equity to decree a specific performance as for a court of law to give damages for the breach of it." Wat. Spec. Perf. § 6. "A valuable consideration, particularity, certainty, mutuality, and a necessity for performance, are the requisites upon which the equity of a case arises." Id. 7. All of these circumstances concur in this case, and we are therefore of the opinion that there is no error in the decree complained of, and that it should be affirmed.

(91 Va. 317)

KEYSER et al. v. GUGGENHEIMER et al.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. April 4, 1895.)

**ATTACHMENT AGAINST NONRESIDENT—REVIEW ON APPEAL—OBJECTION NOT RAISED BELOW—RETURN OF ATTACHMENT.**

1. An objection to an attachment proceeding on the ground that the summons was made improperly returnable may be taken for the first time on appeal.

2. A summons in equity upon which is indorsed an order for an attachment should be made returnable to a term of court, and not to rules.

3. A decree against a nonresident who has not appeared based purely upon an invalid attachment of his property is void.

Appeal from circuit court, Alleghany county.

Action by Guggenheimer & Co. against Keyser, Simpson & Co. An attachment was levied on the property of defendants, as being nonresidents, and thereafter defendants executed a joint assignment to William M. and J. T. McAllister, trustees. From a decree declaring plaintiffs' attachment a lien on the defendants' property superior to the rights of the deed of trust creditors, the trustees appeal. Reversed.

Wm. M. & J. T. McAllister and R. L. Parrish, for appellants. John T. De Laney, for appellees.

BUCHANAN, J. On the 11th day of November, 1892, the appellees instituted a suit in equity in the circuit court of Alleghany county against Keyser, Simpson & Co. to recover a debt of \$816, and also sued out an attachment to attach the estate, real and personal, of G. T. Barnsley in Alleghany county, who, with W. T. Simpson and D. C. A. Keyser, constituted the firm of Keyser, Simpson & Co., on the ground that he (Barnsley) was a nonresident of the state. The res-

ident defendants were served with process, upon which was indorsed the attachment, or order to attach the estate of the nonresident defendant, on the 14th of that month; and the attachment was levied on the same day on a large quantity of personal property belonging to the defendant company, of which the nonresident was a member, and an order of publication afterwards made as to him.

The process commencing the suit, and upon which the attachment or order to attach was indorsed, was made returnable to the clerk's office of that county on the first Monday of the following December. The defendants made no appearance, and the bill filed at the second December rules was taken for confessed as to the resident defendants.

On the 18th day of November,—five days after the suit was instituted,—the members of the defendant firm executed to William M. and J. T. McAllister, trustees, a general assignment conveying all the property, of every kind, owned by the partnership, for the benefit of all the firm creditors. This deed of trust was admitted to record in the clerk's office of the county court of that county on the 18th of that month. At the March term of the circuit court the trustees in the deed of trust filed their petition in the suit, exhibiting with it a copy of the deed of trust, claiming that the lien created by it was paramount to the lien of the attachment, and asked to be, and were, made parties defendant in the suit. At the same term of the court the case was heard upon the bill and exhibits, petition and exhibit, and general replication thereto; and the court decreed that the attachment was a lien upon the partnership property levied on, and superior to the rights of the deed of trust creditors.

From this decree of the court this appeal was taken by the trustees.

The first assignment of error in order, though not the first error assigned by appellants, is that the attachment sued out is void because made returnable to a rule day, when the law at that time (November, 1892) required it to be returnable to a term of the court in which the suit was pending.

It is claimed by the appellees that, since no objection was made to the attachment in the circuit court on this ground by the appellants, they have waived it, and it cannot be considered by this court. This view cannot be sustained. The nonresident debtor has never appeared in the case; no personal service was had upon him; but his property in the state is subject to its laws, and the state has the right to prescribe in what manner that property may be subjected to the claims of his creditors. In this state, statutes have been enacted declaring the manner in which the property of such debtors may be subjected to the payment of their liabilities where there is no lien upon the property for their payment. Independent of these statutes, a court of equity has no juris-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

diction to subject such debtor's property in favor of a creditor at large. The remedy invoked in this case, being one wholly derived from statute law, and one which is harsh in its operation towards the party against whom it is directed, and also towards the creditors of such debtor over whom the attaching creditor obtains priority, must, upon its face, show that the requirements of the statute have been substantially complied with. 4 Minor, Inst. (Last Ed.) 404, 405; Thacher v. Powell, 6 Wheat. 119; Tate v. Liggat, 2 Leigh, at pages 99 and 100; Pennoyer v. Neff, 95 U. S. 714; Daniel, Attachm. §§ 11, 12.

Objections to attachment proceedings on this ground may be taken advantage of, not only in the trial court, but in an appellate court, although not raised in the trial court. President Tucker said in Jones v. Anderson, 7 Leigh, 308, 313, "It is obvious that the very jurisdiction of the court depends upon the regularity of the attachment." It therefore becomes the duty of the court to examine into the regularity of the proceedings in attachment cases, and it may, of its own motion, dismiss an irregular attachment, and ought to do so, when there has been no appearance by the nonresident debtor, and no personal service upon him, as it is the duty of every court, ex officio, to disclaim a jurisdiction which it is not entitled to exercise. Jones v. Anderson, 7 Leigh, 308, 314; 4 Minor, Inst. (Last Ed.) 576, and cases cited; 2 Bart. Law Prac. 985; Coward v. Dillinger, 50 Md. 59, 61; Drake, Attachm. (7th Ed.) § 89a.

In the case of Craig v. Williams, decided by this court, and reported in 18 S. E. 899, the question arose whether an attachment returnable to rules, issued under sections 2964 and 2965 of the Code, was valid or not. That was an attachment in equity against a nonresident debtor. The attachment, or order to attach, was indorsed upon the summons. The summons was returnable to rules. In that case this court held that an attachment issued under those sections of the Code, in a pending suit, whether it was a regular attachment, or an order to attach, indorsed upon the summons by the clerk, must be returnable to the court in which the suit is pending, and that if it was not so returnable it was invalid.

In Grinberg v. Lingerian, it reaffirmed the doctrine laid down in Craig v. Williams, and held such an attachment to be void. 19 S. E. 161; Kyles v. Ford, 2 Rand. 1; Lavell v. McCurdy, 77 Va. 763, 770, 771.

This assignment of error, therefore, must be sustained, and the attachment held invalid.

There being no personal service upon the nonresident defendant, no appearance by him, and no valid attachment of his property, there was nothing for the jurisdiction of the court to rest upon. Its decree was therefore coram non judge, and void. Drake, Attachm. (7th Ed.) § 5; Pennoyer v. Neff, 95

U. S. 714. The circuit court ought to have dismissed the bill for want of jurisdiction.

I am of opinion, therefore, that the decree appealed from should be reversed, and the bill dismissed.

(91 Va. 305)

GEORGIA HOME INS. CO. v. BARTLETT.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. April 4, 1895.)

INSURANCE—CONDITION IN POLICY—CHANGE OF TITLE—APPOINTMENT OF RECEIVER.

A policy of fire insurance was issued to trustees, and subsequently the court appointed another person receiver of the property, with authority to rent the property insured. *Held*, that this was not a change in title or possession by sale or judicial decree, within the meaning of a clause providing that such a change should avoid the policy.

Error to circuit court, Page county.

Action by J. Kemp Bartlett, trustee, against the Georgia Home Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Eppa Hunton, Jr., for plaintiff in error.  
Marshall McCormick and Chas. M. Brown, for defendant in error.

HARRISON, J. This is an action of assumpsit, brought in the circuit court of Page county, by the Valley Land & Improvement Company, for the use of J. Kemp Bartlett, Jr., trustee, against the Georgia Home Insurance Company, to obtain judgment upon a policy of insurance executed by the defendant on the 23d day of August, 1891, upon the property of the Valley Land & Improvement Company situated at Luray, in the county of Page.

On the 21st day of April, 1894, the following verdict was rendered: "We, the jury, find for the plaintiff, and assess the damages at \$4,308.84, with interest from January 28, 1892, till paid." The question presented for our consideration was raised upon the trial by the circuit court refusing to give the following instructions, asked for by the defendant: "The court further instructs the jury that if there is any change in the possession of the property insured between the date of the policy and the date of the fire, without the consent or knowledge of the company, the jury must find for the defendant, unless the said company has waived the said provision of the said policy."

There were other instructions asked for by the plaintiff and refused by the court, but, in the view taken of this case, it is only necessary to consider the one quoted.

The policy of insurance sued upon contains the following usual provision: "Or if any change takes place in the title or possession of the property, whether by sale or judicial decree, without notice to the company and its

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



consent indorsed thereon, then the policy shall be void."

It is claimed by the insurance company that, after the policy was executed, there was a change of the possession of the property insured, and consequently a forfeiture under the clause just quoted.

The facts disclosed by the record are as follows: On the 18th day of April, 1891, the Valley Land & Improvement Company, duly incorporated, conveyed a very large amount of real and personal property, including the Luray Inn and caverns in Page county to H. J. Smoot and four others, as trustees, to secure a heavy general indebtedness due from said company. On the 1st day of May, 1891, the company leased the Luray Inn, together with the grounds and curtilage, which had been conveyed in the deed of trust, to one Frederick W. Evans.

On the 3d day of August, 1891, certain creditors of the company filed their bill in the circuit court of Page county, asking the court to enjoin a sale of the property, which had been advertised by the trustees, and further praying for the appointment of a receiver to take charge of the property, and that the trust might be administered under the orders of the court. On the 10th day of August, 1891, the court entered a decree declining to appoint a receiver or to enjoin the sale, but directed the trustees to proceed to sell the property on the terms prescribed by the deed of April 18, 1891, and to report any sale made to the court, and to hold any money received subject to the order of the court.

On the 23d day of August, 1891, the trustees secured and had placed upon the property of the company, real and personal, fire insurance policies to the amount of about \$100,000, distributed among 27 different companies, for which insurance a premium of \$1,892.70 was paid. Among these policies was that of the Georgia Home Insurance Company, defendant in this suit, for \$5,000, which was placed upon the Luray Inn.

On the 26th day of September, 1891, H. J. Smoot and others, trustees, made their report to the circuit court, settled their accounts, and resigned their positions as trustees. The court entered an order ratifying and confirming all their acts and doings as trustees, and appointed J. Kemp Bartlett, Jr., as substituted trustee in their room and stead (Bartlett was the president of the Valley Land & Improvement Company, whose property was insured), "with all the duties and responsibilities required by law," and with the power, among others, to lease out the Luray Inn, and collect the rents. Bartlett was required to give bond and security, and to make reports of his acts and doings as trustee to the court.

He did not, however, qualify as substituted trustee, by giving the required bond, until the 16th day of October, 1891; and on the 5th day of November, 1891, the Luray Inn was destroyed by fire.

It is earnestly contended by counsel for plaintiff in error that the terms of the decree appointing J. Kemp Bartlett, Jr., as substituted trustee, in effect made him a receiver of the property, and that the change from H. J. Smoot and others, trustees, to J. Kemp Bartlett, Jr., receiver, was such a change in the possession of the property insured as to release the insurer from all liability to pay the loss. In *Thompson v. Insurance Co.*, 130 U. S. 287, 10 Sup. Ct. 1019, it is held that a change of receivers is not such a change of possession or title as to forfeit the policy. The objection here is that this was a change from a trustee to a receiver. We understand counsel for plaintiff in error to admit that if the court had appointed one of the original trustees receiver, instead of Bartlett, there would have been no change of possession affecting the policy. This position is unquestionably sound, and it follows, as a consequence, that the court could have appointed H. J. Smoot, one of the original trustees, as receiver, and subsequently to such appointment changed the receiver by removing H. J. Smoot, and appointing J. Kemp Bartlett, Jr., in his place; and under the law as laid down by the supreme court of the United States in *Thompson v. Insurance Co.*, 130 U. S. 287, 10 Sup. Ct. 1019, it would not have worked a forfeiture of the policy, because it would have only been a change of receivers. I can see no propriety in the court's adopting the circuitous method suggested for appointing Bartlett receiver. It would have been a vain thing. Nor do I think his appointment as receiver, in the mode adopted by the court, wrought any such change in the possession or title of the property as is contemplated by the clause of the policy under consideration.

A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody, as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property. *Union Nat. Bank of Chicago v. Bank of Kansas City*, 136 U. S. 236, 10 Sup. Ct. 1013. Under this authority, it may be conceded that the effect of the decree of September 26, 1891, was to make Bartlett a receiver. Still, that did not change the title or right of possession in the property. H. J. Smoot and others, trustees, were, presumably with the consent of the Valley Land & Improvement Company, acting as receivers in fact, though not in law; and the change from them to J. Kemp Bartlett, Jr., as receiver, could not, under *Thompson v. Insurance Co.*, have operated to forfeit the policy. I do not think the sound and just rule laid down in the case cited can be limited to a change of receivers. I think the same reasoning would apply to a change of

trustees, or a change from a trustee in control to a receiver in the control. In fact, no change of this character, merely affecting the control of the rents of the property, is the change contemplated by the policy, and therefore would not forfeit the insurance. This condition in the policy against alienation refers only to such a sale or disposition of the property as causes all interest of the assured in or control over the property to cease. *Assurance Co. v. Scammon*, 126 Ill. 355, 18 N. E. 562. The object of providing against a transfer or change of title or possession is to guard against a diminution in the strength of the motive which the insured may have to be vigilant in the care of his property.

"Any change in or transfer of the interest of the insured in the property, of a nature calculated to make the insured less watchful in guarding and preserving the property from destruction by fire, is in violation of the policy. But if the real ownership remains the same, if there is no change in the fact of title, but only in the evidence of it, and if this latter change is merely nominal, and not of a nature calculated to increase the motive to burn or diminish the motive to guard the property from loss by fire, the policy is not violated." *Ayres v. Insurance Co.*, 17 Iowa, 176, 185, 186.

Now, let us consider what change had taken place in the possession of the property insured that is complained of by the plaintiff in error.

At the time the assurer executed the policy, the insured property was in the lawful possession of the Valley Land & Improvement Company. It was in the actual possession of Frederick W. Evans, under a lease. The policy was taken out in the name of the Valley Land & Improvement Company, and made payable, in the event of loss, to H. J. Smoot and others, trustees, as their interest may appear. The trustees, presumably with the consent of the owners, the Valley Land & Improvement Company, were collecting the rents from the property, and disbursing the same in discharge of their duties as trustees.

At the time of the fire, the property was still in the lawful possession of the Valley Land & Improvement Company, and it was still in the actual possession of Frederick W. Evans as lessee.

The only change that had taken place was that the court had appointed J. Kemp Bartlett, Jr., as the hand to receive and sign receipts for rent arising from the Luray Inn, in the room and stead of H. J. Smoot and others, trustees, resigned. The only act performed by J. Kemp Bartlett, Jr., as receiver, after his qualification on the 16th of October, 1891, disclosed by the record, was to make an indorsement thereon, extending for a further time the same lease that was on the property when the policy was executed; thus continuing the property in the actual possession of the same lessee.

We must look at the substance of things,

and not at the shadow. The purpose of the clause under consideration was not to work a forfeiture; it was intended to protect the insurer against wrong or injury. The plaintiff in error has not been injured by J. Kemp Bartlett, Jr., having been appointed to receive and receipt for rents arising from the Luray Inn in the place of H. J. Smoot and others. Whether he performed that duty as receiver or as substituted trustee, in either case he was doing no more than the trustees were doing when the policy was executed.

Nor has the appointment of J. Kemp Bartlett, Jr., as receiver, produced any such change of interest in the property as to make the assured less watchful in guarding and preserving it from destruction by fire, and consequently there has been no forfeiture of the policy. It is a fact worthy of note that the large insurance on this property, nearly \$100,000, represented by 27 different companies, was promptly paid without question, under the advice of counsel, except by one insolvent company and the plaintiff in error here; and it is conceded that all these companies had the same provision in their policies that is relied on to forfeit the policy in this case.

These insurance policies abound with innumerable stipulations, forfeitures, and provisions hard to understand, and difficult of performance, and it is a well-settled rule that they must be strictly construed against the insurer, and liberally in favor of the insured.

For the foregoing reasons, I am of opinion that there is no error in the judgment of the circuit court, and it must be affirmed.

#### DEPRIEST v. JONES.<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 4, 1895.)

ACCEPTANCE OF DEDICATION — ACT OF ASSEMBLY — OBSTRUCTION OF STREET — ADVERSE POSSESSION — PURCHASER WITH NOTICE — RECITALS IN DEED.

1. An act reincorporating a town, "as the same has been or may be laid off in lots, streets, and alleys," furnishes proof of the acceptance of the dedication to the public of the streets and alleys previously laid off.

2. One cannot acquire by adverse possession the right to shut up or obstruct a public highway.

3. Where a conveyance of lots refers to a certain plan of a town for complete description, the grantee is charged with knowledge of all the facts to be ascertained by an inspection of said plan.

Appeal from circuit court, Augusta county.

Bill by Benjamin Jones against Adda K. Depriest for an injunction. From a decree for plaintiff, defendant appeals. Affirmed.

J. & J. L. Bumgardner, for appellant. John N. Ople, for appellee.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

KEITH, J. Benjamin Jones filed his bill in the circuit court of Augusta county making Adda K. Depriest defendant, and stating that he is the owner of a certain house and lot in the town of Mt. Sidney, in the county of Augusta, bounding upon a 16-foot alley running west of and parallel to the Valley turnpike, the principal street of the town; that this alley was laid off and was upon the plat of the town when it was originally incorporated; that until recently he has had ingress and egress to and from his lot over the premises of the adjoining public school, but, the school property having been inclosed, he is cut off from its further use. He avers that the alley is now open its whole length, as laid out on the maps of the town, except in the rear of lots 40 and 41, which belong to the defendant, who persists in keeping it closed, thus shutting the plaintiff out from all enjoyment of his right to use the alley aforesaid as a public highway; and being thus, as he claims, unjustly deprived of his right, he prays that the defendant may be enjoined from interfering with his use of the alley, and for such other and general relief as the nature of his case requires. The defendant answers under oath, and denies every material allegation of the bill. She avers that she purchased the lot in question by deed from Dinkel and wife, in 1885; that at the time of the purchase there was no alley in the rear of the premises, and, as she is informed and believes, had never been such an alley as plaintiff claims, or any alley whatever; that, on purchasing the property, she employed competent counsel to examine the title, and the abstract of title was submitted to her running back to one George Sampson, who on March 3, 1835, conveyed the lot to William Gambill, from whom she deduces her title; and that during all that time the property has been fenced just as it was at the time the bill was filed. Numerous depositions were taken by both parties. It does not appear when the town of Mt. Sidney was first incorporated, but it is proved that a great many years ago there was a plat made of it, and from that plat it appears that it was regularly laid off into lots, streets, and alleys. April 7, 1882, the general assembly reincorporated the town of Mt. Sidney, in the county of Augusta, "as the same has been or may be laid off in lots, streets, and alleys." This act, I consider, furnishes full proof of the acceptance of the dedication to the public of the streets and alleys as they had been theretofore laid off. Among these streets and alleys is the alley in question, running west and back of lots 40 and 41. It appears, too, that at one time, about the year 1854, the lot upon which the plaintiff now resides, and lots 40 and 41, were owned, or at least occupied, by Charles K. Hyde, and this alley, which had been opened prior to

that time, was some time during his occupancy suffered to fall into disuse, though never entirely closed until some time about the year 1872. The defendant relies upon adversary possession for more than 20 years. This defense cannot be made by one who undertakes to shut up or obstruct a public highway. See *Taylor v. Com.*, 29 Grat. 780; *Norfolk City v. Chamberlaine*, Id. 534; *Yates v. Town of Warrenton*, 84 Va. 337, 4 S. E. 818. It appears that for a long time the land west of this alley was uninclosed; that the greater part of it was woodland; and that access to the lot upon which the plaintiff resides could be had from the adjacent schoolhouse grounds. When other convenient modes of ingress and egress were obstructed, the right to the use of the alley was at once asserted. The defendant's title papers disclose the existence of this alley, or point to the source from which information on the subject was to be derived. She purchased from Dinkel and wife, who in turn purchased of Tunis Schwartz, and in the deed of conveyance from Schwartz to Dinkel, and from Dinkel to the defendant, distinct reference is made to the fact that lots 40 and 41 are described in the "plan" of the town of Mt. Sidney, to which "plan" the grantee is directed for a more full and complete description. When the defendant purchased, therefore, she was charged with the knowledge of all the facts she could have ascertained had she prosecuted the obvious inquiry suggested to her by her own title papers. She would have found to be true just what Watson, the agent of Tunis Schwartz, told her grantor, Dinkel, when he purchased the lots in question,—"that he was entitled to the lots with seventy feet front, and three hundred and eleven feet, and perhaps a little fraction more than that, in depth; that the citizens might want the alley west of and in rear of lots 40 and 41 open some time, and that he reserved that; and that he had no right to sell it, and did not sell it." She would have found that the legislature of Virginia had, by the act referred to, incorporated the town of Mt. Sidney, and in doing so had adopted the streets and alleys theretofore established, and had thus, prior to her acquisition of any interest in the property in dispute, completed, by acceptance, the dedication of the streets and alleys made at some former period. We are not to be understood as placing the right of the appellee to the relief granted him upon the fact of notice, whether express or implied. What we have said on that subject was intended merely to show that appellant purchased either with her eyes open, or willingly closed to the existence of the alley in rear of lots 40 and 41. We are therefore of opinion that there is no error in the decree of the circuit court of Augusta county, and the same must be affirmed.

**CAMPBELL'S ADM'R v. RICHMOND & D.  
R. CO.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. April 4, 1895.)

**ACTION AGAINST RAILROAD COMPANY—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.**

The deceased passed along defendant's railroad every morning, and crossed it, going to his work. On the morning in question, between daylight and sunrise, he had been walking for some distance by the side of the track, and towards an express train approaching at a high rate of speed, and tried to cross the track in front of the train, and was killed. *Held*, that defendant was not liable for his death.

Error to circuit court, Orange county.

Action by William H. Ricketts, administrator of Scott Campbell, against the Richmond & Danville Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

James G. Field, for plaintiff in error. Kirkpatrick & Blackford, for defendant in error.

**HARRISON, J.** This is a writ of error to a judgment of the circuit court of Orange county rendered on the 3d day of May, 1892, in an action brought in said court by William H. Ricketts, sheriff of Orange county, and, as such, administrator of Scott Campbell, deceased, against the Richmond & Danville Railroad Company.

The object of the suit was to recover from the defendant damages for killing the plaintiff's intestate while crossing the track of said defendant company.

It appears from the record that Scott Campbell lived within a mile and a half of Barboursville, in Orange county, was perfectly familiar with the railroad at that place where it crosses a public highway, and was in the habit of passing along the highway, which runs near the depot at Barboursville, every morning early, and crossing the track at that point, in going to his work.

It appears that on the — day of October, 1889, he started as usual to his work, between daylight and sunrise, and that while crossing the track of the defendant company at the point of intersection with the public highway he was struck by the engine and killed. At the trial, after the evidence on both sides was closed, the defendant demurred to the evidence, and the plaintiff joined in the demurrer. The amount of damages was inquired of by the jury, and a verdict returned for the plaintiff fixing his damage at \$2,000, subject to the opinion of the court on the demurrer to the evidence. The court sustained the demurrer, and gave judgment in favor of the defendant; and the case is now before this court for review of that judgment.

It is contended that the plaintiff's intestate lost his life in consequence of the negligence of the defendant railroad company.

I have carefully examined the evidence in the record proper to be considered upon a demurrer, and there is no proof of negligence on the part of the defendant, and full proof of the grossest and most incomprehensible negligence on the part of the plaintiff's intestate. He was walking along a public highway, in full view of the railroad track, for a long distance, until he got within 25 yards of the crossing. All this time the fast express train is thundering towards him. He was again in sight of the track just before reaching it, and, instead of waiting until the train passed, he was guilty of the folly of making an effort to cross the track in front of a fast-flying train, and lost his life. This case is controlled by the case of *Johnson's Adm'r v. Railway Co.*, and the numerous cases therein cited, decided at the present term of this court. 21 S. E. 238.

There is no error in the judgment of the circuit court, and it is affirmed.

(91 Va. 297)

**YOUNG et al. v. ELLIS.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. April 4, 1895.)

**MINING LEASE—WHAT CONSTITUTES—NONPAYMENT OF RENT—EFFECT—BAD FAITH OF LESSOR.**

1. The owners of land granted to another the right to enter thereon to test and search for minerals and oil, and to mine and quarry thereon, the second party to have the right to erect buildings and machinery for work in mines, and to pay \$25 per year if minerals were not mined, and to pay a royalty on all ores shipped. The instrument was termed therein a "lease," and was to continue for 99 years. *Held*, that it was a lease, and not a revocable license.

2. It is proper to give the lessee of a mine an extension of time in which to pay the rent, when it appears that he has frequently attempted to pay it, and the lessor has intentionally eluded him.

Appeal from circuit court, Franklin county.

Proceeding by Armstead Young, Jr., and wife against J. D. Ellis to cancel a mining lease. From a decree for defendant, plaintiffs appeal. Affirmed.

Anderson & Hairston and Dillard & Lee, for appellants. Dennis & Saunders, for appellee.

**CARDWELL, J.** By an indenture dated March 11, 1889, but executed July 8, 1889, and recorded in the clerk's office of Franklin county court, July 30, 1889, Armstead Young, Jr., and Abigail, his wife, appellants, in consideration of one dollar in hand paid, and the covenants and agreements of J. D. Ellis, of Philadelphia, Pa., appellee, contained in the indenture, granted to Ellis "the right and privilege of entering upon" a tract of land belonging to Young's wife, situated in Franklin county, Va., containing seventy acres, and fully described, "for the purpose of examining, testing, and searching for min-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

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erals and fossil substances of every nature and kind whatsoever, and petroleum oil, and of excavating, examining, mining, and quarrying for paving stones or any of the above-named and described substances or minerals," and "to such an extent as Ellis might desire, either in prosecuting and searching for minerals and stones, or in opening, boring, or working such mines as he may discover upon the land or any part thereof"; Ellis to have the right "to erect and maintain such buildings and machinery and fixtures as may be necessary to sufficiently work said mines, including any and all kinds of improved machinery and methods," etc.; "and also the use of timber lands and water necessary and requisite in working the same; and also the right of ingress and egress to any mine or mines discovered on the lands"; Ellis agreeing on his part to pay Young and wife "\$25 per year, and, in the event the said minerals are not actually mined, said rental of \$25 to be credited on the royalty herein specified whenever actual mining commences"; and, further, to pay Young and wife "ten cents per gross ton for all the ores mined and shipped from said lands quarter yearly, and at the end of each quarter during the existence of this lease, or the time under which the mines shall be worked, and for the use and rent of said lands"; and he further covenants and agrees that he will not commit or permit any unnecessary damage to the land, etc. The indenture contains these further provisions: "And it is further agreed that this lease is to extend and continue for the period of ninety-nine years from the date, provided the party of the second part pays the amount hereinbefore agreed to be paid, and at the time or times agreed to be paid, and in default of which this lease and agreement shall be void; and the party of the first part may re-enter into the possession of said lands and premises, and the whole thereof, and remove and eject the party of the second part, and all persons claiming under and through him, therefrom; and, if not worked for — years, this lease is void;" and in consideration of the premises, and of one dollar to Young and wife paid, they further covenanted and agreed to and with Ellis, his heirs and assigns, that they would at any time within five years from the date of the indenture sell and convey to Ellis or his assigns the lands, together with the buildings and improvements thereon, at the price of \$1,000. This paper is signed, sealed, and acknowledged by Young and wife, but not by Ellis.

At the rules held in the clerk's office of Franklin county circuit court on the third Monday in April, 1892, Young and wife filed their bill of complaint against Ellis, setting out the making and execution of the indenture above referred to, which they call a "lease," and charged that Ellis had not as yet commenced mining upon the land, nor paid complainants 10 cents per gross ton for

any ore, and had not paid them the \$25 as he promised to do until actual mining commenced, and had not released to complainants the said deed of lease, but that it still remained as a cloud upon their title to said tract of land; and further charged that Ellis had never taken possession of the land by virtue of the lease,—the prayer of the bill being that Ellis might be required to show cause why the lease should not be set aside and declared null and void, and that the same be set aside and declared null and void, etc.

A number of witnesses were examined on behalf of both complainants and defendant, and on October 27, 1892, the cause came on regularly to be heard by the circuit court of Franklin county upon the bill, the answer of Ellis then filed by leave, with replication thereto, and the depositions of witnesses; when the court decreed that, upon the payment by Ellis to Mrs. Young within 30 days from that date of the amounts that were due to her, viz. on the 11th day of March, 1890, \$25, and on the 11th day of March, 1892, \$25, with interest, then complainants' bill should stand dismissed as of the day of payment, with cost to the defendant; and at the May term of the court, 1893, the cause coming on again to be heard upon the papers formerly read, and on the decree of the October term, 1892, the decree is as follows: "It appearing to the court that the complainants have refused to accept the amounts decreed them at that term [October term], because the same was not offered within thirty days from the date of said decree, the court doth, therefore, adjudge, order, and decree that upon the defendant depositing in Franklin Bank the amounts decreed to be paid to the female complainant by the decree aforesaid, to her order, or to the order of her attorneys, \* \* \* that this suit shall stand dismissed as of the date of said deposit." It appears from the record that the deposit required by this last decree was made in the Franklin Bank on May 25, 1893, whereby the decree became final, and the cause stood as dismissed, and from this decree an appeal was allowed to this court.

The sole question to be disposed of here is whether the circuit court of Franklin county erred in refusing to decree, upon the record as it then stood, the indenture executed by Young and wife to Ellis, null and void. The authorities cited by appellants' counsel to sustain the contention that this instrument is only a revocable license are all, or nearly all, cases arising on either parol agreement or written contracts wherein the licensee does not promise or undertake anything more than to pay a royalty on the ore, oil, or minerals raised from the mines or mills, while in the case here Ellis agrees by the acceptance of the indenture to pay as a consideration, for the rights or privileges given him, a certain sum of \$25 per year

until actual mining commences; that is to say, Ellis is bound to pay this sum whether he mines or not. Every contract must receive a reasonable construction. An agreement to pay money, no time being specified, is held to be an agreement to pay the same on demand, and an agreement to pay money yearly is an agreement to pay at the end of the year from the date of the agreement; while an agreement to do something other than to pay money, no time being expressed, means a promise to do it within a reasonable time. *Cowan v. Iron Co.*, 83 Va. 550, 3 S. E. 120; *Warren v. Wheeler*, 8 Metc. (Mass.) 97; *Atwood v. Cobb*, 16 Pick. 227; *Ryan v. Hall*, 13 Metc. (Mass.) 520; *Thompson v. Ketcham*, 8 Johns. 146.

Regard should be had to the intention of the parties contracting, and such intention should be given effect. To arrive at this intention, regard is to be had to the situation of the parties, the subject-matter of the agreement, and the object which the parties had in view at the time and intended to accomplish. A construction should be avoided, if it can be done consistently with the terms of the agreement, which would be unreasonable or unequal, and that construction which is most obviously just is to be favored as most in accordance with the presumed intention of the parties. *Cowan v. Iron Co.*, supra; *Howeth v. Anderson*, 25 Tex. 557; *Warner v. Hitchins*, 5 Barb. 666; *Halloway v. Lacy*, 4 Humph. 468. Applying these rules to the agreement of Young and wife with Ellis, we find no difficulty in holding that it is not a mere license revocable at the will of Young and wife, but a grant of a right and privilege based upon a valuable consideration,—a mining lease,—that has become common in Virginia in the development of her resources, and only voidable at the institution of this suit for the failure of Ellis to pay the sum certain of \$25 annually due on the lease. *Johnston Iron Co. v. Cambria Iron Co.*, 32 Pa. St. 241; *Bainb. Mines*, 168; *Ellsworth v. Extension Co.*, 31 Minn. 543, 18 N. W. 822; *Pom. Cont.* § 66; *Silsby v. Trotter*, 29 N. J. Eq. 228-232; *State v. Bell*, 92 Am. Dec. 658, and cases cited. A covenant or is excused from performing his part of an agreement when the other party hinders the performance. 12 Am. & Eng. Enc. Law, 1003. The evidence in this case shows that Ellis made every reasonable effort to pay Young and wife the sum of \$25 due at the end of the first year from the date of this lease, and clearly discloses a purpose on the part of Young and wife to hinder the performance of this provision in the lease by Ellis, as a means of avoiding their contract. One witness testifies that he went to Young's house two days before this money was due, in 1890, with \$25 in gold, saw a lady whom he took to be Young's wife, and told her that his business was to pay Young the \$25 due on the Ellis lease, but she told witness that

Young was in the Brown Hill, and she did not know where to find him. Witness further testified that Young had said to him previous to this that if he (witness) could annul the lease he could make some money by the operation, and that he saw Young after the visit to his house, and told him that the money was in bank at Rocky Mount for him. Another witness testifies that he went to the house of Young on the day before this money was due with \$25 in gold to pay the amount due by Ellis on the lease, showed the money to Young's wife, told her what he had come for, and asked her where Young was, and was told by her that he had gone across the mountain about four miles to plow; that witness waited till nearly night, and Young had not come, when he told Mrs. Young that if he could find no one to pay this money to he would leave it in the bank, where Young could get it, and asked her to tell him so for witness; that in referring to the lease Mrs. Young said she did not know anything about it, or would not have anything to do with it. It is further shown that Young, who had been acting for his wife in this entire matter, had expressed to one of the witnesses examined great anxiety to get rid of the lease to Ellis on account of a better offer made him for the property. This evidence is wholly uncontradicted, save by Young and wife, who were examined on their own behalf, notwithstanding Young's incompetency as a witness for his wife at that time, and shows clearly that the non-payment by Ellis of the sum due by him at the end of the first year of the lease was due to the mala fides of Young and wife, and they are thereby estopped from setting up Ellis' default in this respect to avoid their contract. It is true that Ellis did not offer the amount due on the lease in 1891, and before the suit was brought, but, as he says in his answer, it would seem to be folly to be offering money to a party who was evidently trying to escape from a contract made with him. We are of opinion that, upon the case as it stood at the hearing, the circuit court of Franklin county did not err in refusing to annul the lease from Young and wife to Ellis, but as to the right of Young and wife to have this lease annulled upon any state of facts arising after the decree of May 19, 1893, showing that Ellis had defaulted in the payment of the annual sum of \$25, as specified in the lease, or failed or refused to operate the mines within a reasonable time, we express no opinion. It appearing, however, upon the face of the two decrees entered in this cause, that the circuit court has omitted to require Ellis to deposit the sum due by him, according to the lease, on March 11, 1891, in the Franklin Bank, to the credit of Young and wife, or their attorneys, the decree of May 19, 1893, in this respect will be corrected, and, when so corrected, is affirmed.

(91 Va. 322)

PEARSON et al. v. BOARD OF SUP'RS OF  
BRUNSWICK COUNTY et al.<sup>1</sup>(Supreme Court of Appeals of Virginia. April  
11, 1895.)AUSTRALIAN BALLOT LAW — CONSTITUTIONALITY—  
CLAIM AGAINST COUNTY—JURISDICTION OF EQUITY.

1. Act March 6, 1894, putting into effect the "Australian System" of voting, provided for booths, which no one but officers could approach, unless a vote was challenged, and also provided for a sworn special constable to aid any electors physically or educationally unable to vote. *Held*, that the law was not unconstitutional, as depriving electors physically and educationally unable to vote of the right to cast secret ballots, or as establishing physical and educational qualifications for voters.

2. In the provision of Act March 6, 1894, that a sworn special constable therein provided for "may" render assistance to an elector physically or educationally unable to vote, the word "may" is mandatory.

3. A limitation of 2½ minutes within which an elector may prepare his ballot is not so unreasonable as to render the law void.

4. Code 1887, § 836, providing a method for resisting unjust claims against a county affords a complete remedy at law, and equity has no jurisdiction in such cases.

Appeal from circuit court, Brunswick county.

Bill by one Pearson and others to enjoin the board of supervisors of Brunswick county and others from paying certain election expenses. From a decree for defendants, plaintiffs appeal. *Affirmed*.

E. P. Buford, for appellants.

KEITH, P. The plaintiffs filed their bill in the circuit court of Brunswick, alleging that they are citizens and taxpayers of that county, and that they are duly-qualified voters under the constitution of the state of Virginia. They allege that on the 6th of November, 1894, that being the day fixed by law for the purpose, an election was held at the various precincts in the county of Brunswick, as well as throughout the Fourth congressional district of Virginia, for the election of a representative in the congress of the United States, which election was held under the provisions of an act of the general assembly of Virginia entitled "An act to provide for the method of voting by ballot," approved March 6, 1894. The bill goes on to state that expenses were incurred in payment of the per diem of certain officers, the preparation of ballots, the construction of booths, and other items incidental to an election under the terms of the law referred to, and that on the 8th of December, 1894, the bills covering these expenses were presented to and allowed by the board of supervisors, and warrants were drawn by the board upon the treasurer of the county for their payment. The plaintiffs further allege that the act under which these expenses were incurred is unconstitutional and void, and that they cannot, therefore, be paid

out of the general county levy. The bill states many particulars in which it is supposed that the act is repugnant to the constitution of the United States and to that of the state of Virginia. The board of supervisors and the treasurer of Brunswick county, the members of the electoral board, the special constables who conducted the election, and generally all those holding warrants upon the treasurer, whose validity is here denied, are made parties defendant. The bill was taken for confessed, and came on to be heard before the circuit court of Brunswick county, which refused the injunction prayed for, and dismissed the bill. Thereupon the plaintiffs presented their petition for an appeal to this court, which brings the case before us for consideration.

The petition alleges: "That the said act is unconstitutional and void; that the costs of conducting the said election, incurred by putting in operation the provisions of the said act, are illegal charges upon the county levy, and the payment thereof should be enjoined; and that the said decree of the said circuit court is erroneous for the following reasons, which reasons are assigned as errors in the said decree: (1) Because the said act establishes physical and educational qualifications for electors in violation of article 3, § 1, of the constitution of Virginia. (2) Because said act deprives such electors as may be blind, or physically or educationally unable to vote, of the secrecy of their ballots, in violation of article 3, § 2, of the constitution of Virginia. (3) Because said act prescribes restrictions upon the eligibility to office, forbidden by the constitution of Virginia, and therefore in violation of article 3, § 2, of said constitution. (4) Because said act deprives the electors of equality of civil and political rights and public privileges, in violation of article 1, § 20, of the constitution of Virginia. (5) Because said act is repugnant to the guaranties of the liberty of speech and of the press, in violation of article 1, § 14, and article 5, § 14, of the constitution of Virginia. (6) Because said act denies to blind electors, and electors who are physically or educationally unable to vote, "the equal protection of the law," in violation of article 14 of amendments of the constitution of the United States. (7) Because said act withholds from the electors knowledge of the candidates for office, and knowledge of the contents of the official ballot, mentioned therein, in violation of the right of the electors to acquire information as to, and discuss the character of, public men and public measures,—a right inherent in the nature and constitution of the government of Virginia. (8) Because said act violates the freedom of elections, and is otherwise in conflict with article 1, § 8, of the constitution of Virginia. (9) Because said act, so far as, by section 12 thereof, it purports to authorize the judges of election by verbal warrant to cause persons to be instantly arrested, and imprisoned not exceeding ten days, without a trial, for cer-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

tain supposed offenses specified therein, deprives such persons of liberty 'without due process of law,' in violation of article 14, § 1, of amendments of the constitution of the United States, and of article 1, § 10, of the constitution of Virginia. (10) Because said act by divers provisions, and especially by the provisions contained in section 12 thereof, purports to make and create of actions by the citizens, which are in themselves harmless, patriotic, and, it may be, necessary for the preservation of free institutions, crimes and misdemeanors, and is therefore tyrannical, and repugnant to the inherent rights of Virginia citizenship, and is in violation of article 1, § 21, of the constitution of Virginia, and of articles 9 and 10 of the amendments of the constitution of the United States. (11) Because said act is in violation of other constitutional rights of the citizens, taxpayers, and electors, not specially mentioned herein."

Accompanying the petition is a brief, filed by counsel for petitioners, in which the many interesting questions of law arising upon the record are thoroughly discussed. We feel, therefore, that upon the part of the petitioners, at least, we are in possession of all the means of information which would be accessible to us were the appeal allowed, and the case set down for argument. We feel, too, that the questions presented are of the utmost interest to every citizen of the state. We are upon the eve of an election in which many important offices are to be filled, and it is much to be desired that all uncertainty as to the law under which these elections are to be conducted should be removed, and it is therefore a matter of congratulation that the plaintiffs have, in presenting their case to us, thrown sufficient light upon it to enable us to dispose of it without delay and with entire confidence. Our conception of the law and the duties imposed by it upon the various instrumentalities which it creates will be better understood if presented as a whole than by the discussion of its separate and independent features. It will not be disputed: First. That the right of suffrage is derived from the constitution of the state, and to it we look for the qualification of voters and the limitations and restrictions upon the right of voting; in other words, to ascertain who may or who may not vote. Second. The legislature cannot prescribe any qualification in addition to those found in the constitution, and any attempt to do so openly or covertly, directly or indirectly, is void. Third. That there is no educational qualification prescribed by our constitution; and a person otherwise qualified to vote, no matter how ignorant he may be, is entitled to vote. Fourth. The sole function of the legislature, with respect to the exercise of the right of suffrage, is to provide the mode in which those entitled to vote may do so and have their votes counted, and to guard against improper, illegal, or fraudulent voting. Fifth. To this end the legislature may adopt and enforce

reasonable rules and regulations to secure the one and prevent the other. Sixth. But if, under cover of a law to regulate voting, a provision is introduced into the law which virtually establishes a test of the qualification of the voter, additional to those prescribed in the constitution, such provision of the law transcends the power of the legislature, and is null and void. Applying these propositions to the law under consideration, we find that the general scheme of the law is to secure the independence of the voter by secluding him within an isolated booth, surrounded by a neutral zone, within which none may enter save those charged with the duty of conducting the election. No one is allowed within 40 feet of the ballot box save the officers charged with such duties, and, in case of the challenge of a voter, the challengers and challenged and the witnesses, all of whom may appear before the judges. When the challenge shall have been decided, only the elector is permitted to remain. The object is to relieve the voter from every influence inimical to a free and deliberate exercise of the right of suffrage, to free him from all solicitation and annoyance, and to leave him a perfectly free agent to vote as to him seems best. These provisions seem to be not only reasonable, but well adapted to secure the end in view, so far as the voter is concerned who is able to prepare his own ballot. He goes to the judges; he receives an official ballot, printed by authority of the state, upon which is to be found every office to be filled, and every candidate for that office whose name has been filed in accordance with the requirement of the law; he retires to a booth, where he is curtained off, and secluded from all the world. No eye can see him, and no ear can hear him, no evil agency can approach him; and with this environment he prepares his ballot, folds and delivers it to the judge, who, in his presence, places it in the ballot box. With the ignorant voter, however, the case is different. It is obvious that one who, either from physical or intellectual blindness, is unable to read, is wholly incapable of voting by ballot without assistance from some quarter. The law recognizes this, and seeks to provide for it. The electoral board of the county is, by the fifteenth section, required to appoint a special constable, "who shall be an honest and discreet person of said precinct, and be able to read and write, and who shall be a conservator of the peace, and shall be especially charged with enforcing the provisions of this act, having all the powers of a constable." He is required to take an oath faithfully to perform his duties, and for a corrupt violation thereof is punishable by a fine of not less than \$500, and to imprisonment for not less than one nor more than twelve months in jail. The act provides in the fifteenth section that "at the request of any elector in the voting booth who may be physically or educationally unable to vote, the said special con-



stable may render him assistance by reading the names and offices on the ballot and pointing out to him the name or names he may wish to strike out, or otherwise aid him in preparing his ballot. In case said elector be blind, said special constable shall prepare said ballot for said elector in accordance with the instructions of said elector." There is much in the petition for an appeal, and in the argument presented with it, in which we cannot concur, while there is much we heartily approve and commend. It cannot be denied that very great power is placed in the hands of this special constable, that a great trust is reported in him, and that wherever confidence is given it is liable to be abused. We do not think, however, that all the elaborate provisions of the act in question are but artful expedients contrived for the purpose of deluding, entrapping, and defrauding the ignorant voters of this commonwealth. The electoral boards of the county are chosen by the direct vote of the legislature, upon joint ballot, just as are the judges and many other important officers of the state. They in turn select the officers charged with the registration of voters and the conduct of elections. Among the latter, as we have seen, are the special constables. They are bound by their oaths of office to select none but good and discreet men, and those men are in turn sworn faithfully to discharge the delicate and responsible duties committed to them. Not only do they come under the sanction of an oath, but severe penalties are denounced against them for a violation of their duties; and, in addition to the liability incurred by the express terms of the act, they would doubtless be responsible in damages to any elector with respect to whom they had failed in the performance of their duty.

Let us examine somewhat more in detail the duties of a constable. He is an officer charged with a duty to the public of the gravest and most delicate nature, a duty in the performance of which the whole commonwealth, and not alone the individual voter who seeks his assistance in the preparation of his ballot, is vitally interested, for nothing more nearly concerns the commonwealth than that each of her citizens shall cast an intelligent ballot, which, when cast, shall be honestly counted. Under such circumstances we may declare with confidence that the word "may," as used in the fifteenth section of this statute, is always construed as mandatory, and not as merely permissive or directory. Without doubt the primary meaning of "may" is permissive or directory, while the primary meaning of "shall" is mandatory or imperative, yet courts, in order to accomplish what to them appears to be the leading purpose of the legislature, have never hesitated in a proper case to hold "may" to be mandatory and "shall" to be merely directory. These rules of construction are too elementary and well established to need any citation in sup-

port of them. Nothing is better established than that where a power or duty is conferred upon an official by the use of the word "may," and the public are concerned in the due performance of that duty, the word "may" will be deemed to be mandatory, and the officer can be compelled to perform it. Such being the case, it is the duty of the special constable to render to him who is blind, or unable, by defective education, to read, every assistance asked for and required by the elector to aid him in preparing his ballot. The vote by ballot *ex vi termini* implies a secret ballot. The secrecy of the ballot is a right which inheres in the voter, and of which he cannot, against his will, be lawfully deprived. It must be, however, in some degree subordinate to the right to vote by ballot, of which it is but a part, and the main object, which is the right to vote, must not be defeated by a too rigid observance of the incidental right, which is that of secrecy. A blind man, or a man unable to read, must, in the nature of things, so far compromise the secrecy of his ballot as to invoke and obtain the aid of others in the preparation of his ballot; but, as it would be a violation of confidence, were he to seek of a friend assistance on such an occasion, for that friend to betray the secret and disclose the vote, so it is a violation not only of confidence, but of official duty, for the constable to lift the veil of the secrecy, which should be impenetrable, and violate the confidence which the law requires the voter to repose in him. The oath of office of the constable binds him, to the performance of the duties imposed upon him not only by statute, but by the constitution. He must observe and respect all the rights of the voter, and among those rights not the least important is to have the secrecy of his ballot kept inviolate, and for a breach of this duty upon the part of the constable he will become amenable to all the pains and penalties provided by law.

There are objections taken which seem to have nothing to rest upon; as, for instance, that which refers to the limitation upon the eligibility to office, and that which charges an invasion of the freedom of the press and of the freedom of speech. These objections, and others of a like nature, seem to us to be wholly fanciful, or if, in any respect, such provisions of the act trench upon and diminish the constitutional rights of the citizen, they are unnecessary to the main purpose of the act, and are separable from it. They could be suppressed, and yet leave the law in full force and vigor. To the latter class of objections belong the ninth assignment of error, directed to that feature of the law which authorizes the judges of election to arrest and imprison upon verbal warrants, and as to the constitutionality of which we express no opinion. It might have been omitted from the law without at all impairing its efficiency. The offenses for which the judges

of elections are authorized by the clause in question to arrest by verbal warrant are the "taking of an official ballot beyond the voting booth, or away from said booth, except to the judges of elections; or to vote any ballot except such as shall be secured by the elector from the judges of election." These are made misdemeanors punishable by a fine of \$100, and of course render the person guilty thereof liable to arrest upon proper warrant, which would be equally as efficacious as the more summary remedy given by the statute, should that mode be held void on account of repugnancy to the constitution.

Since the original petition was filed, counsel for petitioners have, in what may be termed a supplemental brief, suggested that the law is further obnoxious to the objection that it "affords facilities for the absolute destruction of popular elections," because it allows but two minutes and a half in the booth to each voter, when, by reason of the great number of names which may be printed upon a ballot, especially in local elections, it would be impossible for the voter to prepare the ballot within the time prescribed. In the same note it is pointed out that the number of candidates might be intentionally multiplied with a view to embarrassing and hindering the polling of the vote by "swelling the list of the names of candidates to such proportions as to make the law disfranchise the people." If we were permitted to indulge in conjecture, it would be easy to conjure up a hypothetical state of facts which would embarrass—indeed, prevent—the execution of any and all laws. It would seem, however, that in this case the objections are inconsistent with each other. In the same breath it is asserted that the law limits the eligibility to office, and that the rights of the citizen are in danger of being smothered by the swarm of candidates. It can hardly be said that the peril from either direction is so imminent as to require us to pronounce the election laws of this state unconstitutional. The law places no limit upon the number of booths that may be supplied, while the power of the county courts to multiply voting precincts is fully commensurate to the necessities of the people; and this court cannot, as a proposition of law, decide that the time allowed by the statute is inadequate. A limit was obviously necessary, and the period is, we presume, arrived at as a result of a careful estimate, based upon experience in this or perhaps in other states where similar legislation has been introduced. The time given was doubtless deemed sufficient to obviate the necessity for undue haste upon the one hand and to prevent the resort to merely obstructive methods of delay upon the other.

The questions of real interest are those with respect to the powers and duties of the special constable, and as to that feature of

the law which is supposed to invade the secrecy of the ballot. To them we have given our best consideration, and our views have been presented in what we have already said. It is not with courts a question of the adaptation of means to an end. With considerations of policy and expediency courts have no concern. Whether or not the rules and regulations, the checks and safeguards with which the legislature has seen fit to surround the exercise of the right of suffrage in order to secure a full, free, and untrammelled expression of the will of the voter are the best that could be devised, is not for us to determine. Such arguments must be addressed to the lawmaking power. With us it is wholly a question of legislative power, and not one of legislative discretion. By this standard it is impossible for us to say that the act in question is unconstitutional. It cannot be doubted that it was the purpose of the legislature to frame a law which would promote fair elections. It may be that experience may develop unexpected defects in the agencies employed which will call for legislative correction. If such is the case, the remedy will no doubt in due time be applied. The people are with us the source of all honor and power. Their will is expressed by elections by ballot. It is for them to see to it that the agencies employed to collect their will are kept free from all taint of fraud and corruption, and, as far as may be, from the suspicion of it. It is idle to hope for honest officials and honest government as the result of dishonest elections. It would be as well to expect an "evil tree to bring forth good fruit." If fraud is permitted at elections, or if the laws under which elections are held do not make its perpetration both difficult and dangerous, honest men will be excluded from all participation in affairs, while those who have by corrupt practices come into power will not be slow amply to indemnify themselves by speculation for all that their success may have cost. The legislature, therefore, has done well to shelter and protect the voter, and especially the ignorant voter, from every influence inimical to the free exercise of the trust which the state has reposed in him; and we may be permitted to indulge the hope that it will, in the light of experience, supply whatever may be lacking in the existing laws to the accomplishment of that result. If, however, we had come to a different conclusion as to the constitutional questions involved in the record, which accompanies the petition in this case, we should still be obliged to refuse the appeal asked for, as the plaintiffs had a plain and adequate remedy at law without resorting to a bill in chancery, under section 836 of the Code of Virginia. For the foregoing reasons we deny the appeal asked for by the petitioners.

(91 Va. 259)

**MOROTOCK INS. CO. v. PANKEY et al.<sup>1</sup>**  
(Supreme Court of Appeals of Virginia. March 28, 1895.)

**ACTION ON INSURANCE POLICY—JUDGMENT ON NOTICE—CONDITIONS OF POLICY—TEMPORARY VACATION OF BUILDING—TITLE OF INSURED—PURCHASE AT JUDICIAL SALE.**

1. Under Code 1887, § 3211, the notice for judgment takes the place of both writ and declaration, and upon demurrer the only question raised is whether there is matter in the notice sufficient to maintain the action.

2. Code 1887, § 3211, authorizes one to recover judgment after 15 days' notice, in an action on a contract, "before any court which would have jurisdiction in an action, otherwise than under section 3215." *Held*, that a recovery could be so obtained when the court's jurisdiction was based on Code, § 3214, giving jurisdiction in an action on a fire insurance policy to the circuit court of the county wherein the property lies.

3. Code 1887, § 3251, provides "that, where an action is brought on a policy of insurance, the plaintiff need not set forth in the declaration all the conditions and provisos contained in the policy, nor allege observance thereof or compliance therewith in particulars." *Held*, that this section does not give jurisdiction, but only provides what the declaration shall contain, and does not exclude the remedy by motion under Code, § 3211.

4. Where judgment by default is set aside to allow defendant to appear and plead, the latter cannot claim that he was not regularly brought into court.

5. If the building insured is an ice manufactory, and the insurance company knows that continuous operation or continuous personal occupancy is not practicable, and it is not contemplated by the insured and insurer, the policy will not be avoided by a vacancy or cessation of operation for 10 days, although the policy declares that this shall render the policy void.

6. A clause in a fire insurance policy requiring the assured to have the unconditional and sole ownership of the property is not violated where the assured has purchased the property at a judicial sale (which is afterwards confirmed), and the insurer knows such to be the case when the policy is assigned to the insured.

7. Any declarations, acts, or course of dealing by the insurers with knowledge of the facts constituting a breach of a condition in the policy, recognizing and treating the policy as still in force and leading the assured to regard himself as still protected thereby, will amount to a waiver of the forfeiture by reason of such breach, and estop the company from setting up the same as a defense when sued for a subsequent loss; and such waiver need not be founded on a new consideration.

Error to circuit court, Rockingham county.

Action by H. C. Pankey and D. T. Click against the Morotock Insurance Company on a policy of insurance. To a judgment against it, defendant brings error. Affirmed.

Conrad & Conrad, for plaintiff in error.  
Sipe & Harris, for defendants in error.

CARDWELL, J. This is a supersedeas, allowed by one of the judges of this court, to a judgment of the circuit court of Rockingham county, on behalf of H. C. Pankey and D. T. Click, defendants in error, against the plaintiff in error, the Morotock (Fire) Insur-

ance Company, of Danville, Va., a Virginia corporation. The proceeding was on motion under section 3211 of the Code of Virginia, on a policy issued by the plaintiff in error, insuring George E. Sipe, general receiver of the circuit court of Rockingham county in a certain cause pending therein, afterwards assigned, as we shall see, by the consent of the company, to the defendant in error; and the notice upon which the proceeding is brought is as follows: "To the Morotock Insurance Company of Danville, Virginia (a Corporation): Take notice, that on Tuesday, the 10th day of October, 1893, being the first day of the circuit court of Rockingham county, Virginia, we will move the said court for judgment against you for the sum of twelve hundred and fifty dollars (\$1,250), with interest thereon from the 15th day of March, 1893, that sum being the amount we are entitled to recover by virtue of a certain contract of insurance made by you on the 3d day of August, 1892, through W. L. Dechert, your agent at Harrisonburg, Va., which contract is policy No. 5,503 in your said company, and was issued by said agent to Geo. E. Sipe, general receiver circuit court of Rockingham county, and his interest therein was by him, on the 18th day of February, 1893, duly assigned to the undersigned, with your consent and approval; which said contract insured the said Geo. E. Sipe, general receiver, etc., for the term of one year from the 3d day of August, 1892, at noon, to the 3d day of August, 1893, at noon, against all direct loss or damage by fire to an amount not exceeding said \$1,250, upon the following described property, to wit: \$250.00 on the part one and part three story frame and shingle roof building, used as an ice manufactory, and situate at the north end of Harrisonburg, Virginia; \$1,000.00 on the tanks, pipes, engine, boiler, and other machinery and implements for the manufacture of artificial ice, while contained in the above-described building,—which property was on the 7th day of March, 1893, destroyed by fire, of which loss due proof was given you on the said 15th day of March, 1893. H. C. Pankey & D. T. Click, by Counsel. Sipe & Harris, p. q." Upon calling the case, October 14, 1893, the defendant company not appearing, the circuit court entered its judgment in favor of the plaintiffs, and against the defendant, for the sum of \$1,250, with interest thereon from the 15th day of March, 1893, till paid, and the costs of this motion. On another day of the same term the following order was entered: "This day came as well the plaintiffs as the defendant by counsel, and, for reasons appearing to the court, the judgment entered in this cause at a former day of this term is set aside. And thereupon the defendant pleaded nil debet, to which the plaintiffs replied generally, and the cause is continued." The defendant on that day filing, with its plea of nil debet, a statement of the grounds of its defense, as provided by

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

section 3249 of the Code, then at the same term, and on October 28th, the parties by counsel again appearing in court, the order of continuance entered at a former day of the term was set aside; whereupon the defendant, by counsel, demurred to the plaintiffs' notice, and moved to dismiss the action, upon the grounds that the notice was not sufficient under the law; second, that it had not been served as required by law; and, third, that the plaintiffs had no right to maintain their action in the way and manner pursued in this action. But the court overruled the demurrer and motion to dismiss, and permitted the plaintiffs to proceed, and required the defendant to go to trial on the notice, which resulted in a verdict by the jury for the plaintiffs in the sum of \$1,250, with interest thereon from the 17th day of May, 1893, till paid. At the trial the defendant company set up, as its defense to the action, the breach of certain conditions set out in the policy, among the number and those relied on the following: "If the subject of insurance be a manufacturing establishment, and it be operated in whole or in part later than 10 o'clock, or if it cease to be operated for more than ten consecutive days, or if the interest of the insured be other than unconditional and sole ownership, or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days, \* \* \* then this policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void." By indorsement on the policy, or attached thereto, and signed by W. L. Dechert, the agent of the company through whom the policy was issued, the clauses, as to additional insurance and against the operation of the factory at night or the use of electric light are waived, and the assignment by George E. Sipe, receiver, etc., to H. C. Pankey and D. T. Click, of the policy assented to, as set out in the notice; so that the only questions remaining to be determined at the trial were whether plaintiffs had an insurable interest in the property, or whether the clause in the policy which provided that, if the ice factory ceased to be operated for more than 10 consecutive days, then the policy should be void, had been waived. The exceptions by the defendant company to the rulings of the trial court are embodied in three bills of exception, duly certified by the court, and we will consider them in their order.

1. This is an exception to the overruling of the demurrer and the motion to dismiss. The notice in this proceeding takes the place of both the writ and the declaration, and the demurrer, therefore, only raised the question as to whether or not there was matter in the notice sufficient to maintain the action. *Henderson v. Stringer*, 6 Grat. 133. We are of opinion that the notice does set out sufficient matter to maintain the action, and that

there was no error in overruling the demurrer.

As to the motion to dismiss: The motion was made on the ground that a proceeding by notice under section 3211 of the Code does not apply to insurance policies. This section provides that "any person entitled to recover money by action on any contract, may, on motion before any court which would have jurisdiction in an action, otherwise than under section 3215, obtain judgment after fifteen days notice." And the contention here is that this proceeding comes under the exception in this statute; that is, that the court did not have jurisdiction, otherwise than under section 3215. But it seems clear to us that the circuit court of Rockingham had jurisdiction of the action under section 3214, which provides that "any action at law, or suit in equity, except where it is otherwise provided, may be brought in any county or corporation, \* \* \* if it be to recover a loss under a policy of insurance, either upon property or life, wherein the property insured was situated, or the person whose life was insured, resided, at the date of the policy." It is further contended, however, that this action comes under the exception mentioned in section 3214; that is, that it is "otherwise specially provided" by section 3251 of the Code. This contention is also untenable because section 3251 only provides "that where an action is brought on a policy of insurance, that the plaintiff need not set forth in the declaration all of the conditions and provisos contained in the policy, nor allege observance thereof or compliance therewith in particulars," etc., and does not give jurisdiction to the courts in such actions, but only defines what is necessary to be set forth, and what not necessary to be set forth, in the declaration in an action on a policy of insurance. But upon another ground the motion to dismiss was properly overruled. As we have seen, judgment by default had been rendered by the court, and, when set aside, the defendant appeared and pleaded to the action, and it was therefore too late for it afterwards to say that it had not been regularly brought into court. *Harvey v. Skipwith*, 16 Grat. 414; also, section 3260 of the Code.

2. This is an exception to the ruling of the circuit court in refusing to give six instructions to the jury as asked for by the defendant company, and in giving in lieu thereof the six instructions with the third, fourth, and fifth modified. It is unnecessary to comment on the merits or demerits of the six instructions asked for by the defendant, for the reason that the instructions as given by the court clearly and fairly lay down the law applicable to the case. Instructions 3 and 4, as asked for, instructed the jury that if the subject covered by the policy sued on was a manufacturing establishment, and ceased to be operative or became vacant or unoccupied for 10 consecu-

tive days prior to the fire, and was so vacant and unoccupied at the time of the fire, then the policy became and was void, and that they must find for the defendant; while the modification, as made by the court, was, unless they further believe from the evidence that the character and use of the property was known to the insurer, and that in view of the known use and character of the manufacturing business conducted on the premises, as an ice manufactory, continuous operation or continuous personal occupancy was not practicable, nor contemplated by the insured and insurer, during a portion of the time covered by the policy. The fifth instruction, as asked for, instructed the jury that, if they believed from the evidence that the interest of the assured in the property insured was any other than unconditional and sole ownership, they should find for the defendant, to which the court added: "But if they further believe from the evidence that at the time of the issuance of the policy in suit, that Geo. E. Sipe, general receiver of the circuit court of Rockingham county, as the owner of the debt of \$3,000, secured by a deed of trust upon the insured premises, had an insurable interest in the property, and that at the time of the transfer of said policy to the plaintiffs in this suit they had become the purchasers at a judicial sale of the insured premises (which sale was afterwards confirmed by said court), and that the insured had knowledge of the character of the plaintiff's title at the time of said transfer, the jury are further instructed that the plaintiffs are not debarred by the provision of the contract aforesaid." The modifications inserted by the court in the instructions permitted the jury to take into consideration all of the dealings of the parties, the knowledge of the insurer of the character of the property and its use, both at the time of the issuance of the policy and after, and especially at the time when the policy was assigned to Pankey & Click, and then to determine whether or not the insurer became estopped from setting up the breach of the condition relied on as a defense. This was eminently proper, and in accordance with the very right of this case. The decisions of the courts of other states upon the question of waiver of the conditions of an insurance policy are too numerous for citation, if not irreconcilable; but it is laid down as the law of this state in the able opinion of Judge Burks, speaking for the court, in *Insurance Co. v. Kinnier's Adm'r*, 28 Grat. 88, and never since questioned by this court, that a condition in a policy of fire insurance, that if the risk be increased by a change of occupancy or other means within the control of the assured, without the consent of the insurers, "the policy shall be void," being inserted for the benefit of the insurers, they may dispense with a compliance therewith, or waive a forfeiture of the policy incurred by a breach thereof, and thereby become estopped from

setting up such condition as a breach in an action for a loss subsequently occurring; "and such waiver need not be in writing, but may be by parol." "Any acts, declarations, or course of dealing by the insurers, with knowledge of the facts constituting a breach of a condition in the policy, recognizing and treating the policy as still in force, and leading the assured to regard himself as still protected thereby, will amount to a waiver of the forfeiture by reason of such breach, and estop the company from setting up the same as a defense when sued for a subsequent loss;" and, further, that such waiver need not be founded on any new consideration.

The evidence in the case at bar clearly showed—in fact it is not controverted—that Dechert, the local agent of the plaintiff in error at Harrisonburg, clothed with the usual authority conferred upon agents of an insurance company, and who issued the policy of insurance to George E. Sipe, receiver, knew what the interest of the assured was in the property covered by the policy; that he was well acquainted with the property; that he was on the premises a few days before the policy was issued; that the ice factory was on the day he was there not in operation; that it was not susceptible of occupancy as a dwelling; that it was never operated in the winter; and that it was not in operation when the assignment of the policy was made from Sipe, receiver, to Pankey & Click. Dechert himself, who was introduced as a witness for the assured, testified to the above facts; and, further, that the ice factory was in operation about a month after the policy was written, he thought, but not after that; that he used the policies of the plaintiff in error mainly on special hazards, and where good companies declined to write; that he did not make any indorsement of waiver as to ceasing to operate on the policy; that nothing was said about such an indorsement, and he did not think it necessary from the nature of the business of an ice factory, and that he knew they were not operated in towns during the winter months; that he was at the sale when Pankey & Click purchased the property, and, when told by Pankey that he wanted it insured, he (Dechert) then got the two policies which had formerly been issued to Sipe, and transferred them to the purchasers on the day of sale. The evidence further shows that Dechert, the agent, was asked by Pankey at the time whether the policies he had assigned to Pankey & Click were as good as new ones; and that he replied that they were as good as new policies, and the money would be paid just as soon if there was a fire; and that on the same day Dechert issued another policy on this same property for an additional insurance of \$1,000, making a total insurance of \$4,000 on the property, shown to have cost from \$10,000 to \$11,000, all of which was

promptly paid up, except the amount of the policy here sued on. This evidence, we think, clearly shows that the plaintiff in error was liable to Pankey & Click, defendants in error, on the policy sued on, and there being no question that there was a total loss by the fire of March 7, 1893, the insurer was liable for the full amount of the policy, \$1,250, and the verdict of the jury was therefore in accordance with the law and the evidence; and, having taken this view, it is useless for us to notice the third and last bill of exception taken by the plaintiff in error, which is an exception to the ruling of the circuit court of Rockingham county in refusing to set aside the verdict of the jury, and grant a new trial; especially is it unnecessary to review this exception, as this case does not in any respect come within the rules laid down as governing in granting new trials, and so often sanctioned by this court. Grayson's Case, 6 Grat. 712, and cases following. We are therefore of opinion that there is no error in any of the rulings of the circuit court, and the judgment rendered in the case at the trial thereof must be affirmed.

(91 Va. 209)

INGLES et al. v. STRAUS et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. March 21, 1895.)

TITLE OF ACT—SUFFICIENCY—CHANGE OF COUNTY SEAT—EQUITY PRACTICE—DISSOLUTION OF INJUNCTION—SUFFICIENCY OF SHOWING—CONTINUANCE.

1. In an act entitled "An act to authorize and provide for a special election in the county of P. as to the removal of the courthouse of said county" may be properly embraced provisions for a second election, in case one should fail to decide the issue, and for the selection of a site, and for other matters in furtherance of the building of a new courthouse.

2. As the judge of a court in which an injunction is pending may in vacation dissolve the same upon reasonable notice (Code 1887, § 3444), the proof to sustain the bill should be taken with all reasonable dispatch.

3. Where there are sixty-seven working days between the granting and a motion for the dissolution of an injunction, upon only ten of which the plaintiff takes depositions, and during one month of which time he takes but one deposition, a continuance should not be granted, especially when the affidavit does not state the names of the witnesses to be examined, or that their evidence is believed to be material.

4. Though a waiver by plaintiff in a bill for an injunction of answer under oath, deprives the answer of its effect as evidence, yet such answer, if it negatives the equities of the bill, must be treated, upon a motion to dissolve, as a denial of plaintiff's case.

5. The dissolution of an injunction rests in the sound discretion of the court, and, unless it appears that there has been an abuse of such power, the action of the lower court will not be disturbed.

6. If a motion to dissolve an injunction comes up on bill and answer, and depositions used as affidavits, and the evidence does not show probable cause from which it may reasonably be inferred that plaintiff will be able to

make out his case upon the final hearing, the injunction will be dissolved.

Appeal from circuit court, Pulaski county.

Bill by A. L. Ingles and others against Franz Straus and others for an injunction. From a decree dissolving an injunction which was granted, plaintiff's appeal. Affirmed.

I. H. Larew and J. O. Wyson, for appellants. J. E. Moore, A. A. Phlegar, and James A. Walker, for appellees.

CARDWELL, J. This case grew out of an act of the general assembly approved January 22, 1894 (Acts 1893-94, p. 41), entitled "An act to authorize and provide for a special election in the county of Pulaski as to the removal of the court house of said county." The act provided that "it shall be the duty of the judge of the circuit court of Pulaski county, upon the petition of not less than one hundred qualified voters, to order a special election in the said county to be held at the several voting precincts thereof, on a day to be designated by him, within thirty days after the presentation of said petition to him for the purpose of taking the sense of the qualified voters of said county whether the county-seat of said county be removed from the town of Newbern at all; and, if so removed, whether to the town of Pulaski, in said county, or to the town of Dublin, in said county." And then after providing for the notice to be given, the manner of conducting the election, and how the ballots should be printed and counted, the act further provides that, if three-fifths or more of the votes cast be cast for the removal of the courthouse to the town of Pulaski, then the courthouse and county seat shall be removed to the town of Pulaski in said county, and the county seat shall be thenceforward at the said town of Pulaski; or, if three-fifths or more of the votes cast be for the removal of the courthouse to the town of Dublin, in said county, then the courthouse shall be removed from the said town of Newbern to the town of Dublin, and the county seat of said county shall be thenceforward at the said town of Dublin; but, if more than two-fifths of the votes cast be cast against the removal of the courthouse, then the county seat shall remain at the town of Newbern; and, in the event that three-fifths or more of the votes cast shall not be cast either for the removal of the courthouse to Pulaski or to Dublin, but if the combined vote in favor of Pulaski and Dublin shall be three-fifths or more of the votes cast in said election, then and in that event the circuit judge of the county of Pulaski should immediately after the said election, and within 20 days thereafter, enter an order in the clerk's office of said county ordering another election to be held within 40 days after the entering of the said order, said election to be held and canvassed, and result ascertained, in like manner, after like notice, as the first election, the act further prescribing how the ballot should be printed, etc.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

On the 14th day of February, 1894, a petition was presented to the judge of the circuit court of Pulaski, signed by 106 of the qualified voters of the county, praying that the special election be ordered in accordance with the act of the legislature, and the judge made the order directing a special election to be held at the several voting precincts in the county on the 6th day of April, 1894. This election was held in conformity in all respects to the act, and resulted in the polling of 2,670 votes, of which 1,489 were counted as votes in favor of removal to Pulaski, 308 as in favor of removal to Dublin, and 923 as against removal. The result was reported by the commissioners of election to the judge of the circuit court of Pulaski on April 9, 1894; and it appearing by their report that two-fifths of the votes cast were not cast against the removal of the courthouse, and that three-fifths or more of the votes cast were not cast either for removal to Pulaski or to Dublin, but that the combined vote in favor of Pulaski and Dublin was three-fifths or more of the votes cast in the election, the judge, on the — day of April, 1894, entered an order directing another election to be held on the 22d day of May, 1894, to determine whether the courthouse should be removed to Pulaski or to Dublin. This election was accordingly held, and the result, ascertained by the commissioners duly appointed for the purpose, was reported to the judge of the circuit court on May 24, 1894. At this election 2,168 votes were cast, of which 1,536 were counted as in favor of the town of Pulaski, 615 for the town of Dublin, and 17 scattering votes counted as against removal; whereupon the judge of the circuit court entered an order declaring that the county seat of the county of Pulaski should thereafter be the town of Pulaski, and appointed commissioners to select a site in the town of Pulaski for a courthouse, and directed all things else to be done necessary to carry out the provisions of the act, and in accordance with the wishes and determination of the voters of Pulaski county, as ascertained by the election held. Immediately upon the entry of this order, the plaintiffs below, and appellants in this court, filed their bill of complaint in the circuit court of Pulaski county; charging fraud in the conduct of the election; that illegal votes had been cast and counted against the town of Newbern, and in favor of the removal of the courthouse; that voters had been intimidated; that the act of January 22, 1894, was unconstitutional, etc.; and praying that the petitioners for the election of April 6, 1894, and the commissioners appointed by the court to choose a location for the courthouse in the town of Pulaski, be enjoined and restrained from doing any further acts in the premises, and for general relief. This bill was presented to the judge of the hustings court of Radford, who refused the injunction prayed for; whereupon it was presented to Hon. Robert A. Richardson, then one of the judges of this court, on

May 30, 1894, and the injunction granted. Answer was promptly filed, denying all material allegations of the bill, and after due notice a motion was made to dissolve the injunction on the 19th day of July, 1894; but, on motion of plaintiffs for a continuance, the hearing of the motion to dissolve was postponed to August 18, 1894, to enable them to complete their depositions. On the 18th of August they again moved for a continuance, which was refused, and the injunction was dissolved. From this decree an appeal with supersedeas was allowed by one of the judges of this court.

Quite a number of questions have been raised in the record, but those not disposed of by the order entered in the case at the November term, 1894, of this court, which, by consent, removed the cause from Wytheville to this court, at Richmond, and continued it to the January term, 1895,<sup>1</sup> may be disposed of by the determination of the two main questions in the case, namely: First. Is the act of January 22, 1894, in conflict with section 15, art. 5, of the constitution, and therefore null and void? Second. Did the judge of the circuit court of Pulaski county err in refusing the motion made by plaintiffs below August 18, 1894, for a continuance, and in dissolving the injunction at that hearing?

We come first to consider the constitutionality of the act in question, the title of which has been quoted; and as the contention of appellants is that the act itself is broader than its title, containing provisions not covered by the title and subjects not embraced in the title, we must first see what is embraced in the act.

The first three sections of the act contain the usual provisions for holding a special election, that special election to determine—First, whether the courthouse shall be removed; second, whether it shall be removed to Dublin or Pulaski. The fourth section simply provides that if, at the first election, more than two-fifths vote against removal, the county seat shall remain at Newbern; but, if three-fifths be cast for removal either to Dublin or Pulaski, the place receiving three-fifths shall be the county seat; but if two-fifths of the vote be not against removal, and neither Dublin nor Pulaski receive three-fifths, then a second election shall be held between Dublin and Pulaski, and the place receiving the highest number of votes shall henceforward be the county seat. After setting out that certain citizens of the town of Pulaski had proposed to donate to the county, in the event of the removal of the courthouse to the town of Pulaski, so much land as may be necessary for a site for the courthouse and jail, and to erect and construct, free of cost to the county, a safe and suitable jail, and to erect and construct, free of cost, except as to the insurance money (the courthouse at Newbern having been burned), and proceeds of the sale of the courthouse lot in

. \* No opinion filed.

the town of Newbern, a suitable courthouse, the fifth section of the act goes on to provide that, before ordering the election provided for in the act, the judge of the circuit court shall take a good and sufficient bond, with surety, in a penalty prescribed, conditioned to cover all the undertakings of the citizens who propose to donate the location and erect the building specified, and then provides for the appointment of three commissioners to select a site in the town of Pulaski for the courthouse and jail if the vote determined that the county seat was to be moved there (similar provisions are made in this section with regard to Dublin); and, further, that, in the event of the removal of the courthouse from the town of Newbern to the town of Pulaski, the old jail at Newbern, and the lot on which it is located, and on which the old courthouse stood, shall be sold as provided by law, and the proceeds therefrom and all the insurance money collected upon the policy carried by the board of supervisors of the county upon the old courthouse shall be applied towards the building of a new courthouse for the county at such place as may be determined on by the election thereinbefore provided; and that it shall be the duty of the supervisors of the county to provide a suitable place in the town to which the courthouse shall have been removed by the vote of the people for a court room and clerk's office for the county, at which all of the courts of the county shall be held until a new courthouse shall have been built and completed. The first clause of section 15, art. 5, of the constitution of Virginia provides that "no law shall embrace more than one object which shall be expressed in its title." A similar provision to this is found in most of the states of the Union, and has been construed in a large number of cases, and by many courts of last resort, both state and federal; and the authorities that will be cited here will be of cases arising in those states having a similar constitutional provision, the words "object" and "subject" being taken to have one and the same signification.

What is the object embraced in the act of January 22, 1894, entitled, as we have seen, "An act to authorize and provide for a special election in the county of Pulaski as to the removal of the court-house of said county"? Plainly, the removal of the court-house of Pulaski county. It is admitted in the argument of this case that the legislature might have passed an act simply removing the county seat and courthouse of Pulaski county to Pulaski City or to any other point in the county. Indeed, this could not be denied; but, instead of doing this, the legislature saw fit to first ascertain the wishes of the voters of the county as to the removal of the courthouse at all, and, if to be removed, to what point they desired it to be removed, and at the same time made all necessary provisions to carry out the wishes

of the voters of the county when ascertained. The general rule governing in ascertaining the constitutionality of an act of this character may be stated thus: If the subjects embraced by the statute, but not specified in the title, have congruity or natural connection with the subject stated in the title, or are cognate or germane thereto, the requirement of the constitution as to the title is satisfied. 23 Am. & Eng. Enc. Law, pp. 238, 239; Johnson v. Harrison, 47 Minn. 578, 50 N. W. 923. Says Judge Mitchell in delivering the opinion of the court in the last case cited: "Any construction of this provision of the constitution that would interfere with the very commendable policy of incorporating the entire body of statutory law upon one general subject in a single act, instead of dividing it into a number of separate acts, would not only be contrary to its spirit, but also seriously embarrassing to honest legislation. All that is required is that the act should not include legislation so incongruous that it could not, by any fair intendment, be considered germane to one general subject. The subject may be as comprehensive as the legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject, and not several. The connection or relationship of several matters, such as will render them germane to one subject and to each other, can be of various kinds; as, for example, of means to ends, of different subdivisions of the same subject, or that all are designed for the same purpose, or that both are designated by the same term. Neither is it necessary that the connection or relationship should be logical; it is enough that the matters are connected with and related to a single subject in popular signification. The generality of the title of an act is no objection, provided only it is sufficient to give notice of the general subject of the proposed legislation and of the interests likely to be affected. The title was never intended to be an index of the law." See, also, Powell v. Supervisors of Brunswick Co., 88 Va. 707, 14 S. E. 543; Lescallett v. Com., 89 Va. 878, 17 S. E. 546; State v. Town of Union, 33 N. J. Law, 350; People v. Briggs, 50 N. Y. 553; Johnson v. Harrison, 47 Minn. 578; 50 N. W. 923; Falconer v. Robinson, 46 Ala. 347; Carter Co. v. Sinton, 120 U. S. 523, 7 Sup. Ct. 650; Mont Clair v. Ramsdell, 107 U. S. 155, 2 Sup. Ct. 391; Ackley School Dist. v. Hall, 113 U. S. 142, 5 Sup. Ct. 371; Unity v. Burrage, 103 U. S. 457-459; and Com. v. Brown (just decided by this court) 21 S. E. 357. The fact that the act authorizes many things of a diverse nature to be done will not affect the sufficiency of the title, provided the doing of such things may be fairly regarded as in furtherance of the general subject of the enactment. 23 Am. & Eng. Enc. Law, p. 239; McGurn v. Board of Education, 133 Ill. 122, 24 N. E. 529; Blake v. People, 109 Ill. 504; Larned v. Tiernan, 110



Ill. 173; *Mix v. Railroad Co.*, 116 Ill. 502, 6 N. E. 42; *People v. Hazelwood*, 116 Ill. 319, 6 N. E. 480. An act entitled "An act to increase boundaries" of the county may embrace provisions for extending the borders of the county, locating the seat of justice, and accepting donations for public buildings. *Blood v. Marcellott*, 53 Pa. St. 391; *Leger v. Rice*, 8 Phila. 167, Fed. Cas. No. 8,210. "An act to authorize the formation of new counties" comprehends provisions relating to boundaries of old counties from which the new are to be formed, also provisions for the organization and sitting of courts in the new counties. *Commissioners v. Spittler*, 13 Ind. 235; *Haggard v. Hawkins*, 14 Ind. 299; *Brandon v. State*, 16 Ind. 197. Provisions regulating the manner of conducting an election to determine a change of the location of the county seat may be embraced under the title "An act to change the location of the county seat of —," specifying the county. The submission of the change of location to the voters, the selection of the new site, and the removal of the county buildings, are all matters properly connected with the "change of the location," which is the subject expressed in the title of the act. *Simpson v. Bailey*, 3 Or. 515; *In re Division of Howard Co.*, 15 Kan. 197; *Woodruff v. Baldwin*, 23 Kan. 494.

The principal question in all cases like this is whether the act is in truth broader than the title; and, if so, then whether the other objects in the act are so intimately connected with the one indicated by the title that the portion of the act relating to them cannot be rejected, and leave a complete and sensible enactment which is capable of being executed (*Cooley, Const. Lim.*, [5th Ed.] pp. 178, 179); and none of the provisions of a statute should be regarded as unconstitutional where they all relate directly or indirectly to the same subject expressed in the title. 5 *Cooley, Const. Lim.*, supra, note 1; *Phillips v. Bridge Co.*, 2 Metc. (Ky.) 219; *Smith v. Com.*, 8 Bush, 112. In *Phillips v. Bridge Co.*, supra, the act of the Kentucky legislature under review was entitled "An act to amend the charter of the Cov. & Cin. Bridge Co."; and the first section of the act increased the capital stock of the company, and the second section conferred power on the bridge company to sell, and on the city of Covington to subscribe to, the capital stock of the bridge company, and in payment thereof to sell the bonds of the city, and levy a tax for the payment of the interest on the bonds; the contention being in that case that the act was in conflict with the clause in the constitution of Kentucky which provides that "no law shall relate to more than one subject that shall be expressed in the title," but the court held otherwise. Chief Justice Simpson, delivering the opinion, says: The power to sell stock to the city of Covington necessarily requires that a power should be conferred on the latter to subscribe and pay for it. The subject is the

same, although it relates to a transaction to which two corporations are parties, one of whom only is named in the title of the act. If, by the act, a power had been conferred on the city of Covington to subscribe for the stock of any other corporation but the one named in the title of the act, then the provision would fall within the constitutional prohibition, and be clearly null and void; but as it is restricted in operation to matters pertinent to the bridge company, and the provisions of the act, so far as they relate to the city of Covington, are apposite to the purpose which was intended to be affected by its passage, and are sufficiently indicated in its title, it is not liable to this constitutional objection. It was certainly not necessary for the legislature to pass two separate acts to effect the object it had in view,—one to enable the company to sell the stock to the city, and another to enable the city to subscribe and pay for it. The constitutional provision relied upon must receive a rational construction, and not one that would lead to such an unnecessary and absurd result. In *Ex parte Upshaw*, 45 Ala. 234, in delivering the opinion of the court, Justice Saffold says: "It would be a violation of the letter and spirit of this constitutional safeguard if such a construction should be put upon it as would forbid the incorporation into a law of everything needful to the proper operation of the one subject to which it is limited."

We might add many other authorities to those already cited, but we deem it unnecessary. Assuming, however, that the act itself is broader than the title, and that such portions of the act as are not embraced in the title are to be stricken out, then, if so much of the act remains as authorized the election to be held to ascertain the sense of the voters as to the removal of the courthouse, which to our mind is clear, then the result is the same, as the general law of the state would have imposed upon the board of supervisors of Pulaski county the duty of providing a site at Pulaski City for the courthouse, jail, and clerk's office, and to erect all needed buildings thereon, when the result of the election determined that the county seat was to be henceforward at Pulaski City, and would have given them the same control over the proceeds arising from the sale of the courthouse lot at Newbern, the remaining buildings thereon, and the insurance money, as the act in question gives them (section 925, Code Va.); and, had they failed to perform this duty, they would have been compellable to do so by mandamus.

It is argued with earnestness by appellants that the title of the act we are now considering provides for but one election while the body of the act, or the act itself, provides for two elections, and for this reason, if no other, the act should be held to be unconstitutional and void. In other words, the contention is that this "second election," as it is called, could only have been provided for by a sepa-

rate act. The weight of authorities, as we have seen, is decidedly against this contention. The second election was but a means to an end, and the authorities go so far as to characterize the contention, under these conditions, that there should have been a separate act, as wholly untenable. Elections are held to ascertain the will of the people,—in the one case, as to who shall fill an office or post of trust; in the other, whether a thing proposed, affecting their interest, shall be done or not done. In the case here there might not have been any occasion for a second election, or a second vote, as it might be more properly called. The end desired was the removal of the county seat if the voters of Pulaski county so determined, and to the place they wished it to be located. Had either Pulaski City or Dublin received three-fifths or more of the votes cast April 6, 1894, there would have been no second vote or election; but by this vote of April 6th it was shown clearly that the will of the people was to remove the county seat from Newbern. And it could not be moved both to Pulaski City and to Dublin; hence the will of the people was again ascertained as to which of the two places the county seat should be moved. The vote at the second election was overwhelmingly in favor of Pulaski City, finally determining in the modes prescribed in the act that the will of the people of Pulaski county was that the county seat be removed from Newbern and to Pulaski City. We can therefore readily see how useless it would have been for the legislature to have provided, by another and separate act, for the second election. In fact, we do not see that the act of January 22, 1894, provides for but one election; namely, an election to ascertain the will of the people of Pulaski county as to the location of their county seat.

We are also unable to see the force of the contention that the act upon its face provides for a "combine" between Pulaski City and Dublin against Newbern. On the contrary, the act appears to fairly and justly deal with Newbern by providing that, if two-fifths of the votes cast be against the removal of the county seat, the county seat shall remain at Newbern; and with the notice of the election duly posted, and accompanied by the order of the judge of the circuit court embodying the provisions of the act as to how the election was to be held, the character of the ballots to be used, and how they were to be counted,—in fact, everything needful to inform the voters of the effect and meaning to be given to their respective ballots,—we think it would be a reflection upon the intelligence of the voters of Pulaski county to hold that they did not understand that a vote cast at the election of April 6th for removal either to Pulaski City or to Dublin would be counted as a vote for the removal of the county seat from Newbern.

Nor are we able to see the force of the contention that "the act confers on Judge S. W.

Williams another office and public trust during his continuance in office as circuit judge, contrary to section 24 of article 6 of the constitution, and that the act invades the province of the judiciary." The act, in our opinion, is a comprehensive provision, not broader than its title, for the removal of the county seat of the county of Pulaski if the people so desired, and that nothing is contained therein "so incongruous that it could not, by any fair intendment, be considered germane to the one general object," but that everything contained in the act "may be fairly regarded as in furtherance of the general object of the enactment." All of its provisions should be regarded as relating directly to the same subject, having a natural connection therewith, and not foreign, in any sense, to the subject expressed in the title. We are therefore of opinion that the act of January 22, 1894, is constitutional and valid; that it does not confer on Judge S. W. Williams another office and public trust, or invade the province of the judiciary in any respect.

We come now to consider the only remaining question, whether the judge of the circuit court erred in refusing the motion of the plaintiffs for a continuance, and in dissolving the injunction, at the hearing August 18, 1894. Section 3444 of the Code of Virginia provides that the judge of the circuit court in which a case is pending wherein an injunction is awarded may in vacation dissolve such injunction after reasonable notice. So that, where the extraordinary remedy by injunction is resorted to, the party or parties resorting to it are fully apprised by the statute that a motion to dissolve may be made at any time after reasonable notice, and the proof thereof to sustain the equities of the bill should be taken with all reasonable dispatch. There were sixty-seven working days between the grant and dissolution of the injunction. Plaintiffs took deposition on only ten days, and on five of the days examined but one witness a day, and between the 19th of July and the 18th of August but one day of the additional time given them to take their proof was utilized, and but one deposition was taken; and the motion for a continuance on August 18th was based solely on the affidavit of one T. W. Covey, which only suggests a desire to take depositions of about "two hundred more" witnesses, but does not state that any of them were known or believed to be material. The motion to dissolve on August 18th was heard on the bill, the answer of the defendants denying specifically and generally, without the least evasion, all of the equities of the bill and every material allegation therein contained, and on the depositions of 28 witnesses examined for the plaintiffs.

It is true that upon a motion to dissolve an injunction the defendant is considered the actor, and upon him rests the burden of disproving the equities of the bill. Such full and positive proof, however, is not exacted

as would be necessary upon a final hearing of the cause, since the effect of requiring such strictness of proof might be to prevent a dissolution until the final hearing. And, for the purposes of such motion, defendant's answer is to be taken as true so far as responsive to the allegations of the bill, and fully and fairly meets complainant's equities without evasion, and without passing over material allegations. High, Inj. § 1470; Miller v. Washburn, 8 Ired. Eq. 181; North's Ex'r v. Perrow, 4 Rand. (Va.) 1. But it may be suggested that this rule applies only to an answer under oath. "If plaintiff waives the answer of defendant under oath, while such waiver deprives the answer of its effect as evidence, and dispenses with the necessity which would otherwise exist of disproving it by testimony equivalent to that of two witnesses, yet such answer, if it negatives the equities of the bill, must be treated upon a motion to dissolve as a denial of plaintiff's case." High, Inj. § 1527; Lockhart v. City of Troy, 48 Ala. 579. The dissolution of an injunction is largely a matter of judicial discretion, to be determined by the nature of the particular case under consideration, and so as to a motion to continue a motion to dissolve; and where this discretion has apparently been soundly exercised by the judge below, and especially where the contrary does not appear in the record, this court will not disturb the action of the lower court. Mining Co. v. Harrison, decided at the January term of this court.<sup>1</sup> "When a motion is made to dissolve an injunction, the court of chancery never continues it unless from some great necessity, because the court is always open to grant, and, of course, to reinstate an injunction wherever it shall appear proper to do so." 1 Bart. Ch. Prac. (New) 467. Applying this established rule to the case at bar, we do not think that the judge of the circuit court erred in overruling the motion for a continuance August 18, 1894. He doubtless did, and rightly, take into consideration, not only the general features of the case, but the injury and inconvenience resulting from a protracted litigation over the location of the county seat. Nor do we think that the judge of the circuit court erred in dissolving the injunction at the hearing on August 18, 1894. "When a motion to dissolve is heard upon the bill, answer, and deposition used as affidavits, and the evidence does not show probable cause from which it may reasonably be inferred that plaintiff will be able to make out his case upon the final hearing, the injunction will be dissolved. If, however, plaintiff's right to relief is supported by evidence regularly taken in the cause in his behalf, and on which he intends to rely upon the final hearing, the injunction will not be dissolved upon bill and answer alone, but will be ordered to stand over to the hearing." High, Inj. § 1526; Cunningham v. Tucker,

14 Fla. 257. Following this rule strictly, when applied to the case at bar, the judge of the circuit court was clearly right in dissolving the injunction, as the depositions read on behalf of the plaintiffs at the hearing did not show probable cause from which it might have been reasonably inferred that plaintiffs would be able to make out their case upon final hearing. Nor did this evidence support plaintiffs' right to the relief set up in the bill. On the contrary, we think that the weight of this evidence is against the allegations of the bill. At all events, it fails to support them, and plaintiffs' counsel admit that, with 28 witnesses examined, the charge of fraud which is the gravamen of the bill, was not made out. Therefore, if the motion to dissolve the injunction rested only on the bill and the answer denying all the grounds of equity set up in the bill, the injunction should have been dissolved. Hogan v. Duke, 20 Grat. 244; Moore v. Steelman, 80 Va. 331; Motley v. Frank, 87 Va. 432, 13 S. E. 26.

We are therefore of opinion, upon a review of the whole case, that the decree complained of, entered by the judge of the circuit court of Pulaski county August 18, 1894, is clearly right, and must be affirmed.

BUCHANAN, J., concurs in the result.

(91 Va. 782)

#### BENTON v. COMMONWEALTH.<sup>1</sup>

(Supreme Court of Appeals of Virginia. March 28, 1895.)

CRIMINAL LAW—NEW TRIAL—WRONGFUL CONTINUANCE—FORMER JEOPARDY—WAIVER BY APPLICATION FOR NEW TRIAL—HOUSEBREAKING—LARCENY.

1. Where the supreme court grants a prisoner a new trial on account of a failure to give him a "speedy trial" in the court below, due to the wrongful continuance of the case at a certain term, he is not entitled to a discharge, but only to the new trial given him.

2. The first count of the indictment charged housebreaking with intent to commit larceny; the second, entering a house without breaking, with the same intent. On the first trial defendant was found guilty as charged in the indictment; on a second trial he was found guilty of grand larceny. It was claimed that as he was, on the second trial, found guilty of grand larceny alone, he was acquitted of housebreaking, and, the verdict on the first trial being general, and silent as to the larceny charged, it was a verdict for housebreaking with intent to commit larceny only, and in effect an acquittal of the charge of larceny. *Held*, that a plea in accordance with the above claim was bad, as by applying for a new trial he waived his former jeopardy.

3. Though housebreaking with intent to commit larceny and grand larceny may be charged in one indictment, the accused may be found guilty of either or both offenses, but only one penalty can be imposed, unless there is a separate count for each.

4. Code 1887, § 4040, provides that "if the verdict be set aside and a new trial granted the

<sup>1</sup> Opinion held by order of court.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

accused, he shall not be tried for any higher offense than that of which he was convicted on the last trial." *Held*, that on the new trial the accused is liable to be convicted of any offense charged in the indictment for which there is no severer punishment than the offense of which he was convicted.

5. It is permissible to charge in different counts of the same indictment an entering of a house without breaking and also by breaking.

6. A meathouse is a storehouse, within Code 1887, §§ 3705, 3706, forbidding the entering a storehouse with intent to commit larceny.

7. Where the record shows, "On motion of the defendant rules were ordered against" certain persons, it will be inferred that the prisoner was personally present in court.

Error to circuit court, Fauquier county.

D. W. Benton was convicted of entering a house with intent to commit larceny, and brings error. Affirmed.

Garrett & Garrett, for plaintiff in error.  
R. Taylor Scott, Atty. Gen., for the Commonwealth.

RIELY, J. The plaintiff in error, D. W. Benton, was jointly indicted with others, in the county court of Loudoun county, at its August term, 1892, under section 3706 of the Code, for housebreaking in the nighttime with intent to commit larceny. He was convicted upon the indictment, and upon a writ of error to this court a new trial was awarded him on the ground that improper testimony had been admitted against him by the trial court. *Benton v. Com.*, 89 Va. 570, 16 S. E. 725. He was again convicted, and a new trial was again granted him by this court, because the case had been erroneously continued at one term for the commonwealth against his protest. *Id.*, 18 S. E. 282. When the case went back the second time for a new trial it was removed to the county court of Fauquier county, in which, at its September term, 1894, a general verdict of guilty was found against him upon the indictment, and his punishment fixed by the jury at confinement in the penitentiary for three years and six months. Judgment was entered upon the verdict, and upon a writ of error to the circuit court the same was affirmed. Upon the calling of the case at the May term, 1894, of the said court, the prisoner moved the court to dismiss the prosecution against him, and discharge him from custody, upon the ground that this court had decided that by the erroneous continuance by the county court of his case for the commonwealth at its February term, 1893, he had been denied the "speedy trial" guaranteed to him by the constitution, and for that reason had reversed the judgment entered against him at the following March term; and that, therefore, he could not be further prosecuted for the offense charged against him. The court refused to discharge him, and in this there was no error. In reversing the judgment this court simply awarded the prisoner a new trial. That was the full extent of the deci-

sion, as the records of this court show. The court did not decide that for such error the prisoner should be discharged from prosecution, and could not have intended that such should be the effect of such reversal. What is meant by the "speedy trial" guaranteed by the constitution of Virginia, and what is the delay in the trial of one charged with felony that shall forever discharge him from prosecution, has been construed and interpreted by the legislature in the enactment of a statute that "every person against whom an indictment is found charging a felony, and held in any court for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of the circuit, or four of the county, corporation, or hustings court, in which the case is pending, after he is so held without a trial," unless the failure to try was due to certain causes mentioned in the statute. Section 4047, Code Va. This, or a similar provision, has long been a part of the statute law of the state (1 Rev. Code 1819, c. 169, § 28, and Code 1849, c. 208, § 36), and this legislative interpretation of the constitution has more than once received the sanction of this court. *Adcock's Case*, 8 Grat. 661; *Brown v. Eppe* (decided at the January term last) 21 S. E. 119; and *Nicholas v. Com.* (decided at the present term) *Id.* 364. The case was then continued on the motion of the prisoner from time to time until the September term of the court. At this term he obtained leave of the court to withdraw his plea of not guilty, and in lieu thereof offered two pleas in bar of the prosecution against him, though styled "pleas in abatement." They were demurred to by the attorney for the commonwealth. The court sustained the demurrer, and rejected the pleas. They involve the same principle of defense, and may be considered together. The first plea sets forth that at the March term, 1893, of the county court of Loudoun county, he was convicted on the indictment, and the following verdict rendered by the jury: "We, the jury, find the prisoner, D. W. Benton, guilty of grand larceny as charged in the within indictment, and fix his punishment at two years' confinement in the penitentiary,"—upon which verdict judgment was entered against him, but that it was afterwards reversed by this court, and a new trial granted him. The second plea sets forth that he was convicted at the November term, 1892, of the said court, and the following verdict rendered by the jury: "We, the jury, find the defendant, D. W. Benton, guilty as charged in the within indictment, and fix his punishment at two years' confinement in the penitentiary;" that judgment was entered thereon against him, and that such judgment was afterwards reversed by this court, and a new trial awarded him. It was contended and ably argued by his counsel that, the prisoner having been convicted at the March term, 1893, of grand larceny only, and the verdict being silent as to the charge

of housebreaking with intent to commit larceny, he was thereby, in effect, acquitted of the offense of housebreaking with intent to commit larceny; and that the verdict at the November term, 1892, being general and silent as to the larceny charged, it was a verdict for housebreaking with intent to commit larceny only, and, in effect, an acquittal of the charge of larceny; and, consequently, that he had been acquitted of both the felonies charged, and was not liable to be again put upon trial for either of the said offenses, although at no time had a verdict of "not guilty" been rendered in his favor, but he had been convicted at separate times, and by different juries, of each of the said offenses. These pleas present the important inquiry: Upon what charge or for what offense may an accused be tried who has been convicted upon a single count, wherein more than one offense is distinctly or substantially charged, where the verdict of conviction has been set aside, and a new trial granted him? The indictment in the case at bar contained only two counts. The first was for breaking and entering in the nighttime the meathouse of Mary Neville, with intent to steal the goods and chattels of Robert Neville; and the second for entering the said house in the nighttime without breaking with the intent aforesaid. Each count also charged the actual larceny of a quantity of meat of Robert Neville, in the said house, of the value of \$50. There was no separate count for the larceny. Housebreaking with the intent to commit larceny and grand larceny are distinct offenses under the law, and to each is affixed its own penalty, but they may be, and often are, one continued act, and may be charged in the same count of an indictment. Upon such count the accused may be found guilty of either or both offenses, but there can be only one penalty imposed. *Com. v. Hope*, 22 Pick. 1; *Josslyn v. Com.*, 6 Metc. (Mass.) 236; and 2 Blash. Cr. Proc. § 144. If it is desired to punish for both offenses in a case of this kind, there must be inserted in the indictment a separate count for the larceny, as was done in *Speer's Case*, 17 Grat. 570. An acquittal, where there is but one count, is a bar to prosecution for all offenses therein charged. If there is a conviction generally, and it is submitted to, this is also a bar to all such offenses. If there is a conviction for larceny only, and it is submitted to, this too is a bar to further prosecution for all offenses charged. It is when the conviction is not submitted to, but a new trial is granted, that the difficulty arises. When an accused is convicted of an offense, and applies for and obtains a new trial, he thereby waives his former jeopardy, and subjects himself to further trial. As a general principle, this cannot be questioned. But to what extent does his waiver go? Where two distinct felonies are charged in the same count of an indictment, as here, is it limited to such one of the

offenses charged as to which he was convicted, or does it extend to the whole indictment, and to both the felonies charged? Prior to the decision of *Stuart's Case*, 28 Grat. 950, the question here involved had not been the subject of legislation in Virginia, but the general assembly, in the revision of the criminal laws, soon thereafter, with the manifest purpose of changing the rule laid down in that case, added to section 36 of chapter 208 of the Code of 1849, the following: "But if the verdict be set aside on the motion of the accused, and a new trial awarded, on such new trial the accused shall be tried and such verdict may be found and sentence pronounced as if a former verdict had not been found." Acts 1877-78, p. 279, c. 311. While that act was in force, William Briggs was indicted in the county court of Culpeper county for murder, and convicted of murder of the second degree. Upon a writ of error to the circuit court of that county the verdict was set aside, and a new trial awarded. When the case came on to be tried anew, he offered a plea, in substance, that by the verdict on the former trial he had been acquitted of murder of the first degree, and could not be again tried for that offense. The court rejected the plea, and on the trial he moved the court to instruct the jury to the same effect, which the court refused to do. The case came before this court upon a writ of error which brought in review the statute aforesaid, and it was sustained as constitutional. *Briggs v. Com.*, 82 Va. 554.

In the general revision of the civil and criminal laws made by the Code of 1887 the rule prescribed by the act of 1877-78 was modified, and this provision: "If the verdict be set aside, and a new trial granted the accused, he shall not be tried for any higher offense than that of which he was convicted on the last trial,"—was enacted in its stead. Code 1887, § 4040. This statute has now to be construed in respect to the case at bar. Any question as to its validity is settled by the authority of *Briggs v. Com.*, cited above. What is meant by "higher offense" than that of which he was convicted at the last trial? What is to be the line of demarcation between offenses so as to determine the offense or offenses of which the accused may be tried where a new trial is awarded? All offenses are divided by law into two classes,—felonies and misdemeanors. Between them there is no trouble in applying the statute. It is between the various felonies themselves as a class that the difficulty arises in applying the rule of the statute. It is not easy, in construing the statute, to lay down an inflexible rule that will apply to all cases. As a general rule, however, it is to be determined by the maximum of the penalty affixed to the offense. Into some offense some other element besides the measure of penalty may

perhaps enter, and affect the distinction. If so, such case will be dealt with when it arises. The obvious intent of the statute is that the accused person should not on a new trial be subject to the risk of greater punishment than that with which the offense of which he was convicted on his last trial was punishable, but that he should remain liable to be convicted of any offense charged in the indictment for which there was no severer penalty than for the offense of which he was convicted. As a general rule, then, the maximum of punishment must determine whether offenses, when compared with each other, are of higher, lower, or of equal degree. The legislature, in passing the statute, had in mind, no doubt, such offenses as murder, malicious shooting, etc., with intent to maim, etc., robbery, larceny, and the like, in which the grades of the offense are very distinct. Thus, on an indictment for murder, the accused may be convicted of murder of the first degree, murder of the second degree, voluntary manslaughter, or involuntary manslaughter. And the legislature intended by the statute that a person indicted for murder and convicted of murder of the second degree should not, if granted a new trial, be again liable to conviction for murder of the first degree, for which death is the penalty, while the maximum punishment for murder of the second degree is confinement in the penitentiary for 18 years; or, if convicted of voluntary manslaughter, for which the maximum punishment is confinement for 5 years in the penitentiary, should not again be put upon trial for either murder of the first or second degree; and that a person prosecuted for malicious shooting with intent to maim, etc. (under section 3671 of the Code), for which the highest punishment is confinement for 10 years in the penitentiary, and convicted of unlawful shooting with such intent, for which the highest punishment is confinement for 5 years in the penitentiary, should not on a new trial be again tried for the higher offense of malicious shooting with the intent aforesaid, because that is higher, as measured by the severity of the penalty, than the offense of unlawful shooting with such intent; and that one indicted for grand larceny and convicted of petit larceny, if awarded a new trial, should not be tried again for grand larceny, for which the maximum penalty is 10 years' confinement in the penitentiary, while petit larceny is only a misdemeanor, and punishable by confinement in jail, or by a fine, or by both. Other illustrations of criminal offenses readily suggest themselves. Applying this rule to the case at bar, it will be seen that the offense of housebreaking in the nighttime, with intent to commit larceny, and grand larceny, are of equal degree. Both are felonies, and each is punishable with confinement for 10 years in the penitentiary. That is the maxi-

mum punishment prescribed for each of said offenses. The plaintiff in error was convicted on one trial for the offense of housebreaking with intent to commit larceny, and on the other for grand larceny; but, both being of equal degree, upon applying for and obtaining a new trial on each occasion, he waived his jeopardy as to both, both being charged in the same count, and he was rightly put upon trial upon the whole indictment. The trial court therefore committed no error in sustaining the demurrer to the pleas and rejecting them.

His pleas being rejected by the court, he thereupon demurred to the indictment. The first ground of demurrer was based on the objection that its two counts were repugnant to each other, because the first count charged the accused with breaking and entering the meathouse of Mary Neville, and the second count charged him with entering it without breaking. The two counts are in the usual and approved form for the offense charged, and the same which it is the constant practice to join in one indictment. It is entirely permissible to describe the offense committed in various ways in separate counts of the same indictment, so as to meet the evidence as it may be adduced on the trial. 1 Bish. Cr. Proc. §§ 448, 449; Dowdy v. Com., 9 Grat. 727; and Smith v. Com., 21 Grat. 809. The other ground of demurrer was that the indictment did not charge the breaking and entering, or the entering without breaking, with intent to commit larceny, any house specified in the statute since its amendment. The statute before it was amended, after specifying certain houses, as "shop, office, storehouse, warehouse, and banking house," used the words "or other house" (sections 3705 and 3706 of the Code), but in the amendment (Acts 1893-94, p. 229) the words "or other house" were omitted. It was, therefore, claimed that "meathouse" is not embraced within the description of any of the houses specified, and that the breaking or entering such house with the intent to commit larceny is not now a criminal offense. The word "storehouse" remains in the statute as amended, and is defined to be "a building for keeping goods of any kind, especially provisions." A meathouse, as popularly understood, is a building in which meat is stored and kept. It is by its very definition a storehouse, and synonymous with it. And while it is better, as has frequently been said by this court, to describe an offense in the very words of the statute, yet it will be sufficient to do so in any other words that are synonymous, and which plainly bring the case within the statute, except where certain technical words are necessary to be used in an indictment in charging particular offenses. Howel's Case, 5 Grat. 664; Young's Case, 15 Grat. 664; Taylor's Case, 20 Grat. 825; and Dull's Case, 25 Grat. 965.

The demurrer to the indictment was therefore properly overruled.

The prisoner was then rearraigned, pleaded not guilty, and was put upon his trial. Exception was taken by him to the charge given by the court to the jury, and it is the subject of the fifth bill of exceptions. The basis of this exception is the same as that on which the two pleas disposed of above were founded, and it is also that of the several bills of exception taken to the admission of certain evidence on the trial. This ground of defense having been disposed of adversely to the prisoner in the consideration of the pleas, these exceptions fall with it, and need not be further noticed.

The last assignment of error to be noticed is the claim that the record does not show that the prisoner was personally present in court when his case was continued on the 24th day of September, 1894, to a later day of that term of the court. The statement of the record which is relied on for this claim of error is as follows: "Case called and continued for defendant, by counsel, until Monday next, 1st Octo., 1894." But this is not all that the record discloses. On the same day, and immediately following the above, is the statement that "on motion of the defendant rules are awarded him against" certain named persons (who were no doubt his witnesses) to show cause why they should not be fined for their failure to appear that day before the court in obedience to summons previously executed on them. The order of the court is apparently all one, and made at the same time, and the necessary inference from it is that the prisoner was personally present in court when the motion was made by his counsel, and the case continued. As was said by the court in *Lawrence's Case*, 30 Grat. 851: "He had a right, of course, to appear by attorney, and the fact that he so appeared does not show that he was not then personally present in court; and if it otherwise appears from the record that he was then personally present, it will be sufficient." The whole record may be looked to, and, if anything appears in it from which his presence must be necessarily inferred, it is all that the law requires. *Lawrence's Case*, supra; *Sperry's Case*, 9 Leigh, 623; *Cluverius' Case*, 81 Va. 787; 1 Bish. Cr. Proc. § 1353. So, if it were conceded—which we do not do—that it is necessary that one indicted for a felony should be personally present in court when a motion is made by his counsel for a continuance of the case, and that the record should show this, the record here, if it does not expressly affirm the fact of the personal presence in court of the accused when his case was continued, clearly negatives the claim that he was not present; and this assignment of error is not sustained.

We find no error in the judgment of the circuit court of Fauquier county, and it must be affirmed.

# MILLER v. COMMONWEALTH.<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 4, 1895.)

ASSAULT WITH INTENT TO KILL — EVIDENCE — INDICTMENT — INDORSEMENT BY GRAND JURY.

1. An indictment for malicious assault with intent to kill does not involve a charge of more than one offense, because it alleges a felonious assault by defendant, this being an ingredient to the other crime charged.

2. The court may read to the jury the law fixing the punishment provided for the crime.

3. While M. and B. were fighting, and while B. was on top of M., the latter's son struck B. with an iron weight, and ran, and while running he was shot by defendant, who remarked, that he shot at the son of a b—h to kill him. *Held*, that a verdict of guilty of assault with intent to kill was justified.

4. The fact that the record inadvertently names a juror twice does not show that defendant was tried by a jury of 13 men.

Error to circuit court, Gloucester county.

George Miller brings error to a judgment entered on a verdict finding him guilty of assault with intent to kill.

J. N. Stubbs, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

HARRISON, J. George Miller was indicted April 4, 1894, in the county court of Gloucester, charged with malicious assault with intent to kill Thomas Sperry. On the 2d day of July, 1894, the accused was arraigned for trial, convicted, and a verdict rendered against him fixing his punishment at two years in the penitentiary. The prisoner then moved the court for a new trial. This motion was continued until the next day, July 3, 1894, when the motion was then overruled, and the prisoner sentenced in accordance with the finding of the jury. The prisoner obtained a writ of error to the circuit court of Gloucester, which court affirmed the judgment of the county court, and thereupon a writ of error was obtained to this court.

There are numerous grounds of error assigned in the petition, which will now be considered.

First. It is alleged that there are irregularities and imperfections in issuing the venire facias furnishing the list of jurors and summoning the jury, and that the court erred in not sustaining the prisoner's motion to quash the venire facias and the sheriff's return thereon.

We have examined the record carefully, so far as it relates to the subject of this assignment of error, and we find that the law has been in all respects fully complied with in summoning the jury in this case. This subject has been so recently and fully discussed by this court that we deem it unnecessary to say more. See *Nicholas v. Com.* (decided by this court at the present term) 21 S. E. 364.

The second assignment of error is that the

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

court did not sustain the prisoner's motion to quash the indictment on the ground that on its face said indictment had only one count, and that there were two distinct offenses charged in said count, namely, a felonious assault and an attempt to kill and murder. The third assignment of error is that the court overruled the prisoner's demurrer to the indictment for the same reason assigned in the second assignment of error.

As these two assignments of error relate to the same subject, they can be disposed of together. Counsel is mistaken in assuming that the count in the indictment charges a felonious assault separate and apart from the substantive offense of malicious shooting with intent to kill and murder. The charge of felonious assault is an ingredient of the felony which the accused was indicted for attempting to commit. While it is true that the indictment charges a felonious assault, it is the assault which is embraced in the substantive offense charged, so that there is in reality but one offense charged. The indictment is substantially correct, and the demurrer was properly overruled. *Hardy v. Com.*, 17 Grat. 592.

The fourth assignment of error is that the court erred in permitting the clerk to charge the jury by reading the amended section 3888, Code Va., as amended in Acts Assem. 1893-94.

The act referred to contains the law which fixes the punishment visited upon the prisoner for the offense charged, and it was properly read to the jury.

The fifth assignment of error is that the court erred in not granting a new trial on the prisoner's motion upon the ground that the verdict was contrary to the law and the evidence.

The following are the facts proved on the trial, and certified in the record before this court: "At N. R. Gray's store, in Gloucester county, Va., on the — day of February, 1894, were Jacob Miller, Alexander Berry, N. R. Gray, and Smither. Jacob Miller and Alexander Berry got into a quarrel, and Jacob Miller struck Alexander Berry, and then N. R. Gray, the owner of the store, told Jacob Miller and Alexander Berry to go out doors and fight it out, and no one should interfere. They went out, and commenced the fight, and Jacob Miller was on Alexander Berry. Tom Berry, the son of Alexander Berry, struck Jacob Miller with an iron weight on the back of his head, and split it open, and just at that time N. R. Gray and George Miller came out of the store, and Tom Berry was seen running down the road, and George Miller [the accused] fired a pistol at Tom Berry at a distance of twenty or twenty-five yards. After George Miller fired, he told Mr. Gray he shot at the son of a b—h to kill him." These are the facts certified in the record, and they fully justify the verdict of the jury, and the court properly overruled the motion for a new trial.

The sixth assignment of error is that the prisoner was tried by a jury of 13 instead of a jury of 12, and that, therefore, the proceeding was illegal. The foundation for this statement is found in the printed record of the trial, which says that after "the prisoner was arraigned and plead not guilty, as charged in the indictment, and a panel of twenty jurors, summoned by the sheriff of this county, in accordance with the venire facias this day issued by the clerk, and from a list furnished by the court, were examined by the court, and sixteen were found free from all legal exceptions, and qualified to serve as jurors according to law, thereupon the prisoner, by his attorney, struck from the panel four of the said jurors, leaving the following twelve jurors against whom there was no objection, namely, Willie Moore, W. D. Davis, Willie Pointer, Thos. E. Lambuth, A. N. Rowe, J. W. Blake, Jas. T. Hall, Willie Pointer, Ransone White, S. B. Taylor, M. C. Richardson, C. A. Williams, and Geo. W. Deal, who were sworn," etc. It will be observed that in making out this record the name of Willie Pointer is printed twice, thus making it appear that there are 13 jurors, but the record shows that in the list of jurors furnished by the judge of the court 20 names appear, and the name of Willie Pointer appears in that list but once. It also appears from the list of jurors returned by the sheriff that there were the same 20, and the name of Willie Pointer occurs but once. There being, then, but one Willie Pointer on the jury summoned, it is impossible that there could have been more than one on the list that tried the prisoner, and the record shows that 16 of these jurors were found free from all exception, and qualified to certify; and that the prisoner, by his attorney, struck from this panel 4, leaving, as the record says, 12 jurors, against whom there was no objection. It is perfectly manifest from the whole record that there were but 12 jurors who tried the prisoner, and that the name of Willie Pointer, one of said jurors, was inadvertently repeated in making up the record, and therefore this assignment of error is without merit.

The seventh assignment of error is that "it must appear affirmatively in the record that the prisoner was present in court; that is, the prisoner was set to the bar of the court, etc. On an examination of the record it nowhere appears where the prisoner was present in court."

This assignment of error is not sustained by the record. When the prisoner was arraigned and tried, the record of that day's proceedings says: "This day came the commonwealth by her attorney, as well the prisoner, with J. N. Stubbs, Esq., as his attorney, whereupon the prisoner, by his attorney, moved the court to quash the venire facias." The trial proceeded without interruption on that day to a conviction of the prisoner. The court then adjourned until the next day, July



3, 1894, to consider the prisoner's motion for a new trial, and on the day last named the record of that day's proceedings shows the following: "This day came the commonwealth, by her attorney, as well the prisoner by his attorney, for the purpose of hearing the motion made on yesterday to set aside the verdict of the jury, and grant the prisoner a new trial, and, being fully argued, doth overrule the said motion, and refuses to set aside the verdict, and the prisoner is remanded to jail; to which ruling of the court the prisoner, by his counsel, excepted."

These are the only days covered by the prisoner's trial. It appears affirmatively that he was in court at his trial and conviction on the first day. It also appears that he was present the next day to hear the court's decision on his motion for a new trial, because the record quoted says "the prisoner is remanded to jail," and he could not be remanded to jail without having been in court. On the subject of the necessity for the presence of the prisoner in court, see *Benton v. Com.* (decided at the present term of this court) 21 S. E. 495, and the authorities there cited.

Though not assigned as error in the petition, it is argued by counsel for the prisoner in his brief that the record is defective, because it does not show that the indictment was ever found by a grand jury, by having indorsed on the indictment the words, "A true bill," signed by the foreman, which, it is insisted, is absolutely essential.

This view is not in accordance with the Virginia authorities, which hold that this indorsement on the indictment of "A true bill," signed by the foreman, is not necessary. See *Cawood's Case*, 2 Va. Cas. 527; *Price v. Com.*, 21 Gr. 846; *White v. Com.*, 29 Gr. 824.

For the foregoing reasons we are of the opinion that there is no error in the judgment of the circuit court, and the same must be affirmed.

(91 Va. 202)

#### CONRAD v. SMITH.<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 4, 1895.)

#### NEGOTIABLE INSTRUMENTS — RIGHTS OF SURETIES.

T. and K. made a note of \$2,400, with G. as indorser. After its maturity, it was taken up by two notes of \$1,200, each made by K., the first of which was indorsed by G. and O., and the other by J. When these notes became due, after one renewal, K. induced C. to become sole indorser on a note of \$1,200, with which was taken up the note indorsed by G. and C., on K.'s assigning to C., as security, the old note of T. and K., for one-half of which K. had a claim against T., and also a bond held by K. against T. When the note on which J. was indorser became due, it was taken up by a note of K.'s, indorsed by G. and J. *Held*, that G. had no interest in the collaterals held by C.

Appeal from corporation court of Winchester.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Judicial settlement of the estate of James B. Taylor, deceased, wherein Holmes Conrad and German Smith claimed an interest in the fund before the court. From the judgment rendered, Conrad appeals. Reversed.

Jno. J. Williams, for appellant. Barton & Boyd, for appellee.

RIELY, J. On the 16th of December, 1873, James B. Taylor and W. G. Kiger made their joint negotiable note to the Shenandoah Valley National Bank of Winchester for \$2,400, payable 120 days after date, and German Smith indorsed it. When it fell due, on the 18th of April, 1874, it was not paid; and, being protested for nonpayment, the liability of Smith for its payment was thereby fixed. In the meantime Taylor had died. The note remained in bank, unpaid, until the 15th of May, 1874, when, the bank demanding its payment, Kiger, for the purpose of raising the money to pay it, made two notes of \$1,200 each, payable 120 days after date. On one of the notes, German Smith became first indorser, and Holmes Conrad second indorser; and on the other John P. SeEVERS was the only indorser. When these notes matured, on the 15th of September, 1874, they were renewed by the maker with the same indorsers; but when the latter notes became due, on the 16th of January, 1875, Kiger induced Conrad to become the sole indorser on another note for \$1,200, with which was taken up the note for that amount on which German Smith was first indorser and Conrad second indorser, upon the agreement of Kiger to assign to Conrad, as collateral security to indemnify him against loss by reason of such indorsement, the old note of Taylor and Kiger for \$2,400, which had been paid by Kiger on the 15th of May, 1874, when the first notes for \$1,200 were executed, and for one-half of which Kiger had a claim against the estate of his joint maker, James B. Taylor, and upon the further agreement to assign also a bond for \$1,000, subject to several large credits which he held against the said estate. The note so given by Kiger with Conrad as sole indorser was subsequently paid by the latter. When the other note for \$1,200, which was indorsed by SeEVERS, fell due, on the 16th of January, 1875, it was taken up by a new note made by Kiger, with German Smith as first indorser, and SeEVERS as second indorser. This note, when it matured, was paid by Smith. It is contended by the counsel for German Smith that the two notes for \$1,200 each, given on the 15th of May, 1874, were merely in renewal of the note of Taylor and Kiger for \$2,400, and that Smith having been the sole indorser thereon, and having paid one of the two notes for \$1,200, he was subrogated to the right of the bank for the sum he had so paid, and that he, and not Kiger, or Conrad, as assignee of Kiger was entitled to collect the one-half of the note for \$2,400 from the estate of James B. Taylor. The court below,

by its decree, entered in a creditors' suit brought for the settlement of Taylor's estate, held that Smith and Conrad were entitled to share proportionately the said claim; and from this decree Conrad appealed.

The facts and circumstances disclosed by the record do not sustain the contention of the counsel for the appellee. The two notes for \$1,200 executed on the 15th of May, 1874, were made by Kiger alone, to raise the money to pay the protested note of Taylor and himself. They were not given at or as of the maturity of the old note. They had not the same makers as it. The indorsers, with the exception of German Smith, were different persons and new parties, with different liabilities. Conrad had no knowledge of the use that was to be made of the proceeds of the notes, and did not then know of the existence of the note for \$2,400, nor for several years afterwards. The two notes were discounted by the bank, and their entire proceeds passed, not to the bank, to be applied by it to the payment of the note of Taylor and Kiger, for \$2,400, but to the credit of the private and personal running account of Kiger with the bank, subject to his check. He drew his individual check on the bank for the payment of the Taylor and Kiger note, and it was paid out of the moneys with the bank to his credit. It was not simply stamped "Paid," but was indorsed, and the indorsement officially signed, by the cashier of the bank, in his own handwriting: "Paid by Wm. G. Kiger May 15th, 1874. H. M. Brent, Cashier;" and, when so canceled, was delivered to Kiger. These facts show conclusively that the execution of the two notes for \$1,200 each on the 15th of May, 1874, was a separate and independent transaction, and that they had no connection with the note of Taylor and Kiger for \$2,400. When discounted by the bank, they constituted a new loan from it to Kiger, and were not in form or substance a renewal of the old note. The latter was paid by Kiger, one of the joint makers; the liability of Smith, the indorser, thereby discharged; and the note extinguished, except as evidence of a claim by Kiger to be reimbursed by Taylor's estate for his part. No claim against Taylor's estate through or by means of the said note, or right of subrogation, could accrue to Smith. His liability as indorser was absolutely discharged, and his entire connection with the note severed, when Kiger paid it. To Kiger alone remained any right on the said note, and it was to him only evidence of his right to recover one-half of it from Taylor's estate. He had therefore clearly the right to assign it to Conrad, and Conrad the right to collect it, without in the least infringing on any right of Smith, for he had no claim to it, either at law or in equity.

Nor has he just cause to complain of the result. He was the sole indorser on the note of Taylor and Kiger for \$2,400, both of whom were insolvent when it matured. By

the payment of it by Kiger from the proceeds of the two notes for \$1,200 each, he was discharged from that entire liability. When Conrad became sole indorser on the note for \$1,200, on which Smith was prior indorser to Conrad, he was released from liability on that note also. It was a new and self-imposed liability when he became first indorser on the other note for \$1,200, on which Seevers had been the only indorser, and he cannot complain, at least of Conrad, that he had to pay it.

The corporation court of the city of Winchester erred in apportioning between Smith and Conrad the claim of Kiger against the estate of Taylor for one-half of the note for \$2,400 which Taylor and Kiger jointly owed, and which Kiger wholly paid; and its decree, which is appealed from, must be reversed.

(116 N. C. 1052)

#### STATE v. CROWELL.

(Supreme Court of North Carolina. April 18, 1895.)

#### SEDUCTION—LIMITATION—INSTRUCTIONS—SENTENCE.

1. Code, § 1177, which exempts certain crimes, including "deceit," from the two-years statute of limitations, applies to seduction under promise of marriage.

2. One "who has never had illicit intercourse, and who is chaste and pure," is a sufficient definition of a virtuous woman, and the refusal to add thereto "that she must have a mind free from lustful and lascivious desires" was proper.

3. Acts 1885, c. 248, providing that one convicted of seduction under promise of marriage "shall be fined or imprisoned," at the discretion of the court, does not authorize the imposition of both fine and imprisonment.

4. The fact that a sentence both of fine and imprisonment was imposed, when only one was authorized, does not entitle defendant to a new trial, but the case will be remanded for proper sentence.

Appeal from superior court, Catawba county; Timberlake, Judge.

L. A. Crowell was convicted of seduction under promise of marriage, and appeals. Affirmed.

Jones & Tillett and D. W. Robinson, for appellant. The Attorney General, for the State.

CLARK, J. The Code (section 1177) excepts from the two-years statute of limitation perjury, forgery, malicious misdemeanors, and deceit. There has never been such an indictable offense as "deceit," but the meaning of this section has always been that misdemeanors the gist of which was malice or deceit are within the exception. In *State v. Christianbury*, 44 N. C. 46, it was held that, there being no such offense as deceit, it would apply to "cheating by false token," of which deceit was the gist, but would not include "conspiracy to cheat," "the gist of which offense is the conspiracy, and the cheating but an aggravation." That

decision did not restrict deceit to "cheating by false token," but instanced that as an offense coming within the general description of misdemeanors by deceit. The statute against seduction under promise of marriage (Acts 1885, c. 248) had not then been enacted. In *State v. Horton*, 100 N. C. 443, 449, 6 S. E. 238, Smith, C. J., says that this statute "plainly contemplates a seduction, brought about by means of a promise of marriage, in the nature of deceit." Indeed, deceit is the very essence of this offense,—the warp and woof of it, so to speak. There is more warrant for so holding it than the court had for placing cheating by false token under that head, for this offense is perpetrated solely by reason of the trust and confidence placed in the perpetrator by the woman in consequence of the intimate relation existing between them, and by her relying on the promise of marriage, by means of which he procures the indulgence of his desires. In cheating by false token there is not this dependence and breach of confidence and trust. The attorney general properly conceded that this crime would not have come under the other exception in this section,—“offenses committed in a secret manner.” That clearly applies to crimes committed in such manner that the offender is unknown to the person injured.

The act of 1891 (chapter 205), defining felonies and misdemeanors, makes this offense, if committed since the act, a felony, as to which there is no statute of limitation. But that act does not apply to this offense, which was committed prior to its enactment. When there is a prayer to put the charge in writing, the entire charge must be written. *State v. Young*, 111 N. C. 715, 16 S. E. 543. But, as was said by Smith, C. J., in *Currie v. Clark*, 90 N. C. 355, 361: “It is not the policy or purpose of the statute, nor does the language bear such rigorous construction, as to forbid any and all oral expressions from the presiding judge. \* \* \* This would be to subordinate substance to form, and subserve no useful purpose.” The defendant prayed the court to instruct the jury that the offense was barred by the statute of limitations. This the court declined, but orally told the jury, instead: “The statute of limitations has nothing whatever to do with this action, and you will not take it into consideration.” The defendant has the full benefit of the exception that the prayer was refused, and has not cause to complain that the judge did not write down the incidental oral remark.

Nor was there error in refusing to give the definition of an innocent and virtuous woman asked by the defendant. The law looks at conduct, and motive only as shown by conduct, and not at thoughts undisclosed and natural impulses not acted on. The precedents sustain the definition given by the court that an innocent and virtuous wo-

man is one “who has never had illicit intercourse with any man, and who is chaste and pure.” *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574. The court properly refused to go further and charge that the prosecutrix must have had “a mind free from lustful and lascivious desires.”

The court erred, however, in imposing both fine and imprisonment. The act of 1885 (chapter 248) provides that the defendant, upon conviction of this offense, “shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the penitentiary not exceeding five years.” The disjunctive “or” cannot be construed “and” in a criminal statute when the effect is to aggravate the offense or increase the punishment. *State v. Walters*, 97 N. C. 489, 2 S. E. 539. The latter part of the clause, “and may be imprisoned in the penitentiary,” etc., means: “And, if the alternative of imprisonment is selected by the judge, the imprisonment, in his discretion, may be in the penitentiary, not exceeding five years.” This, however, does not entitle the defendant to a new trial, but the case will be remanded, that sentence may be imposed at the next term of Catawba superior court in conformity to this opinion. *State v. Walters*, supra; *State v. Lawrence*, 81 N. C. 522; *State v. Queen*, 91 N. C. 659. The verdict stands. His honor holding the court below will, in the exercise of his discretion, within the limits allowed by law, impose either fine or imprisonment. Error. Remanded.

(116 N. C. 296)

## LOVE v. CITY OF RALEIGH:

(Supreme Court of North Carolina. April 16, 1895.)

CITIES—POWERS—NEGLECT OF AGENTS—HARMLESS ERROR.

1. A city has no implied authority to provide for a pyrotechnic display on the Fourth of July.

2. A city, not having authority to provide for a pyrotechnic display in celebration of the Fourth of July, is not liable for injuries to persons, caused by the negligence of its agents, in control of a display, ordered by it.

3. Error in the exclusion of evidence is not ground for reversal where appellant, if the evidence had been admitted, could not have recovered.

Appeal from superior court, Wake county; Bynum, Judge.

Action by E. H. Love against the city of Raleigh for injuries received through the negligence of defendant's agents in managing a pyrotechnic display. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Battle & Mordecai, for appellant. J. N. Holding and Strong & Strong, for appellee.

EVERY, J. The principal questions presented by this appeal are: First, whether the city of Raleigh was empowered by any general or special statute to purchase fire-

works, and order a committee to direct the manner of making the display; second, whether, if no such authority had been delegated to the municipality, it would be answerable for the wrongful conduct of agents acting within the scope of its instruction to them, but in the exercise of authority not delegated to it by the legislature. It will possibly aid us in the elucidation of these questions to lay down some general fundamental rules defining and fixing the limits of municipal powers. So long as a city keeps within the purview of its delegated authority, it is not responsible for any act of its agents, done in the exercise of its judicial, discretionary, or legislative powers, except where subjected to such liability by some express provision of the constitution or of a statute. *Moffitt v. Asheville*, 103 N. C. 255, 9 S. E. 695; *Hill v. City of Charlotte*, 72 N. C. 56; 1 *Shear. & R. Neg.* § 262; *Robinson v. Greenville*, 42 Ohio St. 625. But when such a corporation is acting in its ministerial capacity, or its corporate, as distinguished from its governmental, character, in the exercise of powers conferred for its own benefit, and assumed voluntarily, it is answerable for the torts of its authorized agent, subject to the limitation that such wrongful acts must not only be within the scope of the agency, but also within the limits of the municipal authority. *Moffitt v. Asheville*, 103 N. C. 254, 9 S. E. 695; 2 *Dill. Mun. Corp.* (4th Ed.) § 968 (766). In the section cited above, Judge Dillon says: "If the act complained of necessarily lies wholly outside of the general or special powers of the corporation, as conferred by its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act, or whether it be done by officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action." Referring especially to the wrongful acts of agents of municipalities, the same author says in a subsequent section (969a): "As to torts or wrongful acts not resting upon contract, but which are ultra vires in the sense above explained (viz. wholly and necessarily beyond the possible scope of the chartered powers of the municipality), we do not see on what principle they can create an implied liability on the part of the municipality. If they may, of what use are the limitations of the chartered corporate powers?" 2 *Thomp. Neg.* 737; *Smith v. City of Rochester*, 76 N. Y. 506; *Mayor, etc. v. Cunliff*, 2 N. Y. 165. It is not denied that if the agent, in the course of his employment, is guilty of negligence, or commits even a willful trespass, with the belief and intention that the act will inure to the benefit of the principal, then not only does the doctrine of respondeat superior apply, but both principal and servant may be made to answer for the resulting damage. See authorities cited in *Tate v. City of*

*Greensboro*, 114 N. C., on pages 416, 417, 19 S. E. 767; especially 2 *Dill. Mun. Corp.* §§ 979, 980, et seq.; *Hewitt v. Swift*, 3 Allen, 420; *Johnson v. Barber*, 5 Gilman, 425; *Wright v. Wilcox*, 19 Wend. 343. "Without express power," says Judge Dillon, 1 *Mun. Corp.* §§ 149 (100) "a public corporation cannot make a contract to provide for celebrating the Fourth of July, or to provide an entertainment for its citizens or guests. Such contracts are void, and, although the plaintiff complies therewith on his part, he cannot recover of the corporation." *Hodges v. Buffalo*, 2 Denio, 110; 2 *Dill. Mun. Corp.* § 916 et seq.; *Austin v. Coggeshall*, 12 R. I. 329. It is needless to cite further authority in support of the proposition that if a city is not empowered to contract a debt for the purpose of making a display on a national holiday, or on such an occasion as the centennial anniversary of its existence as a municipality, it would follow of necessity that it could not, by empowering agents to supervise a display that it could not lawfully pay for, subject its taxpayers to liability for the willful wrong or negligence of such agents, when they are acting entirely outside of the scope of any duty that the city is authorized to impose. 2 *Dill. Mun. Corp.* § 969a. A municipality is not answerable for torts of a servant, except where the wrong complained of is an act done in the course of his lawful employment, or an omission of a duty devolving upon him as an incident to such service.

Before entering upon the consideration of the sufficiency of the statutes relied upon to authorize the action of the mayor and aldermen of the city in making an appropriation and appointing a committee to purchase the necessary articles and to supervise the pyrotechnic display on the occasion referred to, it is perhaps best to recur to the rule that a municipality is clothed with those powers only which are granted in express terms, or necessarily or fairly implied from or incident to those expressly granted, and which it is essential to exercise in order to carry out objects and purposes of creating the corporation. 1 *Dill. Mun. Corp.* § 89 (55); *State v. Webber*, 107 N. C. 962, 12 S. E. 598. In all of the cases relied upon by plaintiff's counsel it seems that the municipalities had the authority to pass an ordinance or make an order under color of authority. It has not been contended or alleged that the action is founded upon the creation of a nuisance by the city, nor can it be successfully maintained that the use of fireworks is analogous to the case of blocking up a public highway which it is the duty of the municipality to maintain in good condition. The charter of the city (chapter 243, Laws 1891) grants to the mayor and aldermen, when assembled, the following powers:

"Sec. 31. That the aldermen when convened shall have power to make and provide for the execution thereof, such ordinances, by-laws, rules and regulations for the better

government of the city as they may deem necessary: provided, the same be allowed by the provisions of this act and be consistent with the laws of the land.

"Sec. 32. The board of aldermen shall contract no debt of any kind unless the money is in the treasury for its payment, except for the necessary expenses of the city government.

"Sec. 33. That among the powers hereby conferred on the board of aldermen, they may borrow money only by the consent of a majority of the qualified registered voters, which consent shall be obtained by a vote of the citizens of the corporation after 30 days public notice, at which time those who consent to the same shall vote 'Approved' and those who do not consent shall vote 'Not Approved;' they shall provide water and lights, provide for repairing and cleansing the streets, regulate the market, take all proper means to prevent and extinguish fires, make regulations to cause the due observance of Sunday, appoint and regulate city policemen, suppress and remove nuisances, regulate, control and tax the business of the junk-shops and pawn-shop keepers or brokers, preserve the health of the city from contagious and infectious diseases; may provide a board of health for the city of Raleigh and prescribe their duties and powers, provide ways and means for the collection and preservation of vital statistics; appoint constables to execute such precepts as the mayor or other persons may lawfully issue to them, to preserve the peace and order, and execute the ordinances of the city; regulate the hours for sale of spirituous liquors by all persons required to be licensed by the board, and during periods of great public excitement may prohibit sales of spirituous liquor by all such persons for such time as the board may deem necessary; may pass ordinances imposing penalties for violations thereof not to exceed a fine of fifty dollars or imprisonment for thirty days. \* \* \* They shall have the right to regulate the charge for the carriage of persons, baggage and freight by omnibus or other vehicle, and to issue license for omnibuses, hacks, drays or other vehicles used for the transportation of persons or things for hire. They may also provide for public schools and public school facilities by purchasing land and erecting buildings thereon and equipping the same within the corporate limits of the city or within one half mile thereof. They may also construct or contract for the construction of a system of sewerage for the city and protect and regulate the same by adequate ordinances; and if it shall be necessary, in obtaining proper outlets for the said system, to extend the same beyond the corporate limits of the city, then in such case the board of aldermen shall have the power to so extend it, and both within and without the corporate limits to condemn land for the purposes of right-of-way or other require-

ments of the system, the proceedings for such condemnation to be the same as those prescribed in chapter 49, section 6, of the Private Laws of 1862 and '63, or in the manner prescribed in chapter 49, volume 1 of the Code."

In these provisions of the charter and in sections 3800 to 3805, both inclusive, of the Code, will be found enumerated all of the powers granted to the city by general or special laws. We do not think that the general power to pass ordinances can be held to carry with it by implication any such grant of authority as that to expend the public money for, and conduct under the auspices of the city officers, such a display as that described by the witnesses. We are aware that such authority has been assumed by cities and towns in many of the states, but where the exercise of it has been drawn in question in the courts it has been sustained only when some statute expressly conferred the power to make the appropriation for that particular purpose. As we understand the authorities cited, the supreme court of Massachusetts has given its sanction to the validity of expenditures for such purposes only where some express provision of law was shown to warrant it. In one of the cases cited from that state (*Tindley v. City of Salem*, 137 Mass. 171) the court held that, even where a person was injured by the negligent use of fireworks by the servants of a city that had ordered the display for the gratuitous amusement of the people, under the authority of a statute, the city was not liable to answer in damages. In an earlier case it had been held that a city council must act strictly in pursuance of statutory power to make such displays to subject it to liability for injuries due to the negligence of its servants in the management of it. (*Morrison v. City of Lawrence*, 98 Mass. 219. Where no statutory authority is shown for a wrongful act done under the direction of a municipality, the supreme court of Massachusetts lays down the general rule as to its liability substantially as we have stated it. *Cavanaugh v. Boston*, 139 Mass. 426, 1 N. E. 834; *Clafin v. Hopkinton*, 4 Gray, 502. If there is no authority conferred upon the mayor and aldermen by the statute mentioned, and we can discover none after diligent search and examination, it is immaterial whether the persons in immediate control of the fireworks were servants acting under the direction of the committee appointed by a resolution passed by the mayor and commissioners, and stood in the relation of agents to the city, or whether they were independent contractors. If the authorities of the city acted ultra vires in ordering the display, the question whether they employed expert pyrotechnists, and acted upon their advice after securing their services, is equally as irrelevant. If, therefore, it were conceded that the chairman of the committee appointed by the city for the purpose

supervised and directed the negligent management of the fireworks, and at such a place as, it was evidence of a want of care to select, we think it was the duty of the court nevertheless to tell the jury that the mayor and aldermen were not authorized by law to make an appropriation for and direct the management of a display of fireworks, and that the city was not liable to respond in damages for the wrongful or negligent conduct of a servant acting under instructions given by the city, but without authority of law. For the reasons given, we think that the court should have instructed the jury that in no aspect of the evidence was the defendant corporation liable for the acts of its servants in the management of the fireworks. Whether the rulings of the court upon the admissibility of testimony were abstractly erroneous or not is not material, since, whether excluded or admitted, it was manifest that the plaintiff was not, in any view of the evidence, entitled to recover. There was no error of which the plaintiff can justly complain, and the judgment must be affirmed.

MONTGOMERY, J., did not sit.

(116 N. C. 667)

MOORE et al. v. SMITH et al. (TRENT et al., Interveners).

(Supreme Court of North Carolina. April 16, 1895.)

CONCLUSIVENESS OF FOREIGN JUDGMENT—EQUITY—PARTIES.

1. A judgment obtained in another state against the sureties on the bond of a deceased North Carolina administrator is, in an action in the latter state for a settlement of the estate, binding on his administrators and their privies, where they were present resisting the recovery against them and the sureties of their intestate, as principal debtor.

2. In an equitable action for the settlement of the estate of a deceased administrator, and to satisfy a judgment obtained in another state against his personal representatives and the sureties on his bond, such sureties may intervene and receive credit for what they have paid on the judgment, remaining liable to plaintiffs for any balance not realized in the present action.

Appeal from superior court, Rockingham county; Bryan, Judge.

Action in equity by W. B. Moore and others against Darien Smith and others, in which James W. Trent and John W. Morris intervened as plaintiffs. From a judgment for plaintiffs, defendants appeal. Modified.

(1) In July, 1862, Pleasant W. Moore died, intestate, in Henry county, Va.; and in October, 1862, Drury Smith was duly qualified as administrator of said Moore, in Rockingham county, N. C., and filed his bond in the penal sum of \$20,000, with H. C. Wooten, James W. Trent, and John W. Morris as sureties on said bond, all of said sureties being then and now citizens of Henry county, Va. The plaintiffs are the heirs at law and distribu-

tees of said P. W. Moore. (2) In 1872 said Drury Smith died, intestate, and the defendants Darien Smith and G. W. Smith were in January, 1873, duly qualified as his administrators, and the other defendants are the heirs at law and distributees of said Drury Smith. (3) In 1878 the plaintiffs instituted a suit in Henry county, Va., against the defendant administrators and their said sureties for an account and settlement of their said estate, which resulted in a judgment in the court of appeals of Virginia against the defendants, and, by a decree of the chancery court of Virginia, said sureties' lands are ordered to be sold, to satisfy said judgment, which is still unpaid. (4) Said Drury Smith's estate is still unsettled, and this action is brought for a settlement thereof, and to have lands sold to satisfy their judgment. At February term, 1892, said James W. Trent and John W. Morris were made parties plaintiff in this action, who filed an amended complaint, alleging that they were in danger of having their lands sold to satisfy the Virginia judgment, and praying the court to protect them by requiring the representatives of their principal in said judgment to satisfy the same out of the real and personal property of the said Drury Smith's estate. Judgment for plaintiffs against defendants was rendered, from which defendants appealed.

R. D. Reid, Glenn & Manly, and Shepherd & Busbee, for appellants. Watson & Buxton, for appellees.

FAIRCLOTH, C. J. His honor ordered an account of the estate of Smith to be taken, and reserved the question of the personal liability of the defendant administrators until the referee's report is filed. The question more elaborately argued before us was as to the effect of the Virginia judgment against the defendant administrators, Darien and G. W. Smith. We find it unnecessary to enter into that question, because that judgment was unquestionably valid against the sureties Trent and Morris, who are now plaintiffs in this action. That judgment is also competent evidence against the defendant administrators and their privies, it appearing from the record that the administrators not only had notice, but were present and resisting the recovery against them and the sureties of their intestate, as principal debtor. *Lewis v. Fort*, 75 N. C. 251; *Hare v. Grant*, 77 N. C. 203.

The further objection was taken that plaintiffs, Trent and Morris, could not recover, as they are indemnified, until they have paid the debt against their principal. In an action at law this position would be tenable, but it is not so in a court of equity; and for this reason they were properly allowed to be made parties plaintiff. The exercise of this equitable jurisdiction works out just results; i. e. the other plaintiffs are enabled to receive the money due them, the real debtor

is compelled to pay it, and the plaintiff sureties are relieved from jeopardy. *Ferrer v. Barrett*, 4 Jones' Eq. 455; *Quickel v. Henderson*, 6 Jones' Eq. 286; *Scott v. Timberlake*, 83 N. C. 382. Of course, the plaintiff sureties would remain liable on the Virginia judgment for any balance not realized in this action. If it appeared that there were any creditors of Smith's estate, they would be necessary parties to enable those sureties to avail themselves of this equitable relief; but, in their absence, the heirs and distributees are the next entitled, and they are present in this proceeding to receive the money due by defendants.

It will be the duty of the court below to direct that the plaintiff sureties receive no more than they have paid on said judgment to the use of the other plaintiffs since its rendition, and that the other plaintiffs receive the balance of the recovery according to their several rights. With these modifications, the judgment is affirmed. Affirmed.

(94 Ga. 255)

**WATSON v. LONG et al.**

(Supreme Court of Georgia. Aug. 6, 1894.)

**NEW TRIAL—APPROVAL OF BRIEF OF EVIDENCE—DISCRETION OF COURT.**

Where the first order fixed the time for hearing the motion for a new trial, and granted leave "until the hearing" to make out and file a brief of the evidence, and by subsequent successive orders different times were fixed for the hearing, and it was expressly provided that within a time limited by each the brief of evidence should be approved, and it not appearing that any brief was presented for approval until after all of these limitations had expired, a further continuance, granted at the term succeeding that to which the hearing had last been continued, did not necessarily carry with it the right on the part of the movant to have the brief of evidence approved at the time fixed for the hearing by this last order, as against an unwillingness of the judge then to exercise the power of approval. His refusal to approve the brief after a lapse of nearly 18 months from the date of trial was not error. Whether, as a mere question of legal power, his approval would have been valid or not, it was certainly not an abuse of discretion to decline to approve the brief after such a lapse of time.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Action between J. M. Watson and B. M. Long and others. From a judgment refusing to approve a brief of evidence, and dismissing a motion for a new trial, Watson brings error. Affirmed.

McBride & Brown and W. T. Roberts, for plaintiff in error. Adamson & Jackson, for defendants in error.

**LUMPKIN, J.** Error was assigned upon the refusal of the trial judge to approve a brief of evidence, and to a judgment dismissing a motion for a new trial. The facts are briefly summarized in the headnote. Granting that the judge had the legal power

to approve the brief of evidence, we cannot say that declining, under the circumstances, to exercise it was an abuse of discretion. Nearly 18 months had elapsed from the date of the trial until the time when the judge was finally asked to approve the brief. It may have been impossible for him, at that time, either to know himself or be able to ascertain whether or not, in point of fact, the brief was correct. Indeed, it is hardly probable that he remembered the evidence as given upon the stand. Under these circumstances, we do not feel constrained to compel him to do something which he may not be able to do conscientiously. We will take this occasion to remark that there is little or no excuse for such delay in having a brief of evidence perfected and approved. Instances like the present are becoming of too frequent occurrence. With great respect and in all kindness to our professional brethren, we earnestly suggest that they attend to matters of this kind with more diligence and promptness. By so doing they will relieve themselves of much trouble and anxiety, and spare this court much unnecessary labor. Judgment affirmed.

(94 Ga. 229)

**COMMERCIAL BANK OF ALBANY v. TUCKER.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**NEGOTIABLE INSTRUMENTS—ACTION ON—VARIANCE—NONSUIT.**

1. The declaration alleging that the plaintiff loaned money to the defendant, and also that money was advanced by the plaintiff to the defendant, upon the promise and undertaking of the latter that he would turn over and deliver to the former drafts drawn by a company of which the defendant was treasurer, is not supported by evidence that the money was not loaned or advanced to the defendant, but to such company, together with evidence that the defendant did contract and undertake, as alleged, to turn over and deliver the drafts.

2. But inasmuch as the case established by the evidence seems to be meritorious, while the judgment of nonsuit is affirmed, direction is given that the plaintiff have leave to amend the declaration at or before the time when the remittitur from this court is entered on the minutes of the court below, so as to make the pleading and the evidence correspond, and that, upon this being done, the case be reinstated, and stand for trial in its proper order.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action by the Commercial Bank of Albany against A. W. Tucker. From a judgment of nonsuit, plaintiff brings error. Affirmed.

The following is the official report:

The bank brought suit against A. W. Tucker upon three drafts. The court granted a nonsuit, on the ground that plaintiff's evidence did not make out its case. The drafts are in the form of ordinary bank checks, drawn on the plaintiff July 7, 8, and 9, 1890. The first, for \$2,000, is payable to

"H. & T. or bearer"; the second, for \$184.26, is payable to "John F. Lewis & Son or bearer"; the third, for \$800, is payable to "Hobbs & Tucker or bearer." The first is signed, "Ga. & Carolina Melon Exchange, A. W. Tucker, Treas'r;" the other two are signed, "Georgia & Carolina Melon Exchange, per A. W. Tucker, Treasurer." The original declaration alleges: "Plaintiff paid said drafts, not because of any indebtedness or liability on its part, but simply as a matter of accommodation to defendant, who undertook and promised, on his own personal and individual responsibility, that, if plaintiff would cash said drafts, he would within two or three days place with plaintiff drafts on consignees of car loads of melons, which would be paid to plaintiff on presentation, and which would be amply sufficient to cover the amount of the drafts so paid by it. Defendant represented to and assured plaintiff that the melons had been shipped and the drafts drawn by the Georgia & Carolina Melon Exchange against the consignees of the melons; that the drafts would come in two or three days or other short time; and that defendant would turn the same over to plaintiff to indemnify and repay it for the money so advanced by it. Within the next two or three days, the Georgia & Carolina Melon Exchange suspended and failed for a large amount, and defendant never did turn over the promised drafts to plaintiff, nor repay it the amount paid out on said drafts, although he well knew the failing condition of the exchange when he borrowed said money of plaintiff. Said drafts were paid by plaintiff on the faith of the responsibility of defendant, who undertook and promised to turn over to plaintiff drafts to a sufficient amount to pay the sums so advanced by plaintiff, which he failed to do, whereby he became liable, and then and there undertook and promised to pay plaintiff said sum of \$2,734.26." By amendment, it is alleged that defendant is indebted to plaintiff in the sum named, as so much money advanced, for that, when he presented said three drafts to the bank, and asked it as a matter of accommodation to him to cash them (there being no funds in the bank to pay them, and no liability on the bank to pay them), the bank refused to advance the money, unless he would become personally responsible therefor, whereupon he then and there undertook and promised that he would be personally and individually responsible for the delivery to plaintiff of the promised melon drafts; and thereupon plaintiff, in consideration and upon the faith of defendant's personal and individual promise and undertaking, advanced said sum to him; and he, having failed to deliver said melon drafts, became liable to pay plaintiff said sum, with interest, under his personal and individual promise and undertaking, upon which and on account of the breach thereof this suit is brought.

Welch, cashier of the plaintiff bank, testified: "The \$2,000 draft was sent to the bank by a messenger. I declined to cash it, and defendant himself came down to get the money, stating that it was very important for him to have \$2,000 for some special purpose, and stated that he had a dispatch from Forrester, the president of the melon exchange, that the drafts for shipments of melons would be down on the next train, or very soon, as the melons had all gone forward and were paid for, and this was to reimburse him and the melon exchange for them, and would be turned over, he thought, by the incoming train. Under these conditions, and under the assurances of defendant that those drafts for shipments of melons would be turned over immediately, I paid the \$2,000 draft. The others were paid in a similar way, with the promise that they should be paid by drafts. He had been doing this for some time, getting advances against a deposit or bonus he had to protect the drafts, getting the money one day, and returning us the drafts the next day for shipments of melons. Immediately after the train came in that afternoon, I went to defendant to get the drafts for the shipments of melons; and he said for some reason they did not come, but would probably be in that night, and assured me again of the dispatch from Forrester that the melons had been shipped and the drafts would come right forward. The melon exchange made a deposit with the bank of \$7,500, to cover any drafts that might go forward and come back protested or unpaid. When these drafts came back unpaid, as they often did, I immediately presented them to defendant, and he made good that amount. This bonus was put there to protect the bank against any failure of payment on these melon drafts that went forward. We had been in the habit of advancing him two, three, and sometimes four thousand dollars, to aid him in paying for the melons until he got his drafts back from Atlanta. The melons had to go to Atlanta to be listed, and drawn for specifically by cars. They were paid for here, and the drafts drawn against the consignee of these melons were drawn in Atlanta, and forwarded back here, and turned over to us. That \$7,500 was not sufficient to meet these drafts after meeting others before them that had failed. It was exhausted by other drafts that came back. That money was paid upon the faith of defendant to return the drafts. He assured me that they would be returned, and gave me, as an additional reason, the dispatch he had from Forrester that the melons had been shipped. He assured me that they would come. On the strength of that assurance, I paid the draft, and without it I should not have paid it. At that time I had no knowledge but that the melon exchange was all right, but by that afternoon's mail I learned that it was in bad condition. I called on defendant for the drafts that afternoon and the next morning. He did not give them to me,



but gave as an excuse that they had not come, and he was looking for them. They were never turned over to me. They were drafts drawn on melon shipments, such as we had been taking. They were supposed to be merchantable paper. Similar advances had been made frequently, and he had made them good when they had failed. He was the treasurer of the melon exchange. He dealt with me as treasurer of the exchange. The bonus they had on deposit was used up in unpaid drafts that came back both before and after. Many of the drafts were out, and it took some time for them to come back. It would be impossible to tell how much cash the melon exchange had in the bank on July 8th, because that bonus was there to protect certain drafts that were out. I do not think the bonus was exhausted at that time, because many of the drafts were not returned. It was really exhausted, but we had not got the information showing it. I did not take drafts drawn by the melon exchange after I heard it was in bad condition, on the evening of the 7th. I think we took no drafts after the failure. We did take some bills of lading for some cars of melons that defendant said were shipped and not drawn against. I let him have this money as treasurer of the melon exchange, and charged it to him that way, but took his word, as a business man and a friend, that these drafts should come in promptly. I told him that I was looking to him personally for the return of them, and not as treasurer of the exchange. I told him that at the bank. My impression is that Armstrong, the bookkeeper, was in the bank. Carter [the president], Ticknor [the assistant cashier], and I had a conversation with defendant that it was a matter of trust to him individually that these drafts should come promptly back to us. We did not hold him responsible for the payment of the drafts, but for the return of the ones promised us,—melon drafts for melons shipped. I cannot name any particular draft that Forrester was to send to defendant, and he turn over to me, because I could not tell who those drafts would be on. If defendant had delivered those drafts, there would have been no liability on him, as I understand it. He would have fulfilled his personal obligation. He may have said something about not assuming personal obligation; but he will also remember that, when he got this money, he was to deliver the drafts for shipments of melons when he got them from Forrester. The discount on those drafts was charged to the melon exchange. There was a little extra charge on those drafts, because they were frequently out a week or ten days. The agreement was made with defendant as treasurer of the melon exchange, and Forrester too. The amount we advanced on these drafts was charged on the books to the melon exchange. After the exchange failed, defendant, I think, turned over the bills of lading for nine cars of melons which he said there had been no drafts drawn against; and, at his and Forrester's

suggestion, we forwarded these bills of lading to their agent in Atlanta, and ordered them sold for the benefit of the bank; and we never got any return from them at all,—never heard from them. I think that was the next day after the transaction, the 8th or 9th. Defendant assumed the personal responsibility to turn over these drafts for shipments of melons. They were to be the same kind of drafts we had been taking,—drafts against melons already shipped. That money went out of the bank on the individual responsibility of defendant that these drafts for shipments of melons should be turned over to me, and on his individual liability in the event they were not delivered to me; and that individual liability was only for the delivery of those drafts. I told him so. My reliance was not on the exchange for the drafts coming on. His was a positive promise that the melons had been shipped, and the drafts would be turned over. The drafts were not delivered. If he had delivered me the drafts from Forrester, I would have had no claim on him at all. He did not tell me that Forrester told him he had the drafts and would send them. He said he had a telegram from Forrester, and the drafts would come on. He said the melons had been shipped. When he spoke of what Forrester had telegraphed him, I told him right then that I looked to him personally for the delivery of the drafts. Previously to this, when it was understood we were to make these advances, Carter and I told defendant that we looked to him in person for the delivery of these drafts. On August 9th the melon exchange did not have \$2,500 besides the bonus to its credit. There was a little money that came back from Falvey & Forrester after the failure of the exchange, either the consignment of this nine cars, or some drafts that had come back and been protested, drawn prior to this transaction. I do not think any of it came from the nine cars of melons, but from certain drafts that came back unpaid. Perhaps \$150 was traced up in that way. We did not keep on dealing with Forrester, the president of the melon exchange. We were tracing up the proceeds of some drafts that came back unpaid, and went into the Atlanta Melon Exchange, and we made a claim for it, and got it. There were seven or eight thousand dollars in amount of these drafts for shipments of melons outstanding and unpaid at the time of the failure. That amount was put to the credit of these former unpaid drafts. On July 7th any amount the melon exchange had put in the bank as a bonus was absorbed by drafts then in transit. The drafts that had been taken previous to that, when they came back unpaid, more than absorbed the bonus. There was no order, that I know of, in which this bonus was to be appropriated to these unpaid drafts. When a draft came back, this bonus could be applied to the payment of it; and up to the time of this transaction, or the day before, all drafts returned had been made

good by Tucker by giving other drafts to keep that bonus good. The drafts outstanding then were more than sufficient to absorb the bonus. The transaction between defendant and myself had no reference to the bonus. If the melon exchange had had a bonus of \$25,000, put there for a specific purpose, it would have been kept for that purpose. If he had had \$7,500 with us on the day he gave this draft, and it came back unpaid, I would have charged it up against the bonus. It was an agreement we kept to until a short time before this, that this \$7,500 was to be kept intact; and, when a draft came unpaid, I went immediately to defendant, and he immediately gave me drafts to take that up, and not disturb the \$7,500. He, as treasurer, had no right to check on that bonus. In letting him have that money, I relied upon his individual promise, both as a business man and a friend. The telegram he mentioned from Forrester had nothing to do with the matter. I relied upon defendant."

Ticknor testified: "The original arrangement with defendant was that we were to advance a certain per cent. against these drafts drawn with bills of lading attached, provided he kept a bonus of \$7,500 in our hands; but the distinct understanding was that we were not to advance a cent unless the \$7,500 was kept there. I left here about July 1st, and returned August 5th. The day before I left, I went to see defendant, and told him that the bonus must be kept as a bonus, or we could do no business at all. He said, wait until he could hear from Forrester. I repeated the conversation to Welch. For instance, if he gave us a draft for a car load of melons, and it suited us, we would advance him fifty per cent. That is the original arrangement as to how we should conduct this business. However, for this charge of \$2,700, we had no drafts in hand. Our responsibility was with the melon exchange company. I asked defendant if Hobbs & Tucker would be responsible for these drafts, and in that case we would not require any bonus. I had no conversation with defendant about his responsibility for delivering the drafts. We never expected to advance a dollar without the drafts in hand. I had a conversation with him after my return. He came to my office after I got back, to talk the matter over. He was afraid I would think he had done something that was not exactly right, and I asked him the question why did he get the money from us, when I had every reason to believe he knew the thing had failed before he got the money, and why did he get the money from us under these conditions. And he said, 'To tell you the truth, I had too much money in this business, and had to get some out. I had to recoup myself.' When he traded those drafts, I do not think there was a cent of the bonus there. I think that money had all been drawn out. I am not positive, but am quite sure, that he knew he was not drawing against the bonus money. I sup-

pose he was drawing against the promise to furnish these drafts. That is what I gathered. All that I know is that there was nothing in hand to be drawn against, except the expectation of being replaced by melon drafts. Two or three days before the failure of the exchange, he had instructions not to buy any more melons (so he told me). I will not state positively how much of the bonus was on hand when I left. There was nothing on hand when this transaction took place, but might have been in round numbers about half the amount which the bonus should have been when I left. I did not like to leave here with this bonus impaired, and asked Welch to see defendant, but he was busy, and did not go. He did not attach the importance to it that I did. When I left here, there was a credit to the exchange of \$10,695. On July 7th there was a credit for \$5,103.53. The \$2,000 item seems to have been paid on the 8th. On the 8th I find a balance of \$5,205.20, and on the 9th, \$3,765.34; that is, from eight to ten thousand dollars in these drafts that were gone forward, drawn principally against the stockholders of this concern, and returned unpaid; and they are credited up here as cash, and were nothing but worthless drafts on stockholders. I know they were stockholders, because we had a list of them furnished us when they first started. The largest drafts were all drawn against the stockholders of the concern, with bills of lading attached; and they were houses of high standing, and we did not get anything out of them. After a deduction of those drafts that were returned, they would have owed us \$3,000 at that time. These drafts were never charged up against that bonus fund. The indebtedness the melon exchange was under to us when it failed was never paid, and we did not count that anything at all. We only counted what we advanced defendant. The exchange was indebted to us \$5,700. \$2,700 we claim is good, and the other lost. While this account shows they had a big credit, these drafts were in transit coming back to us, and were charged against this account. Those were the last drafts we got that came back unpaid towards the last of the business. A great many had come back in the last week or ten days. When they came back, Hobbs & Tucker made them good. Unfortunately, the bonus was not kept separate. The bonus had been exhausted prior to this transaction. The drafts that had been returned up to the time of this transaction had been taken care of by Hobbs & Tucker. On July 7th the exchange was credited as stated, but we had taken drafts as cash, and sent them forward for collection, and had no report on them. They were coming back every day, but the bulk of them came back after the transaction with defendant. The bank had paid the money for them, and sent them off to our correspondents for collection. There was a liability to us from the exchange until we got final payment for them. Up to the time of the fail-

ure, if one of those drafts came back unpaid, all we had to do was to present it to Hobbs & Tucker, and they would refund the money; but after the failure they were left on our hands, and, while the account showed an actual credit to the exchange, it should not have been, because the drafts were not finally paid. There were enough drafts out to absorb that fund. On the 9th there were out about \$8,500 of drafts, when their account showed \$3,700 to their credit; in other words, they had out \$5,000 more than they had credit for. If the drafts had got back to the bank by that time, the exchange would have owed us \$5,700. The responsibility had occurred, but the drafts had not been charged up. The melon exchange was due us for the drafts that had been received and sent off for collection. Defendant drew all the drafts. The understanding was that we were to advance them a certain sum on these melon drafts, and we had advanced them \$8,500. At the time of this transaction with defendant, the \$7,500 had been absorbed by previous drafts. Nothing was said about the way in which these drafts were to be paid. Under our original agreement, defendant had no right to draw a check not based on a melon shipment on that bonus. I would not have let it touched that fund. It would have been a separate transaction. These unpaid drafts charged up on August 9th were turned over to defendant, and he gave us a check for part of them; and, after this failure came, some of the drafts were drawn on stockholders, and he gave us back those drafts, and we tried to get them out of the stockholders, but could not. These drafts on the stockholders were for cars of melons with bills of lading attached, like all the others. They were acting like any other customers. This \$8,500 of melon drafts came in about the 7th, 8th, and 9th of July. We did not charge them up until they all came in, and then all at one time, and they were in considerably before they were charged up. When the exchange was in existence, Hobbs & Tucker made good to us all these drafts that were in default. There was none in default when defendant made the promise that we claim. This transaction with him was not in the ordinary line of the business, but was an outside matter. I told him I would not advance without the bonus intact, but did not anticipate anything like this. There were some drafts that came in unpaid, returned for some objection. I do not remember what they were; and we would send them to defendant, and he would give us a check on ourselves, and make that good by subsequent deposits. They would deposit melon drafts with bills of lading attached. On July 6th, on a settlement between the bank and the exchange, they would have owed us \$5,700 if they had made good all the drafts that were not heard from. We sent the drafts forward, and did not know that day that there was a cent due us. Our books showed over \$3,000 due them. When a draft

came back, defendant would swap me a good one for it. He was treasurer of the melon exchange, and the business was carried on by him as treasurer."

Tucker, the president of the bank, testified: "Forrester, president of the exchange, came to me, and said defendant would need some assistance in handling the melon business, and wanted to know if the bank would assist him in cashing drafts, and said that defendant, as treasurer of the melon exchange, would deposit \$7,500, this bonus to remain intact, and secure us against any losses for cashing these drafts. They were to indemnify me against any losses. The exact amount I do not remember, but about half was deposited with the bank when I left here the latter part of June. I left with the understanding with Welch that the bonus should be made up to \$7,500, and should be intact. When I came home, a few days after the failure of the melon exchange, their debt to the bank, including the amount advanced defendant, was about \$5,600. The bonus was exhausted, and Welch had let defendant have a good amount in addition. According to our understanding, we were to cash melon drafts for defendant. I had no understanding with him as to making advancements in the absence of drafts. Very few transactions took place before I left."

Wooten & Wooten and J. W. Walters, for plaintiff in error. R. Hobbs, W. T. Jones, and D. H. Pope, for defendant in error.

LUMPKIN, J. The Commercial Bank of Albany brought an action against A. W. Tucker. A nonsuit was granted, and the plaintiff excepted. The substance of the declaration and of the evidence offered in support of it appear in the official report.

1. We have given the declaration a very thorough and careful examination. Taking into view all of its allegations, we do not think it can be fairly construed as being either more or less than an action by the bank against Tucker for money loaned or advanced to him upon his promise and undertaking that he would turn over and deliver to the bank drafts drawn by the Georgia & Carolina Melon Exchange, a company of which he was the treasurer. As will be seen by reference to the reporter's statement, the declaration alleges that the plaintiff paid the drafts "simply as a matter of accommodation to defendant"; that "he well knew the falling condition of the exchange when he borrowed said money of plaintiff"; that "said drafts were paid by plaintiff on the faith of the responsibility of defendant"; and that "he became liable and \* \* \* undertook and promised to pay plaintiff" the sum so advanced. These and other like expressions in the declaration bear out, we think, the construction we have placed upon it. An examination of the evidence will show that it does not support the declaration. The case made by the proof was that the money was not loaned or advanced to Tucker

individually, but to the company he represented; and although there was evidence that Tucker did contract and undertake, as alleged, to turn over and deliver to the bank drafts drawn by his company on melon shipments, there is a fatal variance between the declaration and the evidence in the vital respect above pointed out. An averment that money was loaned to an individual or advanced to him is not supported by proof that it was loaned to a company for which he was acting. The two things are necessarily inconsistent.

2. The judgment of nonsuit, for the reasons above stated, was clearly right, and is therefore affirmed. But we have given direction that the plaintiff may amend his declaration, at or before the time when the remittitur from this court is entered in the court below, so as to make the pleading and the evidence correspond, and that, upon this being done, the case be reinstated. Our reason for giving this direction is that the case made by the evidence seems to be meritorious; and, if the plaintiff really is entitled to a recovery, it ought not to be defeated upon mere technical rules, however correct. Without making now any absolutely binding or definite adjudication that the plaintiff is entitled to recover upon the facts proved, we simply rule that the case appears to be one worthy of further investigation. The trial court may be able, without serious difficulty, to arrive at a just and lawful conclusion when the defendant's side of the case has been brought out by the evidence. Whether or not he is protected by the statute of frauds, or, independently of this question, is for any other reason not liable, can better be determined after the whole case has been developed. Judgment affirmed, with direction.

(94 Ga. 196)

#### PETRIE v. STEEDLY.

(Supreme Court of Georgia. July 23, 1894.)

##### PARTNERSHIP—RIGHTS OF SURVIVOR.

No action lies in favor of the surviving partner against the representative of the deceased partner to recover back the whole premium paid by the plaintiff to the intestate of the defendant for being taken into a partnership with the latter in his professional business, as a physician; the partnership term agreed upon being two years, and dissolution by death having taken place within a few days after the expiration of three months; the contract of partnership being silent touching death, or dissolution thereby, and touching a return of the money paid as premium, or any part thereof. The petition in the present case makes no offer to apportion the premium, or application to have it apportioned, nor does it allege that it is apportionable, and no facts are set forth upon which any apportionment could be made.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. Hutchins, Judge.

Action by C. B. Petrie against Georgia Steedly, administratrix. From a judgment for defendant on demurrer to the complaint, plaintiff brings error. Affirmed.

Thomas & Strickland, for plaintiff in error.  
Erwin & Cobb, for defendant in error.

SIMMONS, J. It appears from the declaration that Dr. Steedly, a physician residing in Athens, Ga., entered into a partnership with Dr. Petrie, a nonresident physician, on the 8th of December, 1891, for a term of two years. The contract of partnership recited that Dr. Steedly, being established in Clarke county in the practice of medicine, and desiring to enter the practice of surgery to a greater degree than formerly, believed it best to take a partner; that Dr. Petrie, after looking over the field and work, was favorably disposed and inclined to come, and had come; and that they agreed as follows: Dr. Steedly to associate Dr. Petrie with him as an equal partner,—the partnership to include everything in the way of private practice, sanitarium, hospital, training school, or otherwise, as they might see proper to enlarge their professional work,—and that Dr. Petrie was to pay Dr. Steedly \$1,000 in cash, and at the end of the first year \$500 additional, if they had collected out of the partnership business as much as \$6,000, or had its equivalent in accounts, etc. The partnership, as above stated, was to last two years. Dr. Petrie paid the \$1,000 in cash upon entering into the partnership. A little more than three months thereafter, Dr. Steedly died; and, after the time arrived in which suit could be brought against his administratrix, Dr. Petrie brought this action against her to recover the \$1,000 paid to the intestate,—it being alleged that the consideration of the contract had failed, and without fault of the petitioner, by reason of the partnership having been terminated by the death of Dr. Steedly; that the effect of his death was to release each from his obligations, and entitle the petitioner to be placed in the position he was in when the partnership was entered into. The defendant demurred to the declaration upon the ground that it was not sufficient in law, and set forth no cause of action against the defendant. The demurrer was sustained, and the plaintiff excepted.

The court did not err in the ruling complained of. The general rule of law is that, where a contract has been in part performed, no part of the money paid under the contract can be recovered back. The contract declared upon being one of a personal nature, the death of one of the parties put an end to it. Further performance was prevented by the act of God. There was no breach of contract upon which an action would lie against the administratrix. The contract was for personal services on the part of both, and both parties knew when they entered into the contract that performance might be prevented at any time during the two years by the death of one of them. They could have provided in the contract for the return of the money, or a part of it, in such a contingency; but, having failed to do so, it would be doing

violence to the terms of the contract if, as a presumption of law or fact, such a condition should be added. Nothing is said in the contract as to apportionment of the amount paid, in case of death, nor is there any allegation in the declaration that the contract is apportionable, and no facts are set forth upon which any apportionment could be made. We think it is clear that, if the plaintiff was entitled to recover anything at all, he was not entitled to maintain an action for the whole of the money paid. It is difficult to see how an apportionment could be made by the jury, even if the plaintiff had asked for an apportionment. The plaintiff, who was a nonresident of Athens, and probably a stranger to the people of that place, was, by reason of his partnership with the defendant's intestate, who had an established practice among them, introduced to them as a competent physician. For three months he was associated in his partner's practice, and upon the death of the latter may have succeeded in retaining a considerable portion of the patronage which had been extended to his partner, and the advantages thus derived from the contract may have compensated him fully for the amount paid by him. It will be seen, therefore, how difficult it would be to arrive at an equitable apportionment of the amount paid, if the plaintiff had offered to make an apportionment. Counsel for the plaintiff in error relied upon the case of *Hirst v. Tolson*, 13 Jur. 596, cited in note to 31 Am. Dec. 521, in which the court decreed the return of a proportionate part of the premium of clerkship paid by an articulated clerk, where the solicitor to whom he was articulated died shortly after the expiration of the second year of the article. In that case, however, the court of equity was exercising its authority over one of its own officers, as was pointed out in the case of *Whincup v. Hughes*, L. R. 6 C. P. 78, in which the case of *Hirst v. Tolson* is doubted. For a full discussion of the principle announced in this decision, see the opinion of the court in *Whincup v. Hughes*, supra. Judgment affirmed.

(94 Ga. 219)

## MONTGOMERY et al. v. MARTIN.

(Supreme Court of Georgia. July 30, 1894.)

## RELEASE OF SURETY—MISAPPLICATION OF PAYMENT—CONSIDERATION OF CONTRACT.

1. Where a mortgagee of personalty, without the consent of a surety upon the note secured by the mortgage, applies the mortgaged property or its proceeds to another debt owing to him by the mortgagor, the surety is discharged to the extent of the value of the property or its proceeds thus misapplied, but no further.

2. A promise by the mortgagee, made after the contract of suretyship, not to credit the mortgagor beyond the amount covered by the mortgage, will not bind the mortgagee, the same being made without any consideration, and a breach of such a promise will have no effect on the contract of suretyship.

(Syllabus by the Court.)

v.21s.E.no.8—38

Error from city court of Cartersville; S. Attaway, Judge.

Action on notes by Montgomery & Co. against F. M. Martin. There was a verdict for defendant, and from a judgment refusing a new trial plaintiffs bring error. Reversed.

The following is the official report:

Montgomery & Co. sued Martin on two promissory notes, each dated January 14, 1890,—one for \$175, due October 1, 1890; the other for \$139.75, due November 1, 1890. These notes were signed by W. G. Bailey and F. M. Martin. They bore credits for cash paid, \$18.06 and \$126.16, October 25, 1890, and November 18, 1890, respectively; and of \$18.20 net proceeds of sale of property of W. G. Bailey under mortgage *fi. fa.*, coming into the sheriff's hands January 6, 1891. There was a return of non est in ventus as to Bailey. Martin pleaded not indebted. Further, that he was only surety upon the note sued on, and always was such, which fact was known to plaintiffs at, before, and since the execution of the notes, and the notes were taken upon that distinct understanding. Further, he signed the notes on agreement with plaintiffs, at and before they were given, that they would take from Bailey a valid mortgage to secure the notes upon the live stock of Bailey worth \$150, and also upon the crops of Bailey of 1890, consisting of about 55 acres of cotton and 8 acres of corn, all situated upon the place of defendant; and upon the further agreement with plaintiffs, at and before the execution of the notes, that plaintiffs should not furnish Bailey more supplies or other things than would make the principal of the note, and that plaintiffs would diligently use the mortgage (which was in fact given by Bailey to plaintiffs) in such way as that defendant should get the benefit thereof in the extinguishment of the note sued on; that is to say, that plaintiffs would, upon the maturity of the notes, diligently foreclose the same, and collect all possible thereon. These agreements were a condition precedent on which defendant signed the note, but plaintiffs violated the agreement, in that they did not diligently foreclose and collect the mortgage, and endeavor to collect said debts, Bailey's crop so mortgaged being worth some \$415, and plaintiffs' mortgage being a first lien thereon, and if plaintiffs had complied with their agreements they would have realized from the foreclosure of the mortgage more than enough to discharge the notes. Plaintiffs further violated the agreement, in that they failed and refused to confine the things furnished by them to Bailey to the amount of the notes sued on, but furnished him in addition supplies to the amount of \$100, whereby his indebtedness to them became increased, and his ability to pay the notes decreased, and the risk of this defendant "decreased," contrary to the express agreement between plaintiffs and this de-

fendant, as a condition precedent to the signing of the note, that all payments received by plaintiffs from Bailey, and especially all the crops of Bailey, should be applied as a credit upon the notes. Defendant cannot give the exact dates and amount so paid by Bailey to plaintiffs, but some time between September 7 and December 1, 1890, Bailey delivered to them seven bales of cotton, worth on an average \$45 per bale or more, which should have been applied to the notes sued on. There was a verdict for defendant, and, plaintiffs' motion for new trial being overruled, they excepted. The motion contained the grounds that the verdict was contrary to law, evidence, etc.; also because the court erred in allowing defendant, Martin, over objection of counsel, to testify that it was the agreement and understanding between him and Montgomery, before and after the signing of the notes, that the proceeds of Bailey's cotton should be applied to the payment of the notes, and that the notes were given on that condition. Plaintiffs' counsel objected to this testimony, because it sought to ingraft new conditions upon the contract, in conflict with those expressed in the notes, and because the conditions were not in the notes, and defendant could not be heard to set up conditions precedent in conflict therewith; because the court erred in charging and allowing the jury to consider oral evidence for the purpose of establishing such conditions, against the express terms of the notes sued on. Error in charging: "If you believe from the testimony that Martin signed these notes only as security, and that he signed them upon the condition that was agreed to by Montgomery at the time, that Montgomery would apply the proceeds of all cotton brought in by Bailey that year to the extinguishment of these notes, now if you believe that Martin signed these as security upon the condition which was agreed to then at the time, and you further find from the testimony that Montgomery failed to carry out that condition and comply with that contract and agreement, then Martin would be released under the law." Alleged to be error because under the evidence, if the surety was discharged at all, it would not be complete, but only a discharge to the extent of the damage he sustained, which could only have been for the amount so misapplied, and which the evidence showed to be much less than was due on the notes at the time. Error in charging: "If Martin signed the notes as security upon the further condition, which was agreed to at the time by Montgomery, that Montgomery was to take a mortgage from Bailey on part of his crop for the purpose of securing Martin, and Montgomery did afterwards, in pursuance of this agreement, take a mortgage, and then afterwards misapplied the proceeds of said cotton, that would release Martin." "If you believe from the evidence that the condition on which Martin signed the notes sued on as

security for Bailey was that Montgomery should take from Bailey a mortgage on the latter's cotton crop to secure said debt, and apply the proceeds received by Montgomery from said cotton crop upon the notes which Martin signed as security, and Montgomery assented to this agreement by securing the proceeds of said cotton and appropriating it to another debt, then I charge you that Martin would be released, and the plaintiffs could not recover anything against him in this case." "If you find from the evidence that the condition on which Martin signed the notes sued on, as security, was that Montgomery should not extend credit to Bailey over and above the amount of the notes which Martin signed as security, in such a way as to increase Martin's risk,—that is, that Montgomery should not sell anything to Bailey on a credit after he has taken up the amount which Martin signed as security, and in this way increased Martin's risk; and if this condition was understood and agreed upon by Martin and Montgomery at the time of signing said notes; and if Montgomery violated this agreement or condition, by letting Bailey have goods in addition to the amount of the notes sued on, without Martin's consent, and applied the payment of such overplus to the proceeds of cotton mortgaged to secure the notes sued on,—then I charge you that Martin would be released and discharged, and plaintiffs could not recover anything against him in this case." Because, under the evidence in this case, the court should have charged the jury that if they found from the evidence that it was necessary for Bailey to have more supplies than the note called for, to enable him to make and harvest his crop, and that said supplies were furnished by Montgomery with the knowledge or consent of Martin, the payment of such supply account, arising from the proceeds of Bailey's crop, was not such a misapplication of the fund in hand as would relieve and discharge the security.

A. M. Foute and T. C. Milner, for plaintiffs in error. John W. Akin, for defendant in error.

LUMPKIN, J. The motion for a new trial contained several grounds, which, together with the facts necessary to an understanding of the questions involved in this case, are set forth by the reporter. The headnotes really cover the whole case upon its substantial merits, as disclosed by the record.

1. It appears that Montgomery & Co. did, in fact, take from Bailey a mortgage in accordance with their agreement to do so; but as against the rights of Martin, the surety, they wrongfully applied a portion of the mortgaged property, or its proceeds, to another debt they held against Bailey. To this extent the surety was injured, and therefore is entitled to credit, as to his liability on the note, to the extent of the value of the property thus misappropriated.

2. It does not appear that Montgomery & Co. made any agreement with Martin not to credit Bailey beyond the amount covered by the mortgage as an inducement to sign the note. If, after the execution and delivery of the note, Montgomery & Co., without any valuable consideration moving to them, made any such agreement, it would not affect the contract of suretyship entered into by Martin, because such agreement on the part of Montgomery & Co. would be a mere nudum pactum; but neither the absence of such an agreement, nor its invalidity, would authorize the appropriation of the mortgaged property to the additional debt of Bailey not covered by the mortgage, even if the surety expressly assented to the giving of the additional credit to Bailey, unless that assent, fairly interpreted under all the circumstances, clearly implied a consent on the part of the surety to such application. As the case is to be tried again, we trust that the facts, which, with the record now before us, appear to be somewhat confused, will be fully cleared up, and that, in the light of the rules we have attempted to outline, a right and just result may be reached. Judgment reversed.

(94 Ga. 257)

## HUNT v. HUNT.

(Supreme Court of Georgia. Aug. 6, 1894.)

CUSTODY OF CHILD—CONTRACT RELEASING—DURESS—HABEAS CORPUS—VENUE.

1. A warrant against a father on a charge of kidnapping his own minor children, it not appearing that he had ever parted with his paternal right to their custody, is a nullity; and a writing executed by him while under arrest by virtue of such a warrant, and under the influence of a promise to discharge him from the arrest, purporting to surrender to the mother of the children his paternal authority, is not binding, the same being procured by duress.

2. Where husband and wife are living in a state of separation, the county of the husband's residence is the county of the residence of the minor children, unless he has consented to their acquiring a residence elsewhere, or has voluntarily relinquished his paternal authority over them, or has been otherwise legally deprived thereof. But, irrespective of residence, the ordinary of the county in which the minor children were unlawfully detained by their mother from the custody of their father had, under section 4011 of the Code, jurisdiction to issue and dispose of a writ of habeas corpus sued out by the father to obtain the custody of the children.

3. Under the evidence in the present case, the ordinary, adjudicating upon a writ of habeas corpus, did not abuse his discretion in awarding the custody of the children to their paternal grandparents; and the superior court erred, on certiorari, in reversing the ordinary's decision.

(Syllabus by the Court.)

Error from superior court, Heard county; S. W. Harris, Judge.

Petition in habeas corpus by King Hunt against Jane Hunt for the possession of a minor child. From the judgment rendered, petitioner brings error. Reversed.

P. H. Whitaker & Son, for plaintiff in error. W. H. Daniel, for defendant in error.

LUMPKIN, J. This was a habeas corpus case, disposed of by the ordinary of Heard county, whose judgment was taken by certiorari to the superior court. King Hunt, in his petition for the writ of habeas corpus, alleged, in substance, that he was the father of the two children in controversy; that Jane Hunt illegally detained them, under the pretense that the petitioner had committed them to her custody; that she was a woman of bad character, moving about from place to place, not a fit person to have the care and control of children; and that she had no means of supporting them except by her illegal and immoral practices. In her answer, Jane Hunt denied all the allegations of the petition, except that she had the custody of the children. She alleged that she was their mother; had always supported and cared for them; that on July 10, 1891, the petitioner voluntarily, in writing, released to her the custody of the children, and disclaimed any right to them; and that he was a drunkard, of immoral character, and an unfit person to have control of children. At the hearing before the ordinary, the evidence was conflicting, though its general tendency was to show that the father of the children was a drunkard, and their mother a prostitute. It also appeared that the paternal grandfather of the children was a man of property, well able to support them; that the petitioner resided with his father; and that his father and mother both desired to have the children brought to their house, and to take care of them. The ordinary awarded the custody of the children to the petitioner's father and mother, and his judgment was reversed by the superior court. We will now briefly notice the material questions presented for our adjudication.

1. It seems that the writing by the terms of which the father released the children to the mother was procured from him while under arrest by virtue of a warrant charging him with kidnapping these very children, and that he signed the paper under the influence of a promise that, if he would do so, he would be discharged from arrest. The warrant was sued out by the mother, who deposed, in her affidavit to obtain the same, that King Hunt committed the offense of kidnapping, "by taking and conveying, forcibly and fraudulently and against her will, from her home, her minor children [naming them], with intent to remove them beyond the limits of the state of Georgia." King Hunt being the father of these children, and it not being alleged or otherwise appearing that he had ever parted with his paternal right to their custody, the warrant was a mere nullity, and consequently his signature to the paper, which was made for the purpose of being relieved from arrest

under this warrant, was procured by duress, and therefore this paper was not binding upon him.

2. The respondent, Jane Hunt, further insisted that the judgment of the ordinary was erroneous because she and her children were residents of Carroll county at the time of the trial, and the ordinary of Heard county was therefore without jurisdiction in the matter. In his answer to the writ of certiorari, the ordinary states that no question as to jurisdiction was made during the trial, and that it did not appear that the children were residents of Carroll county. In law, the domicile of the children was that of the father, unless he had relinquished his paternal authority over them, or had been legally deprived of the same. But the jurisdiction did not depend upon the question of residence. It is settled by section 4011 of the Code, which confers jurisdiction in such cases upon the ordinary of the county where the alleged illegal detention exists.

3. On the merits, we think the judgment of the ordinary was right, and that the superior court erred in reversing it. Under all the evidence, and keeping in view the best interests of the children themselves, we are satisfied that the ordinary, in the exercise of that discretion which the law confers upon him, made a wise and legal judgment in awarding the custody of the children to their paternal grandparents, and that judgment ought not to have been disturbed. Judgment reversed.

(34 Ga. 281)

**VENABLE et al. v. STEVENS.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**PARTNERSHIP—LIABILITY OF RETIRING MEMBER—SUFFICIENCY OF EVIDENCE.**

1. Where goods are sold to a firm, and shipped by a common carrier, but before the goods are actually received into the firm's custody, it is dissolved by one of the members retiring, and the remaining members form a new partnership, and the retiring member, for his own protection, prevents a delivery of the goods by the carrier to the new firm until the seller has consented to look to the new firm for payment, and the seller, upon being notified of these facts, accepts acceptances of the new firm upon drafts drawn for the price of the goods on the old firm, and the goods are thereafter delivered by the carrier to the new firm, the retiring member is thereby discharged from all further liability for the price of the goods.

2. In the light of the evidence, there was no error in denying a new trial upon any of the grounds stated in the motion.

(Syllabus by the Court.)

Error from superior court, Terrell county; C. L. Bartlett, Judge.

Action by Venable & Heyman against W. J. Stevens and others. From a judgment for defendant Stevens, plaintiffs bring error. Affirmed.

Hoyt & Parks, for plaintiffs in error. O. B. Wooten and J. A. Laing, for defendant in error.

**LUMPKIN, J.** An action was brought by Venable & Heyman against Hillman, Stevens, and Wade, as partners using the firm name of Hillman, Stevens & Co., upon an open account for merchandise. The real controversy was as to the liability of Stevens. The evidence, briefly stated, disclosed the following state of facts: The goods were sold by the plaintiffs to the firm of Hillman, Stevens & Co., and delivered to a common carrier; but, before they were actually received into the firm's custody, there was a dissolution of the firm, Stevens retiring from the business. The other two members of the firm formed a new partnership, under the name of Hillman & Wade. Stevens, recognizing his liability under the purchase made by the old firm, took steps to prevent a delivery of the goods by the carrier to his successors in the business, until the plaintiffs had consented to look to the new firm alone for payment. They had previously drawn drafts on the old firm for the price of the goods; but afterwards, and with a full knowledge of the detention of the goods by the carrier at the instance of Stevens, accepted acceptances of the new firm upon the drafts already mentioned, and after this the goods were delivered by the carrier to the new firm. It seems quite plain to us that, under the facts stated, the retiring member was discharged from all further liability. That he was originally bound for the price of the goods is beyond question, and it is also true that he could not escape this liability by any contract of dissolution between himself and his partners. But in retiring he took steps to protect himself from liability as to this very account. Whether he had a right to have the goods detained by the carrier is not now material. The plaintiffs, by their conduct, acquiesced in the course pursued by him, and, in effect, voluntarily consented that, upon delivery of the goods to Hillman & Wade, they would no longer look to Stevens for payment, and this consent is clearly manifested by their taking, without objection, the acceptances of the new firm. There were many grounds in the motion for a new trial, but it is not necessary to discuss them, because, in the light of the evidence, the verdict in Stevens' favor was manifestly right, and ought to stand, irrespective of any of the rulings or charges of the court below upon which error is assigned. Judgment affirmed.

(34 Ga. 216)

**NEEL v. BOARD OF COM'RS OF BARTOW COUNTY.**

(Supreme Court of Georgia. July 30, 1894.)

**COUNTY BONDS—VALIDITY—AID OF SOLDIERS' FAMILIES—LIMITATION OF ACTION.**

1. The cases of Akin v. Ordinary, 54 Ga. 59, and Commissioners v. Newell, 64 Ga. 699, touching the validity of bonds issued by Bartow county to obtain means to support the indigent families of soldiers of the Confederate States in that county, reviewed and affirmed. These cases rule the present one in all essential re-



spects as to the validity of the bonds now in controversy.

2. The bonds reciting, and the evidence all showing, that they were issued in pursuance of an order passed by the inferior court in the year 1863, previous orders passed in 1861 were irrelevant, and for that reason were not admissible in evidence.

3. The part taken by the person to whom the bonds were issued, or by others with his knowledge, in encouraging or inducing persons to volunteer as soldiers, whose families afterwards became dependent on the county for support, or proper objects for county aid in supplying their necessary wants, furnishes no reason against holding the county liable on the bonds.

4. The motive which induces a party to enter into a legal contract by which he parts with his money or property, and under which the county receives it, and takes the benefit of it for a public object to which it is legally applicable, will not prevent a recovery on the contract to refund the money and pay for the property.

5. Even if section 3479 of the Code of 1863, which required claims to be presented within 12 months after they accrue or become payable, be applicable to bonds issued by the county (which is by no means certain), that section should be treated as a statute of limitations; and so treated, it was suspended when the bonds sued upon matured, and for more than a year thereafter.

(Syllabus by the Court.)

Error from superior court, Bartow county; W. M. Henry, Judge.

Action by J. M. Neel, receiver, against the board of commissioners of Bartow county to recover on certain bonds. Defendant had judgment, and plaintiff brings error. Reversed.

W. K. Moore and J. M. Neel, for plaintiff in error. R. J. & J. McCamy, A. S. Johnson, A. M. Ponte, J. H. Wikle, and A. W. Fite, for defendant in error.

**SIMMONS, J.** 1. At the request of counsel for the defendant in error, we permitted the cases of *Akin v. Ordinary*, 54 Ga. 59, and *Commissioners v. Newell*, 64 Ga. 699, to be reviewed in the argument before us in this case upon the question of the validity of the bonds in controversy. After a careful consideration of these decisions, we are satisfied that they are correct, and we reaffirm them. They control the present case in all essential respects as to the validity of the bonds in question.

2. The bonds sued on were issued by virtue of an order of the inferior court of Bartow county of February 6, 1863, for the purpose of raising money to buy provisions for the support of soldiers' families. This is recited on the face of the bonds, and the evidence goes to show that they were issued for this purpose. On the trial the court admitted in evidence, over the objection of counsel for the plaintiff, an order of the inferior court of Bartow county, passed in 1861, which authorized the treasurer of the county to issue bonds to the amount of \$20,000, the money arising therefrom to be paid to the captain of each company called into the service of this state

or the Confederate States from that county, the sum of \$12 for each man in the company, and for the purpose of supporting the families of those volunteers who should be called into the service of the Confederate States. It was not claimed by the defendant that the bonds sued on were issued under this order, but it was admitted that they were issued under the order of 1863, referred to in the bonds. We are at a loss to understand why the trial judge admitted this order in evidence, as it was totally irrelevant and inadmissible.

3. The court, over the objection of counsel for the plaintiff in error, admitted evidence as to the part Tumlin, to whom the bonds were issued, took in encouraging soldiers to volunteer, whose families afterwards became dependent on the county for support; and error is assigned upon the admission of this evidence, and upon the instructions of the court on the subject. The part that Tumlin took in inducing persons to volunteer, or the knowledge he had of the part others took in that behalf, furnish no reason against holding the county liable on the bonds. The county had a right to issue the bonds, and this court has decided that the bonds were legal. Whatever part Tumlin took in bringing about the necessity for the bonds would not relieve the county of its liability. Tumlin may have been a "secessionist," and may have made speeches to urge persons to volunteer, but if the county had the right to issue bonds, and they were legal bonds, as this court has decided, and Tumlin purchased them, and paid his money or property for them, and the county received the same, and took the benefit of it for a public object to which it was legally applicable, his motives for entering into the contract or his views upon the question of secession will not prevent a recovery on the contract to refund the money and pay for the property. If the contract was legal, he had a right to enter into it, whatever may have been his motives for doing so.

4. Section 3479 of the Code of 1863 requires all claims against the county to be presented within 12 months after they accrue or become payable. If this section applies to bonds issued by the county, it should be treated as a statute of limitation; and so treated it was suspended when the bonds sued upon matured, and for more than a year thereafter. It is by no means certain that this section applies to bonds issued by a county. Speaking for myself, I do not think it does. The object of the section is to provide for notice to the officers of the county, having charge of its finances, of all claims that might arise against the county, in order that they may make provision for their payment if the claims are just. There is no such necessity where the county issues its own bonds. A record is kept of them, and it is well known, or ought to be, when they mature. But, admitting, for the sake of argument, that the section does apply to bonds issued by the

county, as before remarked, it is a statute of limitations in favor of the county; and all statutes of limitations were suspended during the war, and for more than a year thereafter. Judgment reversed.

(94 Ga. 424)

**WESTERN UNION TEL. CO. v. BRIGHTWELL.**

(Supreme Court of Georgia. April 16, 1894).

**QUI TAM ACTIONS — JURISDICTION OF COUNTY COURT—PENALTY FOR FAILURE TO DELIVER TELEGRAM.**

This case is ruled on the question of jurisdiction by *Dicken v. Telegraph Co.* (decided at this term) 21 S. E. 228, and on the question of release by refunding the toll paid to the company for transmission, by *Telegraph Co. v. Taylor*, 11 S. E. 398, 84 Ga. 419.

(Syllabus by the Court.)

Error from superior court, Terrell county; C. L. Bartlett, Judge.

Action by J. H. Brightwell against the Western Union Telegraph Company to recover a penalty. There was a verdict for plaintiff. From an order denying a new trial, defendant brings error. Affirmed.

The following is the official report:

Brightwell brought suit against the telegraph company in the county court of Terrell county for the statutory penalty for failure to transmit and deliver a telegram with impartiality, due diligence, etc. The case went by appeal to the superior court, and in that court defendant demurred, on the ground that the county court in which the case originated had no jurisdiction over the subject-matter of the suit, and for that reason the superior court had none. The demurrer was overruled, and to this ruling defendant excepted. There was a verdict for plaintiff for \$100. Defendant moved for a new trial; its motion was overruled; and to this ruling, also, it excepted. The motion contained the grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in overruling defendant's motion for nonsuit. Also, because the court erred in refusing to charge as requested by defendant in writing: "If you believe that, at the time the message was delivered to the company for transmission, the charge for the same was paid by the plaintiff, and that the telegram was not sent, and that afterwards the defendant through its agent refunded to plaintiff the money so paid, then I charge you that the contract between the parties was rescinded, and all rights growing out of the same were abrogated, and that plaintiff cannot recover." Also, because the court erred in not charging the jury what constituted a rescission of the contract as to sending the message, and the effect of such rescission, such charge being necessary from the pleadings and evidence as developed on the trial. Error in admitting the statements of the telegraph operator made to plaintiff and to Bolton, over the objection of defendant that admissions made by an agent after

the transaction, and not within the scope of the agent's authority, were not admissible to bind the principal. What the evidence objected to was is not set out in this ground, except in the general way here stated. To this ground the judge added a note that the evidence complained of "as to the within Bolton" was offered for the purpose of impeaching the witness Rutherford.

Gustin, Guerry & Hall and Nottingham & Brunson, for plaintiff in error. Hoyt & Parks, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(94 Ga. 210)

**CHARTERS v. CANDLER.**

**FARMERS' LOAN & TRUST CO. et al. v. SAME.**

(Supreme Court of Georgia. July 30, 1894.)

**RAILROAD RECEIVERSHIP—PROCEDURE.**

A contestant for a fund in court, to whom the fund was delivered by the receiver after a judgment awarding it to such contestant had been rendered, the custodian undertaking to return it to the receiver in case the judgment should be reversed, may, after such reversal has taken place, be compelled by rule to make restitution of the same; and where both the receiver and the prevailing party, to whom the fund was finally awarded, move severally, by separate rules, to enforce restitution, and there is no controversy upon the facts, it is error not to make one or the other of the rules absolute. The presiding judge should exercise his discretion as to which of the movants he will allow to represent the court in procuring a return of the fund. The contestant, having been a party before the court when the fund was awarded to him, and the judgment being not absolutely final when he received it, is subject to its jurisdiction as fully as if he had possessed himself of the fund by direct appointment to receive and hold it subject to final disposition.

(Syllabus by the Court.)

Error from superior court, Hall county; W. E. Simmons, pro hac Judge.

Contest between W. A. Charters, receiver of the Gainesville & Dahlonga Railroad, the Farmers' Loan & Trust Company, A. E. Candler, and others, to establish priority of claims to a fund in court. From the judgment rendered, the receiver and the loan and trust company prosecute separate writs of error. Reversed.

The following is the official report:

In the case of the Merchants' Bank et al. v. The Gainesville & Dahlonga Railroad Company et al. a receiver was appointed, and a sale by him made of the property of the railroad company. The fund thereby produced was claimed by Candler upon an alleged railroad contractor's lien, and by the Farmers' Loan & Trust Company upon a mortgage. The fund was awarded to Candler, which judgment was reversed by the supreme court. 87 Ga. 241, 13 S. E. 560. On November 7, 1890, after the bill of exceptions had been signed, Candler gave to the receiver an instrument as follows: "\$2.-

669.05. Received of W. A. Charters, the receiver in the case of the Merchants' Bank et al. v. A. D. Candler et al., the sum of \$2,669.05, the amount allowed me by the decree of the court in said case upon the lien and *fi. fa.* against the Gainesville & Dah-lonega R. R. Co. held by me. It is further understood and agreed that said sum now paid shall not be placed as a credit upon said *fi. fa.* at present; for that whereas, the Farmers' Loan & Trust Co., the trustee for the bondholders of said road, has filed its bill of exceptions from the decree and action of the court, and have carried said case to the supreme court for review: Now, therefore, should said decree be reversed or said cause remanded for a rehearing, or if said decree should be altered in the supreme court, then I hereby agree and bind myself to refund said sum of \$2,669.05 to said W. A. Charters, receiver, or his successor, at the next term of Hall superior court after said case is heard and disposed of, to be disposed of by the court, to be without interest. But, should said decree be affirmed, then said sum shall be placed as a credit upon said *fi. fa.*, and this shall be a receipt in full to said receiver under said decree. Nov. 7, 1890." On July 27, 1891, the receiver made a written demand upon Candler for the return of the sum named, which demand was not complied with. At some time (the record does not show the date) after the judgment of the supreme court, before mentioned, was made the judgment of the superior court, Candler filed a petition alleging "that the said money arising from the sale of said property is still in the hands of W. A. Charters, Esq., the receiver, and is therefore in the custody of the court undistributed, and petitioner has a special lien thereon which he is entitled to foreclose, and he is entitled to the said money on his said bill in preference to all other claims"; and praying "that said receiver be required to hold said funds arising from said sale till this question of petitioner's lien and right to the funds is finally settled, and a further order of distribution is granted by the court." To this petition the receiver filed an answer, alleging that he "was made a party to said motion to reinstate," and that it is not true he has the actual custody of the money arising from the sale. He further alleges that he turned over the sum named to Candler upon the written agreement before set out, and that Candler has refused on written demand to refund the same. Wherefore the receiver prays that Candler be required to refund the money to him instantler, and that in default thereof he be held to be in contempt of the court, uniting with Candler in his prayer that the receiver be required to hold the fund until the right to the same is finally settled. This answer was filed on January 19, 1894, and the court granted a rule that Candler show cause why the prayer of the receiver should not be granted. On the same

day the receiver filed an amendment, which was allowed, praying that, should the court decline to pass an order holding Candler in contempt for failing to turn over the money to the receiver, an order be granted adjudging said sum against Candler in the case of *The Merchants' Bank v. The Gainesville & Dah-lonega Railroad Company*, and ordering execution therefor to issue against him. The plaintiffs, together with the Farmers' Loan & Trust Company, also filed their motion setting up the same facts, and making similar prayers to those of the receiver. To each of the motions Candler made an answer in the nature of a demurrer, upon the grounds: (1) Such proceeding is not authorized by law. (2) No legal cause for granting the prayers is set forth. (3) The contract upon which it is alleged Candler holds the money is a private contract between him and Charters, which the court has no jurisdiction to enforce upon this sort of proceeding. (4) Respondent is not an officer of the court, and not a custodian of its fund, and therefore is not subject to rule. The court denied the prayers for relief against Candler, and passed an order that the sum in question be awarded to the Farmers' Loan & Trust Company on the mortgage held by it; that the same be paid by the receiver to the bondholders, etc. Separate bills of exceptions were taken by the receiver and by the plaintiffs, assigning error upon the refusal to grant the orders prayed for as to Candler.

M. L. Smith, H. H. Perry, and H. H. Dean, for plaintiffs in error. J. B. Estes, W. I. Pike, Prior & Thompson, and S. C. Dunlap, for defendant in error.

LUMPKIN, J. The facts are stated by the reporter. We have no doubt at all either as to the authority or duty of the court to compel the restoration by Candler of the fund in his hands to the receiver, under the facts of this case. Petitions for this purpose having been filed both by Charters, the receiver, and the Farmers' Loan & Trust Company, the party entitled to the fund, it was a matter of discretion with the presiding judge as to which of the movants he would allow to represent the court in procuring a restitution of the fund, but he certainly ought to have compelled restitution at the instance of either one or the other of these petitioners. The former judgment awarding the money to Candler having been set aside, the fund was still subject to the jurisdiction of the court, and it makes no difference at all that the receiver had voluntarily paid it over to Candler, so far as the right and power of the court to control it was concerned. In view of the circumstances under which Candler received the fund, he was, in legal contemplation, neither more nor less than the custodian for the court, and took and held it subject to such final disposition as the court might order and direct. *Wikle v. Silva*, 70

Ga. 717, is directly in point. See, also, Robinson v. Woodmansee, 76 Ga. 830. As to the obligation of a party to the record, who has received the benefit of an erroneous judgment, to make restitution on the reversal of that judgment, see Bank of U. S. v. Bank of Washington, 6 Pet. 7; and, as to the power and duty of a court to compel the restoration of a fund lately in its registry, see Morris's Cotton, 8 Wall. 507; 12 Am. & Eng. Enc. Law, p. 125. Really, the multiplication of authorities upon the question in hand is unnecessary. It is plain and free from doubt. The fund in controversy having been in a court exercising equitable jurisdiction, and having been withdrawn from the custody of that court by virtue of a judgment which was afterwards reversed, its equitable powers were properly invoked, and ought to have been exercised in compelling restoration. Judgment reversed.

(94 Ga. 251)

**VANCE v. MCBURNETT et al.**

(Supreme Court of Georgia. Aug. 6, 1894.)

**VENDOR AND PURCHASER—RIGHTS OF PURCHASER  
SUBSEQUENT TO CONTRACT WITH THIRD PERSON  
—SALE OF NOTES—WARRANTY—DAMAGES.**

1. Where one purchased promissory notes given for the purchase money of land, and took a conveyance of the land itself, knowing at the time that the makers of the notes had surrendered the bond for titles to the maker thereof, and afterwards took possession of the land by his tenant, he, when so doing, having the title to the land in himself, in consequence of the conveyance made to him when he purchased the notes, he should be treated, relatively to third persons, as having rescinded the contract of sale made by the original vendor, especially where no possession under that contract had ever existed. If, subsequently to such rescission, and while having possession of the land by his tenant, he sells the notes to others, for value, and makes a conveyance of the land itself, so that these purchasers may convey title to the original purchasers of the land when the notes shall be paid off, concealing the fact of rescission and the facts from which the rescission results, namely, the surrender of the bond for titles and the taking possession of the land, and also representing the makers of the notes to be solvent, when in truth they were utterly insolvent, the concealment and the representation, taken together, will amount to a warranty of the notes, both as to title and solvency; and, in an action setting forth the warranty and alleging its breach, he is liable in damages for the amount, whether paid in money or property, which he received for the notes, the notes themselves being worthless.

2. A recovery on the warranty is not hindered by the fact that title to the land was conveyed to the plaintiffs at the time they purchased the notes; the object of this conveyance being, not to invest them with title as owners, but as creditors of the makers of the notes, and as security merely. If these notes had been extinguished as debts against the makers by reason of the rescission of the original contract of sale, and the resumption of possession by the defendant as successor in title to the vendor, there was no debt to be secured by the conveyance made by the latter to the plaintiffs, and all that would be necessary to adjust the equities between the parties would be for the plaintiffs to recover on the warranty, and restate the defendant in his title to the land, all

of which has been provided for in the verdict; the suit being one in which equitable relief could be, and has been, administered.

3. In a sale of property at an agreed price, the seller having received in payment other property at an agreed price, and, in addition thereto, promissory notes on third persons, also at an agreed price, in an action against him upon a warranty of the notes neither the market value of the property sold, nor the market value of that received, exclusive of the notes, is relevant in measuring the damages, unless it appears that the prices fixed by the parties themselves in the course of the transaction were fixed, not with reference to cash as a standard, but with some special reference to the medium of payment, and consequently that these prices were different from what they would have been if uninfluenced by the element of barter. Where price is fixed by express contract of the parties, market value is generally immaterial.

4. Neither upon the merits, nor upon any of the numerous small points, including the newly-discovered evidence, is there any cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by McBurnett & Price against J. J. Vance. There was a verdict for plaintiffs, and, a motion for a new trial having been overruled, defendant brings error. Affirmed.

Cobb & Reese and W. F. Brown, for plaintiff in error. Adamson & Jackson, for defendants in error.

**SIMMONS, J.** Wiggins sold to Hannah & Holloway a lot of land for \$700, taking their promissory notes for this amount, and made them a bond for titles. He sold the notes to Bishop, making Bishop a deed to the land; and Bishop sold the notes to Vance, the plaintiff in error, and made him a deed to the land as security. Prior to the transfer of the notes and conveyance of the land to Vance, Hannah & Holloway agreed with Wiggins upon a cancellation of their trade for the land, and surrendered to Wiggins his bond for titles to them. They had never taken possession of the land, and were then insolvent. Vance knew these facts when he took the notes and the deed, but he rented the land to one Gore, who went into possession, and subsequently transferred Gore's note for the rent, and the notes which Hannah & Holloway had given Wiggins for the purchase money of the land, to McBurnett & Price, in part payment for a storehouse and lot and stock of goods which he (Vance) had bought from them, and made them a deed to the land, at the same time, as appears from the evidence of the plaintiffs, representing to them, as an inducement, that Hannah & Holloway were solvent, and that the land was worth the amount of the notes. When the first of these notes became due, McBurnett & Price sent an agent to Hannah & Holloway to collect it, and then, for the first time, ascertained that the latter had never taken possession of the land, but had canceled the trade with Wiggins, and surrendered his bond for titles. McBurnett & Price then applied to Vance for payment of this note, and he declined to pay, whereupon they filed

their equitable petition; alleging these facts and others, and praying that Vance be required to account to them for the value of the notes. The jury found in favor of the plaintiffs, and the defendant made a motion for a new trial, which was overruled, and he accepted.

1. The verdict was right, and the court did not err in refusing to set it aside. When Vance purchased the notes of Hannah & Holloway from Bishop, and received the deed as security therefor, he knew that they had surrendered to Wiggins his bond for titles. Knowing this, he took possession of the land, and rented it to Gore. Having thus the title to the land, and the possession thereof, he should, as to third persons, be treated as having himself rescinded the contract of sale made by Wiggins, the original vendor, especially as no possession under that contract was ever had by Hannah & Holloway. Vance knew of this rescission of the original contract, and he ratified it by taking possession of the land and placing his own tenant on it. He sold these notes to McBurnett & Price, and made a conveyance of the land to them, as security for the notes, in order that they might make a conveyance to Hannah & Holloway when the notes were paid. He concealed the fact that Hannah & Holloway had surrendered to Wiggins his bond. He represented Hannah & Holloway to be solvent, when they were in fact utterly insolvent. Taking these facts all together, they amounted in law to a warranty of the notes, both as to title and solvency; and under the plaintiffs' declaration, which sets forth the warranty and alleges its breach, he is liable in damages for the amount, whether paid in money or property, which he received for the notes, the notes themselves being worthless.

2. It was contended, however, by counsel for the plaintiff in error, that McBurnett & Price cannot recover upon the breach of warranty as to the notes, because the land was conveyed to them at the time they purchased the notes, and they must look to the land for their indemnification. The object of the conveyance of the land to McBurnett & Price was not to invest them with title as owners, but merely as creditors of Hannah & Holloway, the makers of the notes. When Hannah & Holloway surrendered their bond for titles, and rescinded the original contract of sale, and Vance took possession of the land as successor of the original vendor, the notes given by Hannah & Holloway were also rescinded and became worthless, and the debt which the conveyance to McBurnett & Price was given to secure was destroyed. All that would be necessary to adjust the equities between the parties would be for the plaintiffs to recover on the warranty, and reinstate the defendant in his title to the land, all of which was provided for in the verdict; the suit being one in which equitable relief could be, and has been, administered.

3. At the trial, Vance proposed to prove the

value of the property turned over by him to McBurnett & Price in payment of the property which they had sold to him; also the value of the property they had turned over to him. We think the court properly excluded this evidence, upon objection by the plaintiffs. So far as the record discloses, each one of the parties put a cash value upon the property exchanged. The notes of Hannah & Holloway were taken as cash, and it does not appear that the prices fixed by the parties were fixed with special reference to the medium of payment, and consequently that these prices were different from what they would have been if uninfluenced by the element of barter. We therefore do not think the market value of the property was relevant in measuring the damages. The parties having fixed a cash valuation, not only for the machinery, storehouse, and goods, but for the notes, also, the measure of damages for a breach of warranty of the notes was the price fixed in the negotiation.

4. Neither upon the merits, nor upon any of the numerous small points, including the newly-discovered evidence, is there any cause for a new trial. Judgment affirmed.

(94 Ga. 278)

#### DURDEN v. CLACK.

(Supreme Court of Georgia. Aug. 14, 1894.)  
EJECTION BY SUMMARY PROCESS—JURISDICTION  
OF COUNTY COURT.

1. Where the owner of land sells and conveys it to another by absolute conveyance, but does not actually go out of possession, even though the vendee be also in possession, the latter cannot eject the former from the premises as an intruder by summary process sued out under section 4072 of the Code.

2. The county court has jurisdiction to try and determine applications for the eviction of intruders, and it would be no ground to dismiss a proceeding for this purpose that the evidence showed the plaintiff's remedy was by ejectment, but such evidence would require an adjudication in favor of the defendant on the merits.

(Syllabus by the Court.)

Error from superior court, Morgan county; W. F. Jenkins, Judge.

Action by J. J. Clack against Blanche E. Durden to recover possession of land. After verdict for plaintiff, the cause was removed to the superior court on certiorari, where the writ was overruled, and defendant brings error. Reversed.

J. H. Holland and Jones & Morrison, for plaintiff in error. Foster & Butler, for defendant in error.

SIMMONS, J. 1. The summary remedy provided for in section 4072 of the Code for the ejection of intruders cannot be used for the purpose of trying title to land. It can only be used in cases where an intruder enters upon the land without claiming in good faith a right to its possession, and refuses to abandon the same. If one sells land to another,

and makes a conveyance to him, and afterwards refuses to give up the possession, he cannot be removed, under this section of the Code, as an intruder. In such case the purchaser must resort to some other remedy. If the vendor yields possession and afterwards re-enters, this section is applicable. It does not clearly appear from the evidence in this case that Miss Durden ever went out of actual possession of the land. It was incumbent on the plaintiff to show that she did. Having failed to show this, the plaintiff was not entitled to a verdict, and the court erred in overruling the certiorari.

2. Under section 295 of the Code, the county court has jurisdiction to try and determine applications for the eviction of intruders, and it would be no ground to dismiss a proceeding for this purpose that the evidence showed the plaintiff's remedy was by ejectment; but such evidence would require an adjudication in favor of the defendant on the merits. Judgment reversed.

(94 Ga. 280)

**TOOMBS v. WEST et al.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**NEGOTIABLE NOTE—CONSIDERATION.**

Where the payee of a promissory note procured the same to be executed by stipulating with the maker that he (the payee) would procure employment for a third person (for whose benefit the note was given, and who received the entire consideration therefor) by which the latter would earn enough money to pay off the note, a total breach of this stipulation is a defense to an action brought upon the note by the payee.

(Syllabus by the Court.)

Error from superior court, Randolph county; J. M. Griggs, Judge.

Action on a note by West & Obeare against J. P. Toombs. From a judgment striking out defendant's plea, he brings error. Reversed.

W. C. Worrill, for plaintiff in error. Hood & Moye, for defendants in error.

**LUMPKIN, J.** This was an action by West & Obeare against Toombs upon a promissory note payable to them. The defendant's plea alleged, in substance, as follows: The plaintiffs, being agents of the Manhattan Life Insurance Company, desired to issue a policy on the life of one Tumlin, and to obtain the defendant's note for the premium thereon. In order to induce him to give the note, they promised to procure Tumlin an appointment as agent of the company, and represented that he could soon realize enough from his commission to pay off the note, it being expressly agreed between the parties to the note and Tumlin that Toombs should be interested in the commissions earned by Tumlin to the extent of the amount of the note; and, had this contract been carried out, Tumlin could, with reasonable certainty, have earned money enough to pay the note. In

consideration of the promise and representation made by the plaintiffs, Toombs signed the note, but, after it was made and delivered, the plaintiffs failed and refused to procure the agency for Tumlin. Properly construed, the undertakings of the plaintiffs, in consideration of which the note was given, amounted to a stipulation on their part to procure employment for Tumlin by which he would earn enough money to pay off the note, and there was a total breach of this stipulation. We think the plea set up a good defense to the action on the note. Whether, if Tumlin had been appointed agent, he would have been successful, and would have made money enough to satisfy the note, cannot be known; but the plaintiffs will not be heard to say he would have failed because, by the breach of their contract, they denied him the opportunity even to make the effort; and, besides, the plea alleges, in effect, he would have succeeded, and on demurrer this allegation must be taken as true. The court erred in striking the plea.

(94 Ga. 288)

**BROWN v. STORY.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**PURCHASE FROM ONE HAVING NO TITLE—RIGHTS OF VENDEE.**

One who purchases land from a person in possession, who has no title, but who has made with the owner a parol contract to purchase (whether such second purchaser pays his vendor the agreed price or not), acquires no title and no equity as against the owner; but he can, after obtaining a conveyance from his immediate vendor, protect himself, as against any claim by the owner for purchase money, if the latter executes and delivers a conveyance to his own immediate vendee. The mere execution, however, of such a conveyance, without completing delivery thereof, will afford no protection. In the present case, the action being brought to recover the land because of the nonpayment of a part of the purchase money, the controlling and decisive question is whether there was an actual and complete delivery by the plaintiff's intestate of the deed which purported to convey the land to the defendant's vendor. Let this question alone be tried and determined by the jury on the next trial.

(Syllabus by the Court.)

Error from superior court, Dooly county; W. H. Fish, Judge.

Action by J. L. S. Brown, administrator, against E. J. Story to recover land. There was judgment for defendant, and plaintiff brings error. Affirmed.

Busbee & Crum, for plaintiff in error. J. H. Martin, for defendant in error.

**SIMMONS, J.** Bedgood bought from Brown a lot of land in Dooly county, and gave his promissory notes for the purchase money, but received no deed or other contract in writing from Brown. Bedgood subsequently sold the land to Story. The present action was brought by the administrator of Brown to recover the land because of the nonpayment of a part of the purchase mon-

ey. It appears that when Story purchased the land from Bedgood the latter was in possession, but, as stated, had no title, having gone into possession under a parol agreement on the part of Brown to convey him the land, and not having paid the purchase money. Story therefore acquired no title and no equity, as against Brown, by his purchase from Bedgood. It was contended, however, that Story was protected by a deed subsequently made by Brown to Bedgood. There was some dispute as to whether there was an actual and complete delivery of this deed, or whether Bedgood got the deed without such a delivery. If Brown executed and delivered a conveyance of the land to Bedgood, Story, after obtaining a conveyance from Bedgood, would be protected against any claim of Brown for the purchase money; but the mere execution of the deed from Brown to Bedgood, without a complete delivery thereof, would afford no protection. The evidence failed to show an actual and complete delivery of the deed. This being the controlling and decisive question in the case, the court did not err in granting a second new trial on the ground that the verdict was contrary to law and the evidence, and we affirm the judgment, with direction that this question alone be tried and determined on the next trial of the case. Judgment affirmed, with direction.

(94 Ga. 247)

**AHRENS & OTT MANUF'G CO. v. PATTON SASH, DOOR & BUILDING CO. et al.**

(Supreme Court of Georgia. Aug. 6, 1894.)

**APPEAL—RECORD—SUCCESSIVE GARNISHMENTS—RIGHTS OF GARNISHEE.**

1. Where it affirmatively appears both from the bill of exceptions and from the certificate of the judge thereto that no part of the record is necessary to be sent here by transcript, the writ of error will not be dismissed because there is no transcript.

2. While successive garnishments may issue in a pending case commenced by attachment, yet, after the case has terminated in a judgment against the defendant in attachment, no further garnishment can issue founded upon the same attachment, notwithstanding an issue may still be pending between the plaintiff and a former garnishee touching the truth of the answer made by such garnishee to a garnishment issued in due time.

3. As the defendant in attachment, as well as the garnishee, is interested in the question of whether the garnishment has legally issued, the garnishee does not, by answering the garnishment, waive his right to have the proceeding dismissed at the hearing of an issue traversing his answer; the ground of the motion to dismiss being that there was no legal authority for issuing the garnishment, because judgment had previously been rendered against the defendant in the attachment suit, and thus the suit, as a basis for summons of garnishment, was no longer pending.

(Syllabus by the Court.)

Error from city court of Floyd; W. T. Turnbull, Judge.

Action by the Ahrens & Ott Manufacturing

Company against the Patton Sash, Door & Building Company and others, defendants and garnishees. From the judgment rendered, plaintiff brings error. Affirmed.

Henry Walker, for plaintiff in error. Dean & Smith and J. E. Dean, for defendants in error.

LUMPKIN, J. 1. One of the main purposes of the supreme court practice act of 1889 was to dispense with irrelevant and superfluous matter in bringing cases to this court. Accordingly, we have no difficulty in holding that, where no part of the record is necessary to be sent up, the writ of error should not be dismissed because there is no transcript of the record. In the present case, it affirmatively appears that the bill of exceptions contains everything necessary to a proper adjudication of the case. In overruling the motion made to dismiss it, we are conforming to the spirit, if not the letter, of the act of 1889, and also to the will of the legislature, very frequently manifested in recent years, and expressly stated in its most recent enactment with reference to practice in this court, to the effect that cases shall not be dismissed when there is enough before this court to enable it to ascertain substantially the real questions made, and which the parties seek to have decided.

2. Garnishments may issue where suit is pending, or where judgment has been obtained. Code, § 3532. In the former case, successive garnishments may issue from time to time before trial without giving any additional bond. Id. § 3536. In no case is the plaintiff entitled to a judgment against the garnishee until he has obtained judgment against the defendant. Id. § 3547. Where a suit is begun by attachment, and a garnishment is issued, and afterwards a judgment in the attachment case is rendered in favor of the plaintiff against the defendant, that case is ended, notwithstanding an issue may still be pending between the plaintiff and the person garnished upon a traverse to the garnishee's answer. The pendency of this issue will not authorize the plaintiff, after obtaining judgment against the principal debtor, to have a garnishment issued against another person by virtue of the affidavit and bond originally sued out. If he desires to obtain other garnishments upon the judgment already rendered in his favor, his remedy, clearly, is to institute new proceedings for this purpose, which he is authorized to do under section 3532, above cited.

3. Where the plaintiff, after obtaining a judgment against his debtor, causes an unauthorized second garnishment to be issued, as above indicated, although that garnishee may answer denying indebtedness to the defendant, he will not thus be estopped from moving, at the trial of an issue formed upon a traverse to his answer, to dismiss the entire garnishment proceeding upon the ground that the garnishment itself was unlawfully

issued. Garnishment bonds are required for the protection of the defendant in the suit or in the judgment upon which the garnishment is issued, and therefore such defendant is interested in the question as to whether or not a garnishment is legally issued. It is his substantial right to have a valid garnishment bond as a basis for all garnishments sued out in a case to which he is a party defendant. A garnishment is a suit, and the bond is the foundation of it. If the foundation be wanting, the suit is a nullity. These things being so, the mere answering of a garnishment issued without legal authority will not prevent the garnishee from raising the question as to the validity of the garnishment itself. The garnishment suit being void, and the defendant in the main suit or judgment being vitally interested in having the void suit so declared, no waiver by the garnishee can make it a valid proceeding. If it could, and the plaintiff obtained judgment against the garnishee, he would thus be enabled to collect money to which, as against the original debtor, he was not legally entitled. Consequently, the garnishee would not be protected, because, in a suit against him by his creditor, it would be no defense to urge he had paid out the money upon a judgment rendered on a garnishment illegally issued. For this reason, it would be clearly his right to move to dismiss the garnishment proceeding on the ground that the original suit, as a basis of a summons of garnishment, was no longer pending; and, if the above reasoning is sound, his right to make this motion would not be cut off merely because he had filed an answer to the garnishment. Judgment affirmed.

(94 Ga. 263)

**DANIELLY v. CHEEVES.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**NUISANCE—OVERFLOWING LAND—DAMAGES—AMENDING PLEADINGS.**

1. A declaration laying damages at \$1,000, and alleging that the nuisance complained of rendered the premises almost worthless for cultivation during two specified years, is amendable by adding thereto an allegation that the nuisance rendered the premises totally useless for cultivation, and laying the damage at \$3,000. Thus construed, the amendment is consistent with the plan and purpose of the declaration, which was to recover damages with reference to crops for the two specified years, and not to recover permanent or prospective damages. That the amendment called itself a "count" is a mere misnomer; and that the counsel who procured the allowance of the amendment now construes it as not confined to damages relatively to crops for the two years specified in the declaration, but as extending to and comprehending damage to the land for all time after the year 1881, is no reason for reversing the judgment allowing the amendment. If construed as he now contends it should be, it introduced a new cause of action, and should have been disallowed.

2. Properly construed, each and all of the declarations demurred to should be treated as claiming annual damages for successive years,

and none of them as proceeding for permanent or prospective damages.

3. A nuisance to the plaintiff's cleared and tillable land (the injury consisting in overflowing or saturating the same with water), although resulting from a cause intended to be perpetually operative, and of a nature so to operate gradually and continuously, created in the year 1878, was actionable in 1884 for damage on account of diminished or suspended fertility occasioned thereby with reference to the crops for the years 1882 and 1883; and the same nuisance, having been continued with like effect, was again actionable in 1888 for damage on account of diminished or suspended fertility with reference to the crops for the years 1884, 1885, 1886, and 1887; and the same nuisance, having been continued with like effect, was again actionable in 1889 for damage on account of diminished or suspended fertility with reference to the crop for the year 1888. If, however, the effect of the nuisance, at any stage, was to destroy wholly and permanently the fertility of the land, so that abating the nuisance and withdrawing the excess of water occasioned thereby would not restore the land and render it again fertile, the right to maintain successive actions relatively to subsequent years ceased, and a single action and recovery for such destruction could be maintained, and would be final.

4. In adjudicating upon a demurrer to a declaration, or to a series of declarations which have been consolidated for trial, the court cannot look beyond the declarations themselves, so as to take notice of the contents of the declaration filed in a previous action between the same parties, and touching the same nuisance, and damages therefrom, relatively to crops or rents for previous years. This cannot be done, although a previous action be, in one of the declarations demurred to, mentioned in these terms: "Petitioner shows that he has already filed his suit for the recovery of damages for the years 1878, 1879, 1880, and 1881, which is now pending in court"; no exhibit of the declaration in that action being appended, nor any leave to refer to it being therein prayed for. Unless all facts necessary to establish the defense of a former recovery for the same cause of action appear on the face of the declaration, this defense is not matter for demurrer, but for plea only.

(Syllabus by the Court.)

Error from superior court, Monroe county; J. J. Hunt, Judge.

John A. Danielly brought four separate actions against Thomas J. Cheeves to recover damages for overflowing plaintiff's land. The several actions were consolidated and tried together. From the judgment rendered, plaintiff brings error. Affirmed in part and reversed in part.

The following is the official report:

Danielly brought suit for damages against Cheeves, the case being returnable to the February term, 1882, of the superior court. That case came to the supreme court twice. 74 Ga. 712; 80 Ga. 114, 4 S. E. 902. A recovery of \$125 by plaintiff was sustained by the decision in 80 Ga. Three subsequent suits were brought by plaintiff,—the first, on August 5, 1884; the second, February 7, 1888; the third, February 5, 1889. By agreement, these three were consolidated, and came on for trial at the same time, defendant demurring to the declarations on various grounds. Plaintiff was allowed to amend the declaration of 1884, over defendant's objection that the amendment introduced a new cause of action,



to which ruling defendant excepted pendente lite. In the argument on defendant's demurrer, his counsel was permitted, over objection, to refer to plaintiff's declaration in the suit brought in 1882, and plaintiff assigned this as error. The demurrer was sustained, and plaintiff excepted. The declaration of 1884 alleges that defendant has damaged plaintiff \$1,000, for that in 1878 plaintiff owned 60 acres of lowlands, worth about \$100 per acre for cultivation, lying on the waters of Tobesofkee creek, which lands, being fertile and never liable to overflow, always responded to cultivation, yielding from 50 to 75 bushels of corn per acre. At the same time defendant owned 80 acres of lowlands lying on Yellow creek, subject to overflow, and therefore valueless, the bed of said creek being too shallow to carry off the volume of water. In 1878, for the purpose of improving his own land, and in disregard of plaintiff's rights, defendant cut a ditch from a point above his lands on Yellow creek to a point of Tobesofkee creek; causing, from the increased volume of water, the channel of said last creek, which theretofore was from 7 to 10 feet deep along plaintiff's lands, to fill with sand and mud, and, even in dry weather, causing said lands to be saturated and charged with water so as to render them almost worthless for cultivation, so that, though said lands are planted and cultivated with great expense and care, they have failed to respond, and are now wholly and utterly worthless. "Petitioner shows, that he has already filed his suit for recovery of damages for the years 1878, 1879, 1880, and 1881, which is now pending in court," and that, owing to said overflow of water, defendant has damaged plaintiff \$500 for each of the years 1882 and 1883. The amendment allowed over defendant's objection alleges that he has, in the manner aforesaid, damaged plaintiff \$3,000, for that the acts complained of "injured and damaged the lands of plaintiff by making them totally useless for cultivation since 1881, in the sum aforesaid, and before filing of this suit, and after the filing of the suit to the February term, 1882." The declarations of 1888 and 1889 contain allegations like those already cited, except as follows: That of 1888 lays damages at \$2,000; that of 1889, at \$500. Both add, after the allegation that plaintiff's lands are caused to be saturated with water so as to render them almost useless for cultivation, the words, "within a short while thereafter, and in the course of a few years utterly useless," and omit the words, "and the same are now wholly and utterly worthless." The declaration of 1888 alleges that plaintiff has already filed his suit for damages for the years up to 1883, and that by the cutting of the ditch he has lost his crop for 1884, 1885, 1886, and 1887, of the yearly value of \$500. The declaration of 1889 alleges that he has filed suit for damages for the years up to 1888, and brings this suit to recover for that year; that defendant, by the acts complained of,

has deprived him of all of said land for cultivation, and he is no longer able to make any crops thereon, as it is too wet to cultivate; and that it was worth \$500 during 1888; and defendant, by his conduct, has injured him in that amount. The grounds of demurrer are sufficiently apparent from the opinion.

C. A. Turner, J. S. Boynton, and Berner & Bloodworth, for plaintiff in error. Gustin, Guerry & Hall and W. D. Stone, for defendant in error.

LUMPKIN, J. Several actions which had been instituted by DanIELLY against CHEEVES were consolidated in the superior court. This litigation originated from the same cause as that which was the foundation of the lawsuit between these same parties reported in 80 Ga. 114, 4 S. E. 902. The official report consists of a statement showing how the various questions now presented for adjudication arose in the court below. The rulings of this court have been condensed into the propositions announced in the headnotes.

1. There was no merit in the exceptions pendente lite filed by defendant's counsel to the allowance of the amendment of February 11, 1893, to the plaintiff's declaration of August 5, 1884. That declaration complained that the plaintiff's land was rendered almost worthless for cultivation during two specified years. Taking a fair view of all the allegations contained in the amendment, it may be properly construed as claiming additional damages upon the theory that the nuisance which gave rise to the damages alleged in the declaration had rendered the premises totally useless for cultivation during the two years mentioned. Thus construed, the amendment is consistent with the original plan and purpose of the declaration, the object of which was to recover damages with reference to crops for these two particular years, and not to recover permanent or prospective damages. It is true that the pleader, in the amendment, designated it as a "count," but this was a mere misnomer, and is of no material consequence. In the argument here, the counsel at whose instance this amendment was allowed seemed to construe it as not being confined to damages relatively to crops only for the two years specified in the declaration, but as extending to and comprehending damage to the land itself for all the time elapsing after the year 1881. In taking this position, the counsel was seeking to show that the purpose of the amendment was to make it clear that the permanent injury to the land had not occurred at the time of the filing of the first suit against Cheeves. Were we to give the amendment the construction just indicated, we would be constrained to hold that it introduced a new cause of action, and should have been disallowed; but we do not think that construction would be the proper one, and it is our duty to shape our judgment in accordance

with our own opinion as to the real nature of the amendment, which is as stated above. So doing, no reason for reversing the judgment allowing the amendment appears, and therefore the exceptions pendente lite are overruled.

2. After a careful examination and study of each and all of the consolidated declarations, we are of the opinion that, properly construed, they should be treated as claiming damages for successive years, and none of them as proceeding for permanent or prospective damages. It is true, they contain expressions which would seem to indicate the latter purpose; but, viewing them all together, we think it more consistent with truth and fairness to hold that the object of each and all of them was to recover for losses sustained in successive years because of the fact that the plaintiff's land was rendered unfit for cultivation, and for that reason he was unable to make crops upon the same. The declaration of 1888 alleges that the plaintiff has already filed his suit for damages for the years up to 1883, and that by the cutting of the ditch he had lost his crops for the years 1884, 1885, 1886, and 1887, of the yearly value of \$500. The declaration of 1889 alleges that the plaintiff has already brought suit for damages for the years up to 1888, and that he has been deprived of his land for cultivation, and is no longer able to make crops thereon, and claims damages to the amount of \$500 for the year 1888. It does not appear that in any of the suits the plaintiff seeks to recover the value of his land upon the theory that it had been rendered totally worthless for all purposes, and consequently was of no value whatever. Some reason for concluding that this was not the plaintiff's theory may be drawn from the fact that he did not at once, and long prior to the year 1889, bring a suit for the total value of the land.

3. The third headnote, in connection with what has already been said, is comprehensive enough to render unnecessary a restatement of its contents; and, upon the doctrine there announced, it is evident that the statute of limitations has no application whatever to the several actions, if the plaintiff succeeds, by evidence, in maintaining them as laid. Until it has been definitely established by the defendant that the abatement of the nuisance would in no way improve the land, or amellorate its existing condition with reference to the production of crops, the plaintiff has the right to assume that the nuisance will be abated, and to recover year by year the injury done him by its maintenance. If, however, at any period in the past, the effect of the nuisance has been to destroy wholly and permanently the fertility of the land, so that even abating the nuisance would not restore the land and render it again fertile and fit for cultivation, the right to maintain successive actions relatively to subsequent years ceased at that period. With reference to

this question, we are not, of course, prepared to say what the evidence may disclose, and we intimate no opinion concerning it, one way or the other. But it is a question which ought to be developed and elucidated at the next trial.

4. It is quite clear that in adjudicating upon a demurrer to a declaration, or a series of declarations which have been consolidated for trial, the court cannot properly take notice of a declaration previously filed by the same plaintiff against the same defendant touching the same subject-matter. A declaration, when demurred to, must stand or fall upon its own merits. This is true although the declaration in hand may refer in general terms to the one previously filed. If the contents of the declaration last referred to were set out substantially or in full in the pending declaration, the question would be different. Otherwise, the existence and contents of the former declaration should be taken advantage of, in so far as it may avail the defendant, by plea, for it cannot be properly urged by way of demurrer. Judgment on main bill of exceptions reversed. On exceptions pendente lite, affirmed.

(94 Ga. 270)

#### WILLIAMS v. ADAMS et al.

(Supreme Court of Georgia. Aug. 14, 1894.)

TRIAL OF EXCEPTIONS TO AUDITOR'S REPORT —  
VERDICT—ADMINISTRATION OF DECEDENT'S  
ESTATE—SUPPORT OF MINOR.

1. When exceptions to the report of an auditor are submitted to a jury, they must, under section 4203 of the Code, return a verdict on each exception seriatim. Accordingly, it was error to charge the jury that, if they sustained the auditor's report in full, the form of their verdict should be: "We, the jury, sustain the auditor's report in full."

2. Under section 2540 of the Code, an executor or administrator has no authority to apply or pay any portion of an estate in his hands, belonging to a minor who has no guardian, to the maintenance and education of the minor, without first obtaining the direction of the proper ordinary; and where an administrator, without such direction, pays or delivers to the mother of the minor money or property of the latter in his hands (the father of the minor being alive, and the minor residing with him as a member of his family), the mother's receipt will be no protection to such administrator; nor will the subsequent approval by the ordinary of the administrator's return, including such receipt, legalize the administrator's acts in the premises.

3. Where an administrator cum testamento annexo, without authority of law, actually applies assets of the estate to the support of minor legatees who have no claim upon the decedent's estate for support, and the evidence renders it certain that the legatees were in want, and really took and enjoyed the support thus furnished, whether a court of equity, when the administrator is called to account in an action brought upon his bond, can and will ratify such appropriation, when it involves not only the income of the legacies, but the corpus thereof, and not only a part, but the whole, of the corpus, quare.

4. Where, by a clause in a will, an attorney at law was appointed to see to its probate and execution, according to the provisions in the

various items thereof, to what extent an administrator cum testamento annexo will be protected in acting under the advice of this attorney, quaere.

(Syllabus by the Court.)

Error from superior court, Upson county; J. J. Hunt, Judge.

Action by J. C. Williams, as ordinary, for the use of W. B. Matthews and others, against J. W. Adams and others. From the judgment rendered, plaintiff brings error. Reversed.

The following is the official report:

Williams, as ordinary of Upson county, suing for the use of W. B. Matthews and many others, legatees under the will of James Adams, brought suit on the bond of J. W. Adams, administrator with the will annexed of James Adams, against such administrator and the sureties on his bond. The declaration alleged, in brief: James Adams died early in 1873, leaving a will. By the 3d item of this will he gave his wife, Lida, a life interest in a fractional lot of land in Upson county and the bridge across the Flint river, with an acre of land at each end, and after her death all to be sold by his administrator, and the proceeds divided as thereafter directed in the will; also, a child's part of his personal property. By the 4th item he gave his daughter Louisa Martin and her children a lot of land in Upson county, and, after accounting for it at a certain valuation, provided that they were to have a child's part of his personal property. By the 5th, 6th, and 7th items, respectively, he gave to his daughters Mary E. Matthews, Frances Matthews, and Sarah Williams and their children an equal share in his personal property and the proceeds of the sale of his lands, free from the debts of the husband of Mary E. Matthews as to the portion going to her and her children; and provided that none of the property willed to Frances Matthews and her children was to go into the possession and control of her husband, John F. Frances, in any capacity whatever. By the 8th, 9th, 10th, 11th, and 12th items he gave to other children equal shares in the proceeds of his personalty and the sale of his land, less certain advancements. By other items of his will he directed that all his real estate, not specifically devised or not sold by him while in life, be sold by his administrator, and that his administrator sell all his personalty, and, paying expenses of administration, division to be made as therein before provided. The declaration further alleged that J. W. Adams, administrator, had sold all the realty, except one lot, for \$8,584, and realized from the personalty \$14,774, and had paid out only \$964.91 on debts of the estate and cost of administration, leaving \$22,394.09 in his hands to be paid to the legatees. The petition then set forth who were the various legatees in life, and the amount claimed to be due each, and that the administrator had failed and refused to pay them such amounts, or any part thereof. Defendant

pleaded not indebted. Further, John M., Beula A., and Brinkley Matthews, and Sarah McMichael are the children of Fanny A. and John F. Matthews. John F. Matthews was regularly appointed trustee for his said wife and children by the chancellor whose circuit embraced the county in which they then lived. Before the trustee was appointed, the administrator advanced to the said Mrs. Matthews and her children a mule, provisions, and money, which was necessary to be done in order to support the family, and without which advancement they could not have made a living; and defendants ask the court, in the exercise of its equitable powers, to ratify such advancement. After said Matthews was appointed trustee, the administrator paid to him the full distributive share, and more than such share, of said Mrs. Matthews and her children. Further, Rebecca E., Ida M., Dora C., Clara F., and James C. Williams are children of Sarah and D. R. Williams, all minors, and without an appointed guardian; but D. R. Williams and his wife were the natural guardians, and to them the administrator paid the full distributive share of Sarah Williams and her children, and overpaid it by \$300. They were without means of support, and advancements to them were necessary, and defendants pray that these advancements be ratified. Further, a similar plea as to the children of Laura C. and William Martin, and as to the children of Mary E. and Green B. Matthews; and that the Martin children and the children of Mary E. and Green B. Matthews, and Mary E. Matthews brought suit against Adams, administrator, for their interest in the estate of John Adams, and the case was settled by paying \$200 to their counsel. Further, that John F. Matthews invested, as trustee, the money paid to him in land, which he now owns as trustee, and on which he and his family live. Further, that James W. Greene was appointed by the will to see to the execution of the various provisions of the will, advise and direct the administrator, and in all these matters the administrator acted under and by the direction of James W. Greene. The case was referred to an auditor, who made a report. Exceptions were filed to the auditor's report by plaintiff, both of law and fact. The only exceptions now material were the 19th, 20th, 21st, 22d, 23d, 24th, 25th, 26th, 27th, and the 31st exceptions of fact. The jury found a general verdict sustaining the auditor's report. Plaintiffs moved for a new trial, and, the motion being overruled, excepted.

The 19th exception was: "The auditor ought not to have charged the children for the supplies and money furnished mothers, because the evidence did not show how much supplies were furnished, and how much money, and whether either or both was actually necessary, and used for their benefit." The 20th was: "The evidence did not show that J. F. Matthews and his wife were not able to support their children, and it became

necessary for the administrator to aid in their support." The 21st was: "The evidence did not show that Green Berry Matthews and his wife, Mary E., were not able to support their children, but showed that they were, and did support them." The 22d was a similar exception as to D. R. Williams and wife, and the 23d a similar exception as to Mrs. L. C. Martin and her husband. The 24th was: "The auditor erred in finding that defendant had fully paid the children of F. A. Matthews, and \$11.29 over; that the evidence showed that he had not fully paid them, and now owes each of them \$263.73." The 25th, 26th, and 27th were similar exceptions as to the children of Mrs. Martin, of Mrs. Mary E. Matthews, and of Mrs. Sarah Williams, respectively. The 31st was that the auditor erred in finding that the administrator acted under advice of the ordinary in making the exchange of the note and security of John I. Hall for the note and security of Jennings.

The motion for new trial was upon the grounds that the verdict was contrary to law, evidence, etc.; also, because, the issue in this case being upon eight exceptions of fact, the jury failed to pass upon each exception separately, but found a verdict generally sustaining the auditor's report. Error in charging: "If you should sustain the auditor's report in full, the form of your verdict should be: 'We, the jury, sustain the auditor's report in full.'" In a note to this ground of the motion, the court states that, in connection with the charge therein excepted to, he also charged that should the jury, under the evidence and law, find that any one or more of the exceptions should be sustained, the form of their verdict would be: "We, the jury, sustain exceptions numbers so and so (naming the number), and against the other exception (naming them by number)." Error in charging: "The first question relied on by the plaintiff is the 19th exception, which I charge you is so general that you could not come to any conclusion as to what you are called on to find, and you should ignore it. If the administrator has paid all the debts of the estate, and just claims against it, and no one would apply to be guardian, I charge that if they had no guardian, and the administrator in good faith paid out money or property for their support, in excess of the interest or their estate, he is protected by the law. And if the ordinary subsequently approved the return of the administrator, it in effect is an approval of the administrator's acts, and renders his acts legal; but, before you would allow that, it must appear what the administrator paid out was for the education and maintenance of the minors, and it should be allowed to that extent only. I charge you that if the mother of these children gave her receipt for money or property, of a kind which could reasonably be used in the maintenance and education of her children, the plaintiffs in this

proceeding are concluded, for the reason the auditor has so found, and no exception is taken to that. Hence, if it so appears that such receipts were given, it will be your duty to find, to the extent of those receipts, that the money and effects were paid to the plaintiffs, unless this fact is rebutted by other evidence. If the plaintiffs claim that anything is due them, the burden is upon them to show how much is due."

J. M. Mathews, for plaintiff in error. J. S. Boynton, Hall & Hammond, A. M. Speer, and M. H. Sandwich, for defendants in error.

LUMPKIN, J. This was a somewhat complicated case, and the questions brought to this court for review arose upon the trial of exceptions to an auditor's report. The material facts are stated by the reporter. The first and second headnotes indicate the controlling points in the case upon which our judgment of reversal is based. In the third and fourth headnotes we have formulated questions which may arise on the next hearing, but which are not now decided.

1. The court, among other things, instructed the jury that, if they sustained the auditor's report in full, the form of their verdict should be: "We, the jury, sustain the auditor's report in full." There being numerous exceptions to be passed upon by the jury, this charge was in plain violation of the express provision contained in section 4203 of the Code, which declares that, when exceptions to the report of an auditor are submitted to a jury, they "shall return a verdict on each exception *seriatim*." We are therefore compelled to hold that this charge was erroneous.

2. The auditor, in effect, reported that the administrator with the will annexed had the right to pay and deliver to the mothers, respectively, of the minors interested in the estate, all of the money and property coming to the minors under the will of James Adams, in order to enable the mothers to apply the same to the maintenance and education of the minors. The view of the law thus entertained by the auditor seems to have been approved by the trial judge, and the main issue contested before the jury was whether or not, in point of fact, the money and property turned over to the mothers of the children was actually necessary for their maintenance and education, and was actually used for this purpose. Under the provisions of section 2540 of the Code, an administrator has no authority to apply or pay, directly or indirectly, any portion of an estate in his hands, belonging to a minor who has no guardian, to the maintenance and education of the minor, without first obtaining the direction of the proper ordinary. In the absence of such direction, the payment to the mother of a minor would be totally unauthorized, especially so when it appears that the minor's

father is alive, and the minor is residing with him as a member of his family. It follows that the receipts given by the mothers to the administrator for the shares of their children, respectively, in the estate of Adams, were no legal protection at all to the administrator. These plain rules of the law were recognized by the able counsel who appeared for him; but it was insisted that the approval by the ordinary of his returns, including the receipts just mentioned, legalized and made valid the administrator's acts in the premises. We cannot concur in this view. The cases of *Rolfe v. Rolfe*, 15 Ga. 451, and 20 Ga. 325, and *Smith v. Hilly*, 29 Ga. 582, all of which were decided before the Code, and *Cook v. Rainey*, 61 Ga. 452, and others to the like effect, decided since the adoption of the Code, do not sustain the contention of the defendants in error in this respect. These cases do, in effect, hold that, by approving the regular annual returns of a guardian showing on their face that the expenses of maintaining and educating the ward had exceeded the income of his estate, the ordinary consented to the expenditure of more than the annual profits for these purposes. But a careful examination of these cases will show that the money expended by the guardian in each instance was directly disbursed by him for the ward's maintenance and education. In other words, the returns showed unequivocally on their faces that the money of the ward was in fact used by the guardian for these identical purposes. These cases, and others like them, have gone quite far enough in holding that a guardian will be protected in encroaching upon the corpus of the ward's estate, under these circumstances, and we are not disposed to extend it further. Granting, however, for argument's sake, that the doctrine of these cases is applicable to a case arising under section 2540 of the Code, we are quite certain that an administrator, in order to obtain the protection afforded by this section, must see to it that the money is expended properly and judiciously for the minor's support and education, and for nothing else. He cannot obtain this protection by turning over the minor's estate in bulk to any other person, upon the idea that so doing is necessary to the minor's maintenance and education, and that the person to whom he turns the estate over will properly dispose of it for this purpose. To sanction such a rule as this would simply put it within the power of an administrator, having in his hands property belonging to a minor, to deliver it to whomsoever he pleased, and thus avoid the responsibility which the law puts upon him. Surely such a thing was never contemplated by the lawmaking power, or by this court in any of its decisions.

3. But suppose the administrator, though without authority of law, did turn over to the mothers of these children their shares

in the estate of James Adams, and can affirmatively show that the children were actually in want, and were actually supported or educated out of the means thus furnished. Will a court of equity, at the instance of the administrator and the sureties upon his bond, ratify such an appropriation of the children's property, the same involving, not only the income, but the entire corpus, of their shares in the estate? We leave this question open for further investigation.

4. Another question which seems to have cut no figure in the trial now under review, but which may become an important one at the next hearing, is whether or not an administrator with the will annexed will be protected in what he does under the advice of an attorney at law appointed by the will to see to its probate and execution. As no ruling was made by the court below on this question, we also leave it open, without intimating any opinion concerning it. Judgment reversed.

(94 Ga. 283)

BEDGOOD et al. v. McLANE.

(Supreme Court of Georgia. Aug. 14, 1894.)

DOMICILE OF MINOR—GUARDIAN—SALE FOR TAXES  
—PRESUMPTIONS AS TO VALIDITY.

1. Although a minor of very tender age may, at the time of his father's death, be temporarily residing with another person in a county other than that in which the father was domiciled, and in which he died, and may continue to so reside after the father's death, the ordinary of the county of the deceased father's domicile had jurisdiction, upon the application of the person with whom the minor was thus residing, to appoint him guardian of the minor, there being nothing to show that the minor's domicile had, during the father's lifetime, become different from that of the father by reason of a relinquishment by the latter of his parental authority to the other person, and the applicant for the guardianship, by applying to the ordinary of the county in which the father died, recognizing and conceding that no change in the minor's domicile had taken place.

2. Where a lot of wild land was sold for taxes by virtue of an execution issued by the comptroller general under the provisions of the act of February 28, 1874 (Acts 1874, p. 105), the presumption, in the absence of sufficient evidence to the contrary, is that the comptroller general complied with his duty as to advertising, as required by the sixth section of that act, as amended by the act of March 2, 1875 (Acts 1875, p. 119); and this presumption is not overcome by exhibiting three copies of a newspaper dated, respectively, in three successive weeks, and published at the capital of the state, in each of which appears a proper advertisement that the lot in question was in default for taxes, without also exhibiting other copies of the newspaper printed during the weeks immediately before and immediately after the three weeks mentioned, and not containing such advertisement, or else showing that no such copies were issued. The mere fact that the files of the newspaper, kept in the office in which it was printed, contained no copies of given dates, would not, of itself, be sufficient evidence that no copies of the paper were in fact printed and issued on those dates.

3. Irrespective of the various questions raised in the motion for a new trial, the verdict, for the reasons indicated in the foregoing

notes, was wrong on the substantial merits of the case, and the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Dooly county; W. H. Fish, Judge.

Action by H. A. McLane against Bedgood & Royal. Plaintiff had a verdict, and, from a judgment refusing a new trial, defendants bring error. Reversed.

Brisbee & Crum, Wm. Brunson, and J. H. Martin, for plaintiffs in error. Geo. W. Wooten, J. W. Haygood, and Gustin, Guerry & Hall, for defendant in error.

**LUMPKIN, J.** It appears that S. J. McLane, under a regular chain of title from the state down to himself, was the owner of a lot of wild land in Dooly county, on October 23, 1870. He died, while seised of this lot, and Hugh McLane, who was his son and only heir at law, became of age in 1889 or 1890. In 1877 the comptroller general, under the provisions of the act of February 28, 1874 (Acts 1874, p. 105), as amended by the act of March 2, 1875 (Acts 1875, p. 119), issued an execution against this particular lot for its taxes for the years 1874, 1875, and 1876. The land was levied upon by the sheriff, and, after due advertisement, was legally sold in 1878 to one Clements, under whom Bedgood & Royal now hold. Hugh McLane brought the present action against them to restrain them from trespassing upon the lot, for the recovery of the value of timber which they had cut and removed from the same, and for the cancellation of their paper title to the lot. There was a verdict for the plaintiff, and the defendants assigned error upon the overruling of their motion for a new trial.

1. The act of 1874, above mentioned, made it the duty of the comptroller general, upon receipt of the several digests of the receivers of tax returns, to make out a complete list of all the unimproved or wild lands in this state not given in for taxes, and, after completing the list, to make advertisement of such lands for 30 days in one newspaper published at the capital of the state, and in such advertisement require the owners of said lands to come forward and give in and pay the taxes on the same. By the act of 1875, already cited, the time during which the publication was to be made was changed from "thirty days" to "once a week for four weeks." After the expiration of the time of advertisement, it became the duty of the comptroller general, under the act first mentioned, to issue executions against all wild lands not returned for taxation. The ninth section of that act provided that "no sale made under this act shall in any manner operate to affect or defeat the title of any idiot or lunatic or minor who has no legal representative." It will have been observed that, at the time of the sheriff's sale of the lot in controversy, Hugh McLane, its

owner, was a minor; and one of the controlling questions is whether or not, at the time of that sale, he had a lawfully-appointed guardian. It appears that, in 1873 or 1874, one Mize was appointed guardian of Hugh McLane, who was then a mere child, by the ordinary of Miller county. At that time Mize was residing in Randolph county. S. J. McLane died about one year before Mize was appointed guardian of his son. At the time of his death the elder McLane resided and was domiciled in Miller county, to which county he had recently removed from Randolph. In point of fact, Hugh McLane had never personally resided in Miller county at any time before the appointment of his guardian, and only in so far as his residence was legally incidental to that of his father could he be said to have been a resident of that county. Under this state of facts, did the ordinary of Miller county have jurisdiction to grant the letters of guardianship? We think he did. According to section 1693 of the Code, the domicile of every minor is that of his father (if alive), unless such father has voluntarily relinquished his parental authority to some other person. There was no evidence to show that the elder McLane had ever done this. At most, it only appears that he was permitting his child to reside temporarily with Mize. Therefore, when McLane died, the domicile of the child was in Miller county. The mere fact that he continued to reside with Mize in Randolph county, after the father's death, would not of itself be sufficient to change his lawful domicile in Miller; and, by applying to the ordinary of that county for letters of guardianship, Mize recognized and conceded that no change in the minor's domicile had taken place. We therefore think the appointment of the guardian was valid. Consequently the ninth section of the act of 1874, above quoted, has no application, and the sale by the sheriff under the comptroller general's execution was good, if otherwise free from legal objection to its validity.

2. In the absence of sufficient evidence to the contrary, the law presumes that the comptroller general complied with his duty as to advertising, as required by the acts cited in the first division of this opinion, and the burden of proof was upon the plaintiff to show that he did not. An attempt to do this was made by exhibiting in evidence three copies of the Atlanta Constitution, published, respectively, in three successive weeks before the issuing of the comptroller general's execution, in each of which copies appears a proper advertisement of the lot in controversy as being in default for taxes. This, in our opinion, was not sufficient to show a failure to advertise once a week for four weeks without producing other copies of the same paper published during the weeks immediately before and immediately after the three weeks mentioned, and showing that neither of them contained the ad-

vertisement, or else by proving that no such copies were in fact issued. If they were issued, there is certainly, at least, as much presumption that one or the other of them contained the advertisement as that neither did contain it, and it was incumbent on the plaintiff to show affirmatively the absence of the advertisement from both. As he did not produce such copies, his next contention was that, in point of fact, they were never issued, and this he attempted to establish by showing that an examination of the files of the Constitution, kept in the office where that paper was printed, contained no such copies. This itself was insufficient to establish that such copies were not in fact printed and issued. It would be a very easy thing, after a newspaper was printed and placed on file, to remove it; or it might be that, by inadvertence, oversight, or neglect, a particular issue of the paper may never have been placed upon file in the newspaper office. Indeed, such a thing is far more probable than that a newspaper regularly published had no issue on a given date or dates upon which, in due course of business, copies of it ought to have been printed and circulated. So we think the plaintiff failed to show that the comptroller general's advertisement was not duly published, and the presumption that it was must stand. This disposes of the only remaining material objection to the validity of the sheriff's sale.

3. Numerous other questions were raised by the motion for a new trial, but, irrespective of all of them, we have shown that the verdict was wrong on the substantial merits of the case. We therefore grant a new trial, without discussing the grounds of the motion in which these other questions are presented. Judgment reversed.

(94 Ga. 231)

# SOUTHERN MARBLE CO. v. DARNELL.

(Supreme Court of Georgia. July 30, 1894.)

## DIVERSION OF WATER—DAMAGES—INJUNCTION—ESTOPPEL.

1. The measure of damages for injury to a mill site occasioned by diverting therefrom at a point above the owner's land, by means of a permanent ditch, the water or a part of the water in a stream which would otherwise have reached the mill site, and might have been used as a part of the available water power, is either the difference in the value of the land without the diverted water and its value with that water, or the like difference as to the value of the mill site itself; the owner being entitled to recover one or the other of these differences at his election. No mill ever having been actually erected, nor anything done preparatory to its erection, the intention of the owner at the time the diversion of the water took place, or at a previous or subsequent time, to erect a mill on the site in question, would make no difference as to measuring his damages. The anticipated profits of a mill which never existed could not be recovered.

2. The like measure of damages would apply to an other or manganese mine or mines never opened or worked or put in a state of preparation for applying the water to them.

3. If the owner consented to the construction of the ditch or canal, knowing the purpose of the same, he could not afterwards complain of the result as an injury to him or his premises. His consent might be inferred from his aiding as an employé in surveying and locating the route of the ditch, and accepting compensation for his labor, unless he actually objected and made his objection known in due time.

4. If the owner stood by while the ditch or canal was being constructed at a heavy expense, and made no objection, and took no steps to prevent the work or its consequences, until after completion, he would be estopped from afterwards obtaining an injunction against the use of the ditch or the continuous diversion of the water by means of the same.

(Syllabus by the Court.)

Error from superior court, Pickens county; George F. Gober, Judge.

Action by Manson Darnell against the Southern Marble Company for an injunction and other relief. There was a verdict for plaintiff, and from an order denying a new trial defendant brings error. Reversed.

The following is the official report:

Darnell brought his petition against the Southern Marble Company to recover damages alleged to have resulted to him from the diversion of water by defendant, and for injunction to prevent any further diversion. The petition was demurred to, and the overruling of the demurrer is one ground of exception. The jury found for the plaintiff \$100 as damages, and that defendant be perpetually enjoined as prayed. Defendant moved for a new trial, and the overruling of the motion is the other ground of exception. The petition alleges: Upon plaintiff's land flow two streams of water, known as "Barnett Creek" and "Dock Creek." On one of them is a valuable water power, of the height of about 25 feet, over which the creek flows, and to utilize which plaintiff intended to erect a mill for grinding grain for profit; said water power being sufficient, with the natural and ordinary flow of water in the creek, to propel the machinery of the mill or other ordinary machinery usually propelled by water. Plaintiff's home and farm are on this land, and he conducts farming operations thereon, and said streams are very valuable in furnishing to the farm and its uses, at all times when undisturbed and in their natural flow, an adequate supply of water. The land contains valuable mineral deposits, and the streams are indispensably necessary to the development and mining of said minerals; and, in the event plaintiff should at any time desire to enter upon such development and mining, it would be necessary to divert said streams or some portion thereof for that purpose, and the volume of the same in their natural flow would be entirely sufficient for such operations. Defendant, a corporation of this state, doing the business of quarrying marble in the immediate neighborhood of said land, has diverted said streams from their natural and usual channels, and has conveyed the waters of the same off and away from plaintiff's



land, by means of aqueducts, pipes, ditches, dams, and other means, thereby absolutely depriving plaintiff of the uses and benefits of the waters of said streams; has disregarded defendant's notice to desist from such unlawful diversion; and has continued the same for the past two years. If defendant be permitted further to continue such diversion, the land of plaintiff will necessarily be irreparably depreciated in value, his farm will be seriously damaged, his water power on which he intended to erect the mill will be totally destroyed and made worthless, and the various uses and benefits accruing to him by the free and undisturbed possession and enjoyment of said streams will be largely impaired. Defendant is using said waters on its property in quarrying and cutting marble for profit, without the permission of or the slightest compensation to plaintiff, who, by these means, had been damaged \$5,000. He prays that defendant be commanded by injunction to desist absolutely from the diversion of the streams from their natural and usual channels, and from interfering in any way with their course or condition. The grounds of demurrer to the petition are: (1) The allegations show no cause of action in plaintiff against defendant, and (2) do not entitle him to the relief prayed, nor to any relief. (3) He fails to allege that defendant is insolvent. He fails to allege that the damages claimed to have been done him are irreparable; but, on the contrary, sets forth that he has been damaged a certain sum, which allegation, while it destroys a necessary ingredient in the petition for injunction, affords no basis otherwise for the action, there being no prayer for money judgment. (4) He fails to allege where the alleged diversion of water was made. He fails to allege how much he has been damaged as to his cattle or stock, how much as to farming uses of water, how much as to mineral or quarrying purposes, or how much as to the contemplated mill; nor does the petition furnish any data upon these matters, but is utterly vague and insufficient. And he fails to allege that he could profitably have erected and operated a mill upon his property, using the water power mentioned, with an ordinary and natural flow of the water, or that a profitable development of the mineral interest upon the land could be obtained by the use of such water in its ordinary and natural flow. By amendment, plaintiff alleged that, while he has claimed damages in a sum mentioned, such damages are irreparable if defendant be permitted to continue the acts complained of; that his farm as such, and with reference solely to the use of the same for agricultural purposes, has been damaged \$1,000 by the acts complained of; that by the diversion of the water from his land, and the diminution of the supply to which he is justly entitled, he has been damaged \$500 as to his cattle, horses, and other stock; that his contemplat-

ed mill property has been damaged \$1,000; that, with the ordinary and natural flow of water in the stream on which said water power is situated, the contemplated mill could have been profitably erected and operated, and other machinery usually propelled by water, for threshing grain, ginning cotton, etc., could have been successfully and profitably utilized on and by said water power, but for the unlawful acts of defendant in the diversion and diminution of the water supply; that by said acts the mineral interest, consisting of valuable deposits of manganese and other, has been damaged \$2,000; that, by being denied the free and undisturbed use of the supply of water naturally belonging to and running in said stream, complainant has been unable to complete negotiations for the leasing of these mineral deposits to solvent and responsible parties, and such negotiations were actually in progress, and were terminated by such parties because of the diversion and diminution of the water supply by defendant; and that in the use of water from said streams, of which plaintiff has been deprived by the acts of defendant, for culinary and other household purposes, he has been damaged \$500,—for all of which several sums he prays judgment. He further alleges that, at the time of the diversion of the streams flowing over his land, he was the owner and in actual possession of the same; that one of the streams runs within less than 50 feet of his residence; that these streams flow in a southerly direction, their source being in a northerly direction from his land and residence; that, at a point on said streams about 400 yards from his land, the ditch by means of which the water is diverted has been cut for a distance of nearly five miles, running in a westerly direction, taking up and diverting all the streams flowing in a southerly direction and which the ditch crosses, the purpose being to discharge the water of said streams into a reservoir at the western turning of the ditch, and thence to the mill and quarries of defendant, in the operation of which mill and quarries the water is used, etc. The grounds of demurrer to the amendment are: (1) It is too vague and general as to the elements of damage. (2) As to the claim of damages to the alleged mill site or "contemplated mill property," and as to the alleged mineral interest, (a) the elements of such damage are not specifically alleged; (b) plaintiff cannot recover for future or prospective damages; (c) nor can he recover conjectural, speculative, or remote damages, such as he sets forth as to the mill site and mineral interest. (3) Those portions of the petition and amendment asking for damages for diversion of agricultural or household supply of water, or supply of water to cattle or stock, do not specifically set forth the elements of damage complained of. The judge sustained the demurrer as to the allegations relating to diminution of water for stock,



culinary, and domestic purposes, and agricultural purposes, but overruled the demurrer in other respects, holding that the plaintiff might show what he had been damaged from the diversion of water from his contemplated mill, the measure being "the reasonable value of the profit for rent of such a plant as he intended and had ability to build, for the time during which he was deprived of its use by the act of defendant by the diversion of the water, if such is the fact, taking into consideration the cost of the plant"; and that plaintiff should be allowed to show what he had been damaged by being deprived of the water for the washing of his mineral property, if such was the fact, such damages not to be prospective, but to be confined to what he had actually sustained. In its answer, defendant denies that it has damaged the plaintiff in any way; or that it has so diverted water as to deprive plaintiff of an abundant supply for his stock, or for any ordinary domestic or agricultural purpose; or that with the full, ordinary, and natural flow of water there would be a sufficient supply to afford plaintiff such power as to enable him to erect and profitably conduct a mill; or that there are mineral deposits of value on his land, the profitable working of which is or has been prevented by a diversion of water by defendant; or that the natural and ordinary flow of water would be sufficient for the profitable working of said minerals. Defendant further pleads that it acquired a perfect legal right to construct the waterway complained of. One of its lateral ditches does divert a small amount of water which by its natural course would flow into Dock and Barnett creeks, but plaintiff is not in any manner injured thereby. The points of diversion are near the heads of the streams, and the amount of water diverted from the streams by the ditch is very small,—so small as not perceptibly to lessen the volume of water in the streams when they reach plaintiff's land. These streams are made up or supplied by numerous springs along their course, the greater number of which are at points below the ditch. When the streams reach plaintiff's land, they contain a sufficient quantity of water to furnish an adequate supply daily for 50,000 head of cattle,—a much larger herd than will probably ever be pastured on said land by plaintiff, his heirs or assigns. It is not practicable, with or without the water diverted by the ditch, to erect a mill at plaintiff's alleged mill site (which defendant has had examined) that can be successfully and profitably operated. The alleged damage to said mill site, if any has been sustained, is too remote and speculative to be recovered. Defendant cut the ditch more than two years ago, and has continued from that time to use it. It was constructed at much labor, expense, and time, and is of much value to defendant. Long before it was dug, plaintiff was fully aware of defendant's purpose.

He actually took part in the survey for the ditch, was employed by defendant to assist in its construction, did assist in the work, and was paid for his services by defendant; wherefore he is estopped from urging that he has been damaged by it, but, if not estopped, he has, by his long acquiescence and laches, deprived himself of the right to equitable relief by injunction.

The motion for a new trial alleges that the verdict is contrary to law and evidence, and contains the following special grounds: (1) To plaintiff's testimony of his intention to erect a mill, the defendant objected, on the ground that such proof would be irrelevant and immaterial, and because a recovery on account of such intention would be of a future, speculative, and remote nature. Upon this objection the court made the following ruling, which is assigned as error: "My idea is that he would have a right to show that he had an intention and ability to erect a mill, and has a right to show what was the value for rent of such a mill as he had the ability and intended to erect, for the time he was deprived of it by the act of the defendant, if he was deprived. I mean by value for rent the profit for hire. You can take into consideration what it would cost, and the profit that would be in it for rent during the time he was deprived of it, taking into consideration the amount of cost and all. Of course, the capital he put into it would be taken into consideration. It is the profit for rent during the time he was deprived of it." (2) Plaintiff testified, in relation to damage by diversion of the streams from his mineral land: "We have got some manganese and other property, and we got an option at one time to certain property to McConkey and Ely. Then two parties come to me and Mr. Padgett, and wanted a showing on our property there, and we give them a showing, and the time come on for them to pay for it, and they told me the money was ready if we put the water back there,—the water the Southern Marble Company took from me. Me and Mr. Padgett were to get sixteen hundred dollars. Mr. Padgett had a half interest in the minerals. They told us both that the money was ready if we would put the water back there; that they had no use for it without the water." To this testimony defendant objected, on the ground that the plaintiff could only show how much he had been damaged by being deprived of the water that he could have used in the development of the mineral property; that the option did not indicate in any manner the value of the property; that such projected sale did not indicate the value of the property prior to bringing the suit; and that the sayings of these other parties were not admissible. The court ruled that the giving of the option would be immaterial, and that plaintiff would have a right to show any damage, not prospective, accruing to him; also: "You are here asking for an injunction

to restrain these people from diverting this water. If you get the relief you seek, you would have your mineral property and your water on it. You have the right to show what you could have sold this property for, as one of the means of determining its worth or value. You have no right to show what anybody said about it. It is a fact, though, if you can sell it, that you have right to show. Upon the question as to what it would be worth per year, you have a right to show it. You can show, if you can, what you could have sold it for, by way of showing the worth of the property; and then the question would come up as to its annual worth. The measure of damages would be its annual value; that is, for the time he was deprived of the use of this water. The presumption is, if it was worth eight hundred dollars, it is worth that now, if you get the water back. That is the gist of your case, that you were damaged by taking this water off. If you were, you must show it to the jury during this time, prior to the filing of the suit." Plaintiff testified, under this ruling, that they could have sold that property for \$1,600 but for the interference with the water; that he did not know exactly what he could have made out of it, but he thought it would have been worth \$300 a year. Defendant further objected that the law establishes the rental or annual value of the property, and that the testimony gave the opinion of the witness as to what the rental value of the property would be for mineral purposes, when it was not shown that he was an expert. On these objections the court ruled: "I do not think that it would necessarily follow, because he could have sold the land for a certain value, that it would be worth so much per year. If he has been in charge of the property, and knows all the facts and circumstances connected with it, if he knows what he could realize out of it for rent or lease, I think he would have a right to state it." Upon the foregoing rulings errors are assigned, and a similar assignment is made on the following testimony of Padgett, touching which the court made like rulings: "We had a contract with McConkey and Ely. If it proved to be good, they would take it. They worked down on my brother's farm. They would take the mineral interest. It was iron and manganese and other. They called it 'manganiferous ore.' They went on and worked on my brother's below us, and I sorter opened ours. They took an option on ours at \$1,600. Plaintiff and I each had a half-interest in the property. We sold it for \$1,600. That was the contract. That was a little before the ditch was cut. They came and told us they would take the property, but the water was cut off, and they went and worked some on the same land. Taking the water off into the ditch to the marble works prevented the sale. (4) The court charged: "In this case, gentlemen, there has been a good deal said on both sides. It has

been insisted here that this defendant is a corporation, and, on the other hand, it has been insisted that Mr. Darnell was here suing this company when he had no just and proper claim. I say these things have gone before you. They have simply been thrown into this argument. You are here, behind all this, to try this case according to the law and evidence in this case; and nothing that has been thrown into it can justify you in going off from that, and doing anything in the case." This charge is assigned as error, because misleading and calculated to prejudice the defendant in the minds of the jury, and to discredit its counsel. (5) The court charged: "The owner of land is entitled to the free and exclusive enjoyment of all water courses not navigable, flowing over his land; and the diverting of a stream wholly or in part from the same, or the obstructing thereof so as to impede its course or cause it to overflow or injure his land, or any right appurtenant thereto, or the adulterating thereof so as to interfere with its value to him, is a trespass upon his property." Assigned as error, because the facts of the case do not constitute a trespass on plaintiff's property, and the principle of law stated should not have been emphasized. The court gave in charge section 742 and 744 of the Code, adding: "In this connection I charge you, whether or not this proceeding in cutting this ditch, if this plaintiff, Mr. Darnell, was not notified and gave no consent to a diversion of this water, even if it was diverted from a point before it reached his land, he would not be bound by any proceedings of that kind. It would not affect him unless it has been shown to you that, in the damages which accrued to him, he was a party to it, and was bound by it." Assigned as error, because of the following facts: In argument counsel for plaintiff insisted that defendant had robbed the plaintiff of his property, etc., in reply to which counsel for defendant orally requested a charge to the effect that defendant, as a mining corporation, could, under the law, divert water from its natural course by a ditch across the lands of another, and that the jury would be authorized to presume that defendant acquired a legal right to cut the ditch. The charge given was not equivalent to the charge orally requested. On the contrary, the last clause is a practical refusal of the request. It was error to refuse to charge upon the subject of presumption, as requested. The last clause was also error, because the evidence shows that plaintiff assisted in surveying the ditch, was paid for that service by defendant, and stood by and saw the work of construction go on without objecting to it; and he is therefore estopped from denying that defendant had the right to cut the ditch. To this ground the court appends this note: "Counsel asked court to charge sections in this ground set out. Counsel argued to jury that the presumption was the defendant had the authority to do what it

had done, and that the presumption was its acts were lawful acts, and not unlawful acts. Counsel may have asked orally court to charge as to presumptions. As to this I cannot say." (7) The court charged: "The plaintiff alleges that the water has been diverted, so that it is not returned to its natural channel to pass over the plaintiff's land, but is diverted therefrom. He alleges different ways in which he has been damaged. He says that these damages are irreparable, and that for these reasons, on the evidence in the case, the defendant ought to be enjoined from the further and continued diversion of the water, as he insists. As to what the truth of the case is, it is for you to say from the evidence. The burden is upon the plaintiff to make out his case by the preponderance of the evidence. If you believe from the evidence that the defendant diverted the water as charged, in such a way as to take it from its channel, not returning it, and that, after taking it from a point on the stream above the plaintiff's land, so conducted the water that it was not returned to its natural channel, and it did not flow in its natural channel through plaintiff's land, upon such a state of facts, if no reason appeared to the contrary, and the case is in other respects made out, the plaintiff would have a cause of action against the defendant, and he would be entitled to a verdict for nominal damages for the invasion of his right to have the water flow through the land in its natural channel. If the defendant diverted the water as charged, either wholly or in part, so as to prevent it either wholly or in part flowing in its natural channel through the lands of the plaintiff, and by reason of this the plaintiff was damaged, and you further believe from the evidence that such damages are irreparable and continue to be,—that is, the damages caused by such diversion,—then, in such case, if no reason appears to the contrary, and the case is in all respects made out to the satisfaction of the jury, the plaintiff would be entitled to a perpetual injunction enjoining the defendant from diverting the water, if such is the fact. The defendant insists that the plaintiff is estopped from seeking an injunction against it, for the reason that the plaintiff stood by and saw it spend its money, and build its ditch and works, and go to great expense; that the plaintiff helped construct the ditch; and that such time has elapsed; and that for these reasons, along with others, would bar the plaintiff of his right to an injunction, if he ever had such right. The injunction asked by the plaintiff is asked as an equitable right. A man who would have equity must do equity,—that he himself has acted properly about the matter in controversy. He must not, by word or deed, have led the opposite party into the position about which he complains, must have been diligent, and not guilty of any laches in the asserting of his rights." Error, because: (1) Plaintiff

does not allege in his pleadings that his damages are irreparable, but, on the contrary, alleges his damage in a specific sum, and prays judgment therefor. (2) This charge enumerates and repeats the facts alleged by plaintiff, and instructs the jury that they are sufficient, if no reason to the contrary appears, to authorize a verdict for the plaintiff, and then proceeds to state the contrary reason insisted upon by defendant, but omits to instruct the jury that such reason, if it exists, would be sufficient to estop the plaintiff, but, on the contrary, instructs the jury that the plaintiff must by word or deed have led the defendant to do that of which he complains, before he can be estopped. (8) The court charged: "The plaintiff insists that he is entitled to special damages. He insists that the water was diverted from a place where he intended and had the ability to build a mill; that he was prevented from building the mill, for the reason that the water was diverted therefrom; and that he had not sufficient left to run the mill. The burden would be upon the plaintiff to show that he is entitled to the special damages claimed. The burden would be upon the plaintiff to show that he intended to build the mill, and had the ability to build it, in so far as he had money or resources to build it. Again, he would have to show the profit of such a mill during the time he was deprived of the use of it, prior to the time of filing this suit, taking into consideration the cost of the erection of the mill and all the expenses incurred on the account and in the running of it. If the plaintiff has shown to your satisfaction that he intended and had the ability to build such a mill, and was frustrated by the diversion of the water, and that there was a certain profit from the rent of it, making allowance for and taking into consideration the expenses of erection and all other expenses, and after deducting for these, then in such event you would find for the plaintiff whatever special damages he has lost by the act of the defendant in this way, under this rule, up to the time of the filing of this suit." Error, because the damages which the jury are thus authorized to find are speculative and remote. (9) The court charged: "So the plaintiff says he is entitled to special damages for the diversion of the water in connection with certain mineral interests. As to what the facts are it is for you to say. I charge that he would be entitled to recover whatever special damages he has shown he has suffered in this connection. The measure would not be the value of the property, but it would be whatever profit he has shown he has lost on account of his inability to work such mineral property on account of the diversion of the water, and which would have accrued to him if he had had the water and had worked it; not prospective damages, but such as have been shown would have accrued to him had not the defendant deprived him of the water necessary to work them, if such

is the fact, Now, it would be on the plaintiff to show all these things. If there was sufficient water left for the purpose of working them, or if he has not shown what the profit would be, or the jury should believe from the evidence that there would have been no profit in working them, or if the jury should believe that the diversion of the water has not caused the plaintiff any damage, then in such event the jury could not find any special damages on this point for the plaintiff." Error, for the same reason stated in the last ground. (10-15) Errors in refusing to charge the following as requested: "A diversion of water will not be restrained by injunction where there is ample water left for the plaintiff's needs. A court will not consider an application for mandatory injunction where the plaintiff has been guilty of delay in asking its aid. It will not undo what the plaintiff might have prevented by filing his bill promptly. Where special damages are claimed, the proof thereof must be specific; and it is incumbent upon plaintiff to make such proof. If plaintiff had notice of the intention of defendant to divert the water in question before the digging of the ditch, and did not apply for injunction until after the ditch had been dug and defendant had incurred great expense in connection therewith and with the use of the water, he will not be entitled to an injunction. More especially would this be true if plaintiff participated in digging the ditch or in the survey therefor, knowing the purpose of such survey, and did not warn defendant to desist. If the plaintiff is not estopped as above stated, still, in order to entitle him to an injunction, he must show that defendant has diverted the water without right, and is insolvent, or that it has diverted the water without right, and the damage to plaintiff cannot be measured in money. Before plaintiff can recover for damage done to his mineral interests by the diversion of the water, he must show what such damage was. It is incumbent on him to show that he cannot, since the diversion of the water, develop and work such minerals as profitably as he could have done without such diversion. He must further show that he was able to and would have developed or worked such minerals, and what loss in profits therefrom he has sustained by reason of such diversion. The measure of his damages would be in such case, not the value of the mineral interest, but what would be his yearly loss of profits because of such diversion. In connection with this, the jury would have the right to consider what the expense of working or developing of the mineral would have been."

Harrison & Peeples, for plaintiff in error.  
S. A. Darnell, for defendant in error.

SIMMONS, J. Darnell filed his equitable petition against the Southern Marble Company, alleging that he was the owner of cer-

tain lots of land upon which was situated a valuable mill site, where he had intended to erect a mill, and that on another lot there were valuable mineral deposits of ocher; that two streams flowed through these lots, supplying sufficient water to run the mill and work the mine; that the defendant had cut a certain ditch, five miles in length, whereby a portion of the water which naturally flowed through his land was diverted, thus causing damage to his mill site and mine. He prayed for damages and an injunction. The jury, under the charge of the court, returned a verdict for the plaintiff for damages, and decreed a perpetual injunction. The defendant made a motion for a new trial, which was overruled, and it excepted.

1. Several grounds of the motion for a new trial complain of rulings of the judge allowing evidence to be introduced showing the profits which the plaintiff could have made if he had erected the mill, the rent of the mill, etc., and of certain charges of the judge upon this theory of the case and on the measure of damages, all of which will be found in the official report. As there is to be a new trial, we will lay down a general rule which we think ought to control the case. We think where a person goes upon a stream above the land of another, and diverts part of the water from his lands by means of a permanent ditch, which water would naturally have flowed upon his lands to the mill site, and which might have been used as a part of the water to operate the mill if one had been erected there, the proper measure of damages in such a case would either be the difference in the value of the land without the diverted water and its value with that water running to the mill site, or the like difference as to the value of the mill site itself. The owner would be entitled to recover one or the other of these differences at his election. Inasmuch as the owner had not erected a mill upon the site, nor done anything preparatory to its erection, his intention at the time the water was diverted, or at a previous or subsequent time, to erect a mill on the site in question, would make no difference as to the measure of damages. No mill having been erected, the anticipated profits arising from the running of a mill could not be recovered, and proof as to the probable extent of such profits was inadmissible. The charge of the court as to the recovery of such profits was error.

2. The like measure of damages would apply to the ocher or manganese, the same never having been opened or worked or put in a state of preparation for applying the water to it.

3, 4. It was contended on the part of the defendant that the plaintiff is estopped from claiming damages, because, when the ditch was being dug, he knew the purpose for which it was intended, and not only stood by and saw the work going on, but was actually employed by the defendant to assist in dig-

ging the ditch, and was paid for this service. If this be true, we think the plaintiff could not afterwards complain that the ditch diverted water from his premises. It would be inequitable and unjust to allow him to recover damages for an injury resulting from this cause. He could not stand by while the ditch was being constructed at a heavy expense, or aid in the digging of the ditch, receiving compensation therefor, and making no objection, and then recover damages for the diversion of the water from his premises, when he knew or ought to have known that this would be the result of the construction of the ditch. Under these facts, he would be estopped from obtaining an injunction against the use of the ditch and the continuous diversion of water thereby. Judgment reversed.

(44 S. C. 121)

**BUIST v. BRYAN.**

(Supreme Court of South Carolina. April 16, 1895.)

**BUILDING AND LOAN ASSOCIATIONS—APPOINTMENT OF RECEIVER—EFFECT—FORECLOSURE OF MORTGAGE.**

1. The appointment of a receiver for a building and loan association terminates the liability of stockholders for monthly dues.

2. Upon the appointment of a receiver for a building and loan association, a stockholder who has executed a mortgage to the association to secure the payment of an advance of stock is entitled to have all payments of monthly dues and interest made by him credited upon such mortgage.

3. When the monthly payments of dues and interest made by a stockholder who had bid in an advance of stock, and executed a bond and mortgage for its payment, aggregated, at the time of the appointment of a receiver for the association, a sum equal to that for which the mortgage was given, an action to foreclose the mortgage could not be maintained.

Appeal from common pleas circuit court of Charleston county; James Aldrich, Judge.

Action by George Lamb Buist, as receiver of the Assistance Building & Loan Association, against Daniel Bryan. Judgment for plaintiff, and defendant appeals. Reversed.

The plaintiff filed the following complaint: "The plaintiff, George Lamb Buist, as receiver of Assistance Building and Loan Association, a body corporate under the laws of said state, complaining of the above-named defendant, Daniel Bryan, alleges: (1) That heretofore, to wit, on or about the 9th day of September, 1892, in a certain cause depending in the court of common pleas for Charleston county, said state, entitled 'E. M. Moreland v. Assistance Building and Loan Association,' the plaintiff, George Lamb Buist, was duly appointed receiver of the said Assistance Building and Loan Association, and by said court authorized and empowered to take charge of all and singular the assets of said corporation, and to bring all actions of any kind and description necessary for winding up the affairs of said association, and protecting the interests of the stockholders thereof;

that the said George Lamb Buist duly entered upon the discharge of his duty as such receiver, having qualified as required by said order, and ever since has been, and is now, the duly-appointed receiver of said Assistance Building and Loan Association. (2) That the said Assistance Building and Loan Association is a corporation organized under the laws of this state, and was at the times hereinafter mentioned such, doing business at Charleston, in said state. (3) That heretofore, to wit, on or about the 7th day of November, A. D. 1883, the defendant, Daniel Bryan, duly made, executed, and delivered his bond or obligation in writing under seal, in the full and just sum of twenty-eight hundred dollars, wherein and whereby it was recited that whereas the above-bound Daniel Bryan having bid in an advance stock of fourteen hundred dollars on seven (7) shares of the said association held by the said Daniel Bryan as a stockholder therein, and, as collateral security, has assigned to the said association the said shares, and has received for such advances in cash the sum of eight hundred and forty dollars, and that it is contemplated that the said association shall wind up when the funds and assets of the same have so accumulated as to enable each stockholder and member thereof, upon a fair division, to be paid or receive two hundred dollars of property or assets on each and every share held by him or her; the said bond being conditioned that 'if the said Daniel Bryan, his heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the above-named Assistance Building and Loan Association the monthly sum of fourteen dollars, of which the sum of seven dollars per month is for subscriptions to the said shares, and the sum of seven dollars per month is for interest on the said sum actually paid over to said Daniel Bryan, to be paid before the seventh of each and every month until the said association shall wind up and determine, and upon such winding up or determination shall transfer and surrender the said seven (7) shares to the said association, in satisfaction of the advance aforesaid, and shall stand to and abide by the constitution, rules, and regulations of said association, then the above obligation to be void and of none effect, or else to remain in full force and virtue: Provided, that this contract shall not be construed in any manner to provide for more than the highest rate of interest allowed by law for the use of any sum actually obtained from said association.' (4) That on the 7th day of November, 1888, to secure the performance of the conditions of said bond or obligation, the defendant, Daniel Bryan, duly made, executed, and delivered to the said Assistance Building and Loan Association his deed, and thereby conveyed, by way of mortgage, to the said Assistance Building and Loan Association, its successors and assigns, the following lands and tenements, in the county of Charleston and state aforesaid, to wit: 'All that lot, piece, or parcel of land sit-

uate, lying, and being on the north side of Lee street, one door east of Meeting street, in Ward No. 7 [now No. 9] of the city of Charleston and state aforesaid, measuring and containing in front on Lee street forty (40) feet, and in depth fifty (50) feet, abutting and bounding north on lands of —, east on lands now or late of John W. O'Brien, south on Lee street, and west on lands of the said Eugenia O. Robinson, which said lot of land is part of the lot marked No. 68 of Hume's plat, dated 12th December, 1872, of the Blake lands, and conveyed to me by Eugenia O. Robinson by deed dated 7th October, 1881; recorded in Book K, No. 18, page 147, R. M. C. office for Charleston county.' (5) That on the — day of —, 188—, the said mortgage was delivered to the register of mesne conveyances of said county, to be by him entered on record, and was on said date recorded in Book Q, No. 18, page 270. (6) That the said Daniel Bryan has failed to pay the monthly installments due, respectively, as follows, to wit: On the 7th day of May, 1892, known as the one hundred and fifth installment; and installment due on the 7th day of June, 1892, known as the one hundred and sixth installment; and the installment due on the 7th day of July, 1892, known as the one hundred and seventh installment; and the installment due on the 7th day of August, 1892, known as the one hundred and eighth installment; and the installment due on the 7th day of September, 1892, known as the one hundred and ninth installment. And that each and all of said monthly dues or installments have been due for more than the space of three months. And that the said Daniel Bryan has neglected and refused to pay the same, whereby the condition of said bond has been broken, and this plaintiff, suing as receiver of said Assistance Building and Loan Association, is entitled to have a foreclosure of said mortgage decreed by this honorable court, and judgment and execution for any deficiency. Wherefore the plaintiff demands judgment: First. That the liability of the said defendant, Daniel Bryan, under and by virtue of the said bond or obligation, be determined by this honorable court, and the amount thereof fixed and ascertained. Second. That upon the liability of the defendant therein being so determined and ascertained, that a foreclosure of the said mortgage be decreed, and that the property therein described be sold, and the proceeds applied—First, to the payment of the costs and expenses of these proceedings; next, to the payment of any taxes which may be liens on the said premises; and then to the payment of whatever sum of money may then be due upon the said bond and mortgage so held by this plaintiff. Third. That the defendant, Daniel Bryan, may be adjudged to pay any deficiency which may exist after applying all of such sales moneys as hereinbefore prayed for, and that the plaintiff have leave to enter judgment and issue execution against the said defendant, Daniel Bryan, therefor. Fourth.

That the defendant, Daniel Bryan, and all persons claiming under him subsequent to the commencement of this action, may be barred and foreclosed of all equity of redemption or other interest in the said mortgaged premises. Fifth. That the plaintiff may have such other and further relief as the nature of his case may demand and to this honorable court seem meet."

To defendant's answer, plaintiff demurred generally, and particularly to the twelfth and thirteenth paragraphs thereof, which alleged, in substance, that suit was pending by the plaintiff herein against the directors of the insolvent association, to recover funds alleged to have been lost through their negligence and mismanagement, and that the bringing of the present suit before the determination of the suit against such directors was premature. Upon the hearing, the defendant interposed an oral demurrer to the complaint, upon the ground that it did not state facts constituting a cause of action. This demurrer was overruled, and an order entered sustaining plaintiff's demurrer as to the twelfth and thirteenth paragraphs of defendant's answer, and overruling it as to the rest. The defendant appealed, and filed the following exceptions: "(1) Because the complaint herein did not state facts sufficient to constitute a cause of action, and the circuit judge erred in overruling defendant's demurrer interposed upon that ground. (2) Because, in overruling the demurrer to the complaint, his honor in effect ruled that a receiver of an insolvent building and loan association, which has run the period of its natural life, can sue the borrowing members of said association for further payments, notwithstanding the fact that the association has ceased to be in operation, and no equivalent collections are made from the nonborrowing members of said association. (3) Because to allow the collections sued for in the complaint is to authorize the collection of an extortionate and usurious rate of interest. (4) Because his honor erred in sustaining the demurrer to the answer, so far as it applies to the allegations in the twelfth and thirteenth paragraphs of said answer. (5) Because his honor erred in sustaining the demurrer to the answer in part, and overruling it in part. (6) Because his honor erred in allowing plaintiff to withdraw a portion of his demurrer after the same had been argued and a decision thereon rendered."

Fitzsimons & Moffett and H. E. Young, for appellant. Mordecai & Gadsden, for respondent.

GARY, J. This is an appeal from an order of the circuit judge overruling a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The complaint and the exceptions Nos. 1, 2, and 3 will accompany the report of the case.

The appellant contends that the complaint shows upon its face that the mortgage has been paid. In considering this question, this court must determine whether the monthly payments for subscriptions to the shares of stock should have been applied upon the mortgage. The authorities upon this question are by no means harmonious. The question has not directly been decided in this state, though there are authorities bearing upon this point. The authorities in our state have, however, decided two questions: (1) That the money advanced was a loan; (2) that where the mortgage is to secure the monthly payments of interest and dues, and the contract is declared to be usurious, the borrower is entitled to a credit, not only for the amount paid as interest, but also for the amount paid for subscription on the shares of stock, in ascertaining the amount due on the mortgage. In the case of *Association v. Bollinger*, 12 Rich. Eq. 126, it appears that in December, 1854, Bollinger, who was a member of the association and holder of 10 shares of the capital stock, bid off \$2,000 of the funds of the corporation at the premium of 35 per cent. The contract, in the beginning, allowed a discount of \$700 on an advance of \$1,300, which was called a purchase of \$2,000 of the funds of the corporation. This sum of \$2,000 and interest at 6 per cent. was to be repaid, in sums of \$10, at the end of each month succeeding the 14th of December, 1854, the date of the bond and mortgage. These were the provisions of the bond. Before the second Monday of December, 1854, the defendant had made 32 monthly payments, amounting to \$320. After the execution of the bond and mortgage, the monthly payments required by the condition thereof were duly made until November, 1856. This constituted a further sum paid of \$460. The actual payments on the loan or advance amounted to \$1,480. Bollinger set up the plea of usury, which was sustained. Chief Justice O'Neal, delivering the opinion of the court, after reciting the provision of the usury law then of force, concludes as follows: "Under this provision, the corporation will be entitled to recover the sum actually loaned, deducting the payments made. The result will be that \$1,300 will be the principal, on which payments to the amount of \$1,480 have been made; so the corporation has been overpaid \$180. The consequence is that complainant's bill must be dismissed." It will thus be seen that, in determining the amount due under the mortgage, the association was required to deduct, not only the amount of the dues paid after the execution of the mortgage, but also the amount of those paid before the execution of the mortgage.

In the case of *Association v. Dorsey*, 15 S. C. 462, it appears that in 1878 the defendant obtained a loan of \$1,000 from the said company, and, to secure this loan, gave his bond, with mortgage of real estate, conditioned to

pay to the association monthly the sum of \$17.25, itemized as follows: \$5 for monthly subscription on his share; \$5 for interest on the sum advanced to him, at the rate of 6 per cent. per annum; and \$7.25 for the monthly premium which he contracted to give for the loan,—in all, \$17.25. He obtained this sum at public sale, agreeing to give a premium of \$1.45, which premium was to be paid monthly, and amounted to \$7.25 for five shares. For this amount, and for the monthly interest, as, also, the monthly subscription, on his five shares, he gave the bond and mortgage above mentioned; the monthly payments, as therein stated, being in the aggregate \$17.25. The defendant failed to meet his bond, and suit was commenced to foreclose the mortgage. The defendant pleaded usury. The following appears in the decree of the circuit judge, which was affirmed on appeal to the supreme court: "It is the opinion of this court that the interest paid to the association plaintiff by the defendant, John Dorsey, should be credited upon the dues that should legally have been collected by the plaintiff, to wit, \$5.83 per month, which is the interest, monthly, on \$1,000, at the rate of seven per cent. per annum. The amount in interest, installments, and premium paid into the association plaintiff from January, 1878, to November, 1879, by the defendant, John Dorsey, was \$174.75. The amount to which the association was entitled from the same date to November, 1879, at 7 per cent. per annum, was \$134.09, leaving a balance of \$40.66 in favor of John Dorsey. It is therefore ordered, adjudged, and decreed (1) that the complaint be dismissed, with costs; (2) that the balance of \$40.66 be placed to the credit of the defendant, John Dorsey, on the books of the association plaintiff, who shall apply the same, at the rate of \$5.83 monthly, to the satisfaction of the defendant's dues, until the said amount of \$40.66 shall have been exhausted." The complaint in that case alleged that the defendant, at the time the action was brought, to wit, September, 1879, was in arrears nine months of subscription, interest, and premium, and that the principal sum was therefore due also. Chief Justice Simpson, delivering the opinion of the court in that case, says: "We regard the question here as settled by the case of *Association v. Bollinger*, 12 Rich. Eq. 124, in which a very learned and able opinion of the distinguished chancellor on the circuit, Chancellor Carroll, was overruled by the supreme court. That case and this are almost identical. The charters of the two companies were nearly the same; the by-laws almost exactly alike. A stockholder in that company, as in this, borrowed in advance a certain sum of money, which he expected would ultimately be his. He borrowed at public bidding, as in this. He contracted, as here, by bond and mortgage, to pay the monthly interest. The premium, instead of being paid monthly, was

deducted at the time of the contract. This was paid in cash, instead of by monthly installments. This is the only difference between the cases. Is this a difference in principle? We do not so understand it. The court in that case held the contract usurious; Judge O'Neal, with that strong conviction which characterized all of his opinions, declaring 'that there was no doubt about it'; and, but for the earnest and able decree of Chancellor Carroll, he would not have thought it necessary even to look into the authorities on the subject. The argument of Chancellor Carroll and the opinion of the supreme court overruling it present the two opposing views on this subject. The decree of Chancellor Carroll is based upon two prominent grounds: First. That the dealing of the parties was a transaction between partners, and in reference to partnership funds, and was not a loan. He cited *Silver v. Barnes*, 6 Bing. N. C. 180, and several English authorities. Second. That the money advanced to Bollinger was but that which he (Bollinger) would get when the corporation wound up, and if he was willing to deduct \$300,—the premium,—because he was getting the money in advance, there was nothing illegal in this. In that case, as has already been stated, the premium was deducted at the time the contract was made, instead of being contracted to be paid in monthly installments, as the interest was to be paid. The chancellor thought that in this respect it was like a party agreeing to take less for a debt than the amount actually due, and, having executed the contract, he could not afterwards dispute or repudiate it. These positions, which are the only ones that can be taken with any plausibility in support of such a contract, after full consideration by the supreme court, were overruled, and the contract of Bollinger was declared usurious. We are bound by this decision." In the case of *Thompson v. Gillison*, 28 S. C. 542, 6 S. E. 333, the monthly stock payments were calculated as payments on the bond, divesting the question of usury.

The authorities establish the following propositions: (1) That the appointment of a receiver terminates the contract with the mortgagor as originally contemplated. (2) That the mortgagor, who is also a shareholder, is not liable for monthly dues accruing after the appointment of a receiver. (3) That upon the determination of his contract with the association, as originally contemplated, the mortgagor is entitled as credits on his mortgage both for the amounts paid as interest, and also as dues on his shares of stock. (4) That, where the amounts paid by the mortgagor as interest and dues aggregate a sum equal to the amount the mortgage was given to secure, a complaint for foreclosure of the mortgage will not be sustained. (5) That if the association goes into the hands of a receiver before the interest on the amount actually advanced, at the rate speci-

fied in the contract, and for the length of time the contract was in full force and effect, equals the amount of the premium, then the amount due under the mortgage is to be ascertained by calculating interest on the amount actually advanced, at the rate agreed upon, for the length of time the contract remained of force as originally entered into, and deducting from such amount all payments of interest and dues; the amount paid as interest and dues not to bear interest. (In such a contract as this the interest would be calculated at the rate of 10 per cent. per annum.) (6) The assignment and transfer of the shares of stock by the mortgagor as collateral security for the loan, and consolidating the interest and dues in the mortgage, show that the amount paid monthly, consisting of interest and dues, is to be regarded as what is called "redemption money," and raises an implied agreement that such payment shall be credited on the mortgage.

In support of our positions on these questions, we cite the following authorities: *Thomp. Bldg. Ass'ns*, c. 8, §§ 30, 42, 50; *Id.* c. 12, §§ 5, 13; *End. Bldg. Ass'ns*, §§ 333, 373, 496, 498, 502; 2 *A. & Eng. Enc. Law*, pp. 629, 642; *Randall v. Protective Union (Neb.)* 60 N. W. 1019; *Brownlie v. Russell* (1883) L. R. 8 App. Cas. 248. The leading authorities sustaining a contrary rule as to payments are *Strohen v. Association* (Pa. Sup.) 8 Atl. 843; *Rogers v. Hargo* (Tenn.) 20 S. W. 430; *Towle v. Society*, 61 Fed. 446.

The complaint shows upon its face that the payments made by the defendant exceed the amount due under the mortgage. We decide nothing as to the demurrer to the answer. This action of foreclosure cannot therefore be sustained. It is the judgment of this court that the judgment of the circuit court be reversed, and the complaint dismissed.

(44 S. C. 168)

#### PARKS v. CITY COUNCIL OF GREENVILLE et al.

(Supreme Court of South Carolina. April 16, 1895.)

MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWERS—NEGLIGENCE—HARMLESS ERROR—COSTS.

1. A municipality is not liable, in the absence of a statutory provision, for damages sustained by the tort of its officers.

2. The city of Greenville is not liable for the acts of its officers in laying a sewer across private land, where the mode of procedure prescribed by the city charter (Act 1885; 19 St. at Large, p. 114, § 30) was followed.

3. Municipal officers will not, in the absence of malice or culpable negligence, be personally liable for damages caused by constructing a sewer across private premises under the authority of the city.

4. Where plaintiff has not made out a cause of action, error in the admission of evidence as to damages is immaterial.

5. The supreme court has no original jurisdiction to hear questions relative to taxation of costs.

Appeal from common pleas circuit court of Greenville county; Ernest Gary, Judge.



Action by John B. Parks against the city council of Greenville and others for damages alleged to have been sustained by the laying of a sewer pipe across plaintiff's lot. From a judgment for defendants, plaintiff appeals. Affirmed.

Perry & Heyward, for appellant. Joseph A. McCullough, for respondents.

McIVER, C. J. The plaintiff brought this action against the municipal corporation known and designated by the name of the "City Council of Greenville," and against the several individuals holding the offices of mayor and aldermen, and also the city engineer, to recover damages alleged to have been sustained by him by reason of the laying of a sewer pipe through a lot of land in the city of Greenville, the property of the plaintiff. The allegations contained in the complaint, omitting those which are of a formal character (such as relate to the corporate character of the first-named defendant, the names of the persons holding the offices of mayor and aldermen, the names of the persons composing the committee on sewer, the name of the city engineer, and the ownership of the lot of land, with the description thereof, alleged to be of the value of \$300), are substantially as follows: That the said city engineer, "in co-operation with and under instructions from the said committee on sewer, on or about the — of June, 1892, unlawfully, maliciously, and in willful disregard of the objections of the plaintiff, entered upon said premises, dug up the soil thereon, and laid through the entire length thereof certain terra-cotta piping, to be used as part of the sewer of said city of Greenville." The allegation in the sixth paragraph of the complaint is as follows: "That said sewer pipe is an offensive nuisance upon said premises, well known to all the defendants so to be, and has practically destroyed the value of said premises." In the seventh paragraph of the complaint the allegation is as follows: "That the plaintiff has demanded of the defendants that said piping be removed from said premises, but the defendants have refused to remove the same, or any part thereof, have treated the applications and complaints of the plaintiff with contempt, and at a meeting of the said city council of Greenville, regularly held, the defendants, the mayor and aldermen above named, subsequently, by a unanimous vote, ratified and confirmed said unlawful conduct of the said James R. Lawrance [the city engineer] and said committee on sewer, and are now in possession of said sewer, operating and controlling the same." And in the eighth paragraph of the complaint it is alleged "that, by reason of the aforesaid unlawful and malicious conduct of the defendants, an outrage has been committed upon the plaintiff and his rights, and the value of his property destroyed, all to his damage one thousand dollars."

The defendants answered, admitting the

corporate character of the first-named defendant, the names of the persons set forth in the complaint as the committee on sewer, that the said Lawrance was the city engineer, and that the plaintiff was the owner of the lot described in the complaint, but say that they do not know its size or value, but that they are informed and believe that it is not of the value ascribed to it in the complaint. They admit that the said city engineer did cause to be laid through a corner of plaintiff's lot a pipe, to be used as a part of the city sewer, but deny that such act was done "unlawfully, maliciously, and in willful disregard of the objections of the plaintiff," or that he has sustained any damage thereby. On the contrary, they allege that all the acts done by them were done as the representatives of the said municipal corporation, and under its direction, which corporation was expressly authorized to have done by certain statutes set up in the answer, the terms of which will hereinafter be more particularly referred to, and that all of such acts were done in conformity to such statutes; that when plaintiff refused to appoint one of the commissioners provided for by such statutes, for the purpose of assessing the damages which plaintiff might sustain by laying the pipe through his premises, such commissioner was designated by the chairman of the board of county commissioners, as provided for by such statutes, and when the commissioners made their assessment the amount thereof was duly tendered to plaintiff, who refused to receive the same.

The case came on for trial before his honor, Judge Ernest Gary, and when the complaint was read, and before the answer was heard, a motion was made by counsel for defendants to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action against any of the defendants. After hearing argument the circuit judge granted an order, in which he said: "It appearing to my satisfaction that said defendant, being a municipal corporation, cannot be made liable for a trespass committed by its officers or agents acting in a public capacity, as alleged in the said complaint, I therefore sustain said motion, and dismiss the complaint as to the said defendant, the city council of Greenville." The court then proceeded to hear the testimony as against the other defendants, and when the testimony on behalf of the plaintiff was closed a motion for a nonsuit was made, based upon the ground that there was no evidence tending to establish the material facts alleged in the complaint, which motion was granted. Judgment having been entered accordingly, the plaintiff appeals upon the several grounds set out in the record, but as we do not propose to consider the exceptions seriatim, but rather to determine the questions which we understand them to present, it is unnecessary to state these exceptions specifically.

The first question presented is whether the circuit judge erred in sustaining the demurrer to the complaint upon the ground that it failed to state any cause of action against the defendant the city council of Greenville. Before proceeding to a consideration of the merits of this question, we desire to say, in order to avoid future misapprehension, that in this case no point was raised, either on circuit or in the argument here, that, the demurrer being joint, it could not be sustained as to one and overruled as to the others, as in the case of *Lowry v. Jackson*, 27 S. C. 318, 3 S. E. 473; and, as the point is technical, we do not propose to consider it here, especially as it does not appear that any such point was brought to the attention of the circuit judge, who therefore neither made, nor was called upon to make, any ruling upon the subject. Considering, then, the question, free from any such technical point, we think that the ruling of the circuit judge is abundantly sustained by the following cases: *Coleman v. Chester*, 14 S. C. 286; *Black v. City of Columbia*, 19 S. C. 412; *Young v. City Council*, 20 S. C. 116; and *Gibbes v. Town Council*, *Id.* 213. These cases establish the doctrine that a municipal corporation, being a governmental agency, is not liable to an action for damages sustained by the tort of any of its officers or agents, unless it is made so by some statute to that effect. In this case no such statute has been cited, and, so far as we are informed, none exists. On the contrary, this municipal corporation has, by the act of 1891 (20 St. at Large, p. 1370), been expressly authorized to establish, construct, and maintain "a system of sewerage in the streets, private lots, and dwellings in the city of Greenville." And by section 3 of that act the said corporation is expressly authorized, by its officers or other agents, to enter any building or premises in the city of Greenville, between certain designated hours, for the purpose of establishing, maintaining, and regulating such system of sewerage. And by the seventh section of said act the said corporation is invested with the power "to condemn such private property as may be necessary for said sewerage, the same to be condemned and the damages assessed as is now provided for in the opening of, or widening streets in said city." By turning to the charter of said city (Act 1885; 19 St. at Large, p. 114, § 30), we find that the mode there prescribed is the same as that alleged to have been adopted in this case.

The next question is whether there was any error in granting the nonsuit after the municipal corporation had been eliminated from the case by the ruling on the demurrer. It is very manifest that what the other defendants did was done under the authority and by the directions of the municipal corporation; and if, as we have seen, the acts done were not unlawful, it is clear that these defendants, if liable at all, could only be so

by reason of some culpable negligence on their part, which is neither charged nor proved, or by reason of the fact that these acts were done maliciously, which is expressly charged in the complaint. So that the question is narrowed down to the inquiry whether there was any testimony even tending to show any malice on their part, or on the part of any one of them. We have searched the testimony, as fully set out in the case, in vain for any such testimony, and hence there was no error in granting the motion for a nonsuit.

All of the other exceptions, except the last, relate to alleged errors in the several rulings as to the admissibility of certain testimony as to the question of damages. Inasmuch as we have reached the conclusion that the plaintiff has failed to make out any cause of action against any of the defendants, it is very obvious that the question of damages becomes immaterial, and therefore need not be considered; for this court has uniformly held that, until the plaintiff has made out his cause of action, no question as to the damages which he might be entitled to if he had succeeded in making out his cause of action can properly arise. We may add, however, in justice to the circuit judge, that we are inclined to agree with him as to his rulings upon the several questions as to the competency of testimony. Most of the testimony ruled out was designed to elicit the mere opinions of the witnesses; and even the opinion of the so-called expert, Dr. Swandale, was not competent, for the reason that he was not an expert. He was a physician, and not a sanitary engineer, and was not shown to have such knowledge of or experience in the science of sanitation as would entitle him to be characterized as an expert in such science; for, while he doubtless had quite sufficient knowledge of and experience in the science of medicine as would entitle his opinion, as to matters embraced in that science, to great consideration, it does not by any means follow necessarily that he was an expert in sanitation, and, to do the doctor justice, he does not seem to have made any such claim.

The only remaining question is that presented by the thirteenth and last exception. It is claimed that the costs were taxed without notice to the plaintiff, and inserted in the judgment without authority. This court has so often held that the question of the proper taxation of costs must first be made before the clerk, and the party dissatisfied with the action of that officer must then carry the question, by exceptions, to the circuit court, and from the ruling of that court alone can an appeal to this court be taken, that it is scarcely necessary to say more. Here the matter seems never to have been brought before the circuit court in any form, and this court is asked by this exception to pass, as an original question, upon a matter involving questions of fact, and possibly of law. This

court has no jurisdiction of such a matter, and hence the exception must be overruled. The judgment of this court is that the judgment of the circuit court be affirmed.

(44 S. C. 65)

In re SPRAGINS et al.

MANN et al. v. POOLE et al.

(Supreme Court of South Carolina. April 15, 1895.)

**ASSIGNMENT FOR CREDITORS—CANCELLATION FOR FRAUD—COMPENSATION OF ASSIGNEE—PRIORITIES AMONG CREDITORS—JUDGMENTS RECOVERED PENDING LITIGATION.**

1. The grantee in an assignment for creditors, who is recognized by the court as assignee, is entitled to compensation for his services rendered as such pending proceedings to set aside the deed, though these are eventually successful, he not having participated in the fraud.

2. An assignee is not entitled to the statutory commissions on funds which are turned over by him to a receiver who is appointed upon the cancellation of the assignment for fraud.

3. An order made on the written consent of all the parties, and not excepted to or appealed from, will not be disturbed on appeal.

4. Creditors who obtain judgments against a debtor before the commencement of a suit to set aside an assignment by him for creditors are, upon the entry of a decree setting the assignment aside, entitled to liens on the property assigned prior to judgments obtained later.

5. Where a bill seeking to set aside an assignment for creditors, while alleging that it is on behalf of all creditors who may come in and seek relief, fails to ask an injunction to restrain other creditors from prosecuting actions against the assignor, such other creditors, who do not come in until required by the judge to do so in order to prove their demands, and who obtain judgment on their claims, are entitled to priority of payment from the assignor's property, upon the entry of a decree setting aside the assignment for fraud, except as against judgments previously obtained.

6. A simple contract creditor, filing a bill against his debtor and the latter's assignee to set aside the assignment for fraud, acquires no priority over other creditors who may come in later.

Appeal from common pleas circuit court of Laurens county; R. C. Watts, Judge.

Action in the nature of a creditor's bill by J. & H. Mann & Co. against J. T. Poole and others to set aside a fraudulent deed of assignment. From a judgment of the circuit court, Spragins, Buck & Co. and other creditors appeal. Modified and affirmed.

The decree of Watts, J., was as follows:

"This cause came on for a hearing before me, at the July term of court, for the purpose of deciding certain issues herein, to wit: What compensation should be allowed N. B. Dial, Esq., for his services as assignee of J. T. Poole and agent for creditors under deed of assignment? (2) What fees, if any, shall be allowed plaintiffs' attorneys, and out of what fund paid? (3) As to the homestead of J. T. Poole. (4) As to the order of priority of payment of creditors of J. T. Poole.

"On the 18th day of May, 1892, J. T. Poole executed a deed of assignment to N. B. Dial, Esq., for the benefit of his creditors, and at

a meeting of his creditors called by said assignee a majority of creditors accepted under said assignment, and elected N. B. Dial agent. Said agent and assignee proceeded to sell the assigned estate, collect assets belonging to estate, pay off the claims due, and do all things as required by law, and to carry out the terms of the assignment. On June 21, 1892, an action was commenced by these plaintiffs, on behalf of themselves and other creditors of J. T. Poole who would come in under these proceedings and contribute to the expenses of this suit, to set aside the deed of assignment, on the grounds set forth in complaint herein. On July 23, 1892, his honor, James Aldrich, granted an order restraining the assignee from paying out any funds in his hands belonging to the assigned estate, except necessary expenses to be incurred in the collection of the assets, the payment of taxes, etc. On November 22, 1892, his honor, Jas. F. Izlar, passed a consent order allowing the assignee to pay, out of the funds in his hands from proceeds of real estate, \$2,700, to Shattuck & Hoffman, in satisfaction of a mortgage held by them over said real estate. The cause was heard on its merits by Judge Norton at the February term of the court, 1893, who rendered his decree therein on May 2, 1893, setting aside the deed of assignment, on grounds set forth therein, and appointing H. W. Anderson, Esq., receiver of all the real and personal estate mentioned in said paper, upon his entering into bond, etc.; and, when so appointed, Mr. Dial, the assignee, was ordered to turn over all funds in his hands to said receiver, leaving the question of compensation of Mr. Dial open until the further order of the court. Defendants appealed from the decree of Judge Norton to the supreme court of this state, and his decree was affirmed. H. W. Anderson, Esq., gave his bond as receiver on the — day of January, 1894. Subsequently, Hon. D. A. Townsend, as judge of Seventh judicial circuit, passed a consent decree allowing, among other things, a fee of \$500 to F. P. McGowan, Esq., for having drawn the deed of assignment which had been set aside, and \$250 to Messrs. W. H. Martin and F. P. McGowan, as a fee for representing the defendants in this cause, and that the fees of plaintiffs' attorneys and compensation of N. B. Dial is to be paid out of the funds in hands of receiver, received from sale of stock of goods. J. T. Poole claimed a homestead in his real and personal estate, and \$218.25 in personal property was set off to him, to which exceptions have been duly filed. He lived at his home place, in the city of Laurens, until it was sold under judgment of foreclosure on June 4, 1894. He now claims he is entitled to \$1,000 out of the funds to come in from the sale of the Martin house, and interest from June 4, 1894, the time he was deprived of a home in his real estate, and \$281.75, balance of \$500 due in personal property,—the last to be paid from sale of stock of goods in hands of receiver. Mr. Dial, as

assignee, sold all of the real estate in Laurens county, except one small tract of land, and sold some in Spartanburg county, but there is some still unsold there; and, after the assignment, certain creditors obtained judgments against J. T. Poole, and transcribed them to that county, and now claim they have the first lien on said lands, and are entitled to the proceeds of sale to pay their claims, when it comes into court. It is conceded that the two judgments represented by W. H. Martin, Esq.,—one in favor of Strawbridge & Clothier, obtained February 23, 1892, and interest, March 3, 1892, for \$880.35, and \$21.15 cost, and the other in favor of Gans Bros., of same date, for \$196.15, and \$21.15 cost (interest in both from date of recovery),—should be paid out of funds derived from sale of Martin house, and small tract of land unsold in Laurens county.

"The testimony in this case satisfies me that N. B. Dial, Esq., as assignee and agent, rendered very valuable services to the creditors of J. T. Poole, by his careful, skillful, and painstaking management of the same. He made good collections and good sales, and realized more, by far, for the creditors, than in general is the case in such matters. Being an attorney, and also a good business man, he knew what to do, and acted with promptness and good judgment in all matters from the time he was appointed until he turned the estate over to the receiver, and the creditors got the benefit of his services; and the court has very properly allowed him to establish what that compensation should be, and, after a careful consideration of all the testimony in this case, I am of opinion that he should be allowed \$1,104.25. The amount he collected, paid out, and turned over, exclusive of the sale of Martin house, was \$12,970. He sold that house for \$2,500, and took such ample security, and virtually made it a cash transaction; and while the amount allowed him does not, under the testimony, compensate him fully for the services rendered by him for the benefit of the assigned estate, yet it is nearly what he would have received, had the deed of assignment not been set aside. The plaintiffs' attorneys herein rendered valuable services to the creditors of J. T. Poole, by successfully setting aside the deed of assignment, and preventing the mortgages executed by Dr. Poole to his children and grandchildren from being first paid, thereby increasing the amount of funds to be distributed among all the creditors. Such cases are always unpleasant to conduct, and in view of this, and considering all the testimony in this case offered by them, I am decidedly of the opinion that \$2,600 would be a reasonable fee, and that amount should be paid them. It has been urged with great ability and force that when the court appointed a receiver, and took charge of the assets of the assigned estate, it levied an equitable lien for the benefit of all the creditors of J. T. Poole, and that lien commenced when complaint was filed. I am

free to confess that this question has given me a great deal of trouble. Our own decisions of *Curlee v. Rembert*, 37 S. C. 214, 15 S. E. 954, and *Younger v. Massey* (S. C.) 19 S. E. 125, apply to liens which were obtained and were outstanding when complaints were filed; and under the decisions of United States courts in *Wiswall v. Sampson*, 14 How. 52, and in *Clinkscates v. Manufacturing Co.*, 9 S. O. 323, and *Stackhouse v. Wheeler*, 17 S. C. 91, quoted with approval by our own court in other matters, I am constrained to take this view of the case, and hold that plaintiffs are entitled to be paid out of funds brought in by their diligence, and balance prorated among all the creditors of J. T. Poole,—that is, after paying outstanding liens existing at date complaint was filed. It is therefore ordered, decreed, and adjudged: That H. W. Anderson, Esq., receiver herein, pay over to John T. Poole the sum of \$1,000, with interest thereon at 7 per cent. per annum from June 4, 1894, out of the proceeds in his hands, or to come into his hands, from the sale of the J. F. Martin house to John H. Powers; and out of the funds in his hands turned over to him by N. B. Dial, Esq., from sale of stock of goods, he pay to John T. Poole the sum of \$281.75. These amounts are for his homestead. (2) That H. W. Anderson retain out of the funds now in his hands 5 per cent., to pay him such compensation as the court may hereafter allow him for services as receiver. (3) That out of amounts in his hands, or to come in his hands, from the mortgage due by Powers for Martin house, after paying amount due Poole, as heretofore provided for, he pay to W. H. Martin, Esq., the judgments of Strawbridge & Clothier and Gans Bros. v. J. T. Poole. (4) That out of the funds in his hands from sale of stock of goods he pay the amounts allowed for compensation herein to N. B. Dial, Esq., and fees of plaintiffs' attorneys. It is further ordered, decreed, and adjudged: That H. W. Anderson, Esq., receiver, sell all the unsold lands of J. T. Poole on sales day in November next, or some convenient sales day thereafter (he first legally advertising the same), for one-half cash, remainder on a credit of 12 months, with interest from day of sale, to be secured by bond of purchaser, and mortgage premises, purchaser to pay for papers, with leave of the purchaser to pay his entire bid in cash, and out of the proceeds derived from such sale he retain 5 per cent., to pay himself such fees as court may hereafter allow, and balance he pay out to judgment creditors according to priority of lien, as herein heretofore provided for; that is to say, plaintiffs' judgments in this cause. That balance of funds in his hands, if any, as turned over by N. B. Dial, Esq., after paying amounts herein provided for, and balance of funds in his hands, or to come into his hands, from sale of real estate, he prorate among all the creditors of J. T. Poole who have established their claims herein. It is further ordered that any one inter-

ested herein have leave to apply, at the foot of this decree, for such orders as may be necessary to carry the same into effect. It seems from the order passed by Judge Townsend herein that the costs of this proceeding have been paid; but, if they have not, the receiver is ordered to pay the same after paying out amount due Poole for homestead, and pay the other claims in order heretofore fixed. To the claims, as fixed in testimony, are to be added that of National Bank of Laurens, S. C., on July 20, 1894, \$1,849.53, also note of J. T. Poole, due Martin B. Poole, dated January 24, 1894, for \$283.44 and interest.

"R. C. Watts, Presiding Judge.

"October 3, 1894."

Ball, Simkins & Ball, Johnson & Ilchey, Simpson & Barksdale, and Ferguson & Featherstone, for appellants. W. H. Martin, F. P. McGowan, and N. B. Dial, for certain creditors, appellees.

McIVER, C. J. The action in the case of Mann v. Poole was commenced on the 21st of June, 1892, by the plaintiffs, on behalf of themselves and of all others, creditors of the defendant J. T. Poole, who should thereafter come in and seek relief under said action, and contribute to the expenses thereof, for the purpose of having a deed of assignment made by said Poole to N. B. Dial, Esq., together with certain mortgages previously made by said Poole to his wife and to his grandchildren, set aside as null and void under the assignment law. The facts of that case will be found fully stated in the case as reported in 40 S. C. 1, 18 S. E. 145, 889, and therefore need not be repeated here, except that said deed of assignment was executed on the 18th of May, 1892, and the mortgages about 90 days before that date. While this action was pending, and before it came to a hearing on the merits, to wit, on the 23d of July, 1892, an order was granted by his honor, Judge Aldrich, enjoining and restraining the said assignee, Dial, "from paying out any of the funds realized, or which may be realized, from the assigned estate of the said J. T. Poole, to any claims against said estate, except the necessary expenses which may be incurred in the collection of said assets, the payment of taxes, etc., until the further order of the court." On the 23d November, 1892, the foregoing order was modified by an order of his honor, Judge Izlar, consented to by all the parties, so as to authorize Mr. Dial, as assignee as aforesaid, "to pay from the proceeds of the real estate covered by the mortgage of Shattuck & Hoffman (the same being the property of the assigned estate of the said J. T. Poole) the sum of twenty-seven hundred dollars to the said Shattuck & Hoffman, in satisfaction of the mortgage held by them on said land." The case came on for hearing on its merits before his honor, Judge Norton, who on the 3d of May, 1893, filed a decree,

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the nature and scope of which may be seen by reference to the case of Mann v. Poole, reported in 40 S. C. 1, 18 S. E. 145, 889. Suffice it to say here that, among other things, the deed of assignment was set aside, and Mr. Dial, named therein as assignee, was ordered to turn over to the receiver then appointed all the property embraced in said so-called deed of assignment, and, if any of it had been sold, to pay over the proceeds of such sale to the receiver; reserving the question whether Mr. Dial should be entitled to any compensation, and, if so, how much, for his services while acting as assignee, until the further order of the court. It seems that, though the receiver was appointed by this decree filed, as above stated, on the 3d of May, 1893, he did not qualify until the 4th of January, 1894, and the assets were turned over to him on the 15th day of that month. This delay was probably owing to the fact that an appeal was taken from the decree of Judge Norton, which was not finally disposed of until the 6th of December, 1893. After the appeal was finally disposed of, an order was granted by his honor, Judge Townsend, consented to in writing by all parties (the date of which is not appended to said order, but it is stated in the case that it was passed on the 12th of February, 1894), directing "that the defendant N. B. Dial, heretofore acting in the supposed capacity of assignee of the defendant J. T. Poole, under a purported deed of assignment executed by the said Poole to the said N. B. Dial on May 18, 1892, do, and he is hereby directed to, turn over to H. W. Anderson, as receiver appointed in the above-stated action, all the funds received by the said N. B. Dial from the sale and collections made by him under said supposed deed, excepting such payments and disbursements as were made by the said N. B. Dial while acting in his supposed capacity as said assignee, including the fee of five hundred dollars allowed and paid to F. P. McGowan and the sum of eighteen hundred dollars paid to Shattuck & Hoffman." The order further directed that the receiver "do, out of the funds arising from the sale of the stock of goods," pay certain sums of money, among which are "the fees of the plaintiffs' attorneys for services rendered in behalf of creditors (the said fees to be hereafter determined), and to N. B. Dial, Esq., such compensation, if any, as may be allowed him, to be hereafter determined." It further appears that certain of the creditors of J. T. Poole recovered judgments against him before the 21st of June, 1892, when the action of Mann v. Poole was commenced. Certain others of the creditors of said Poole, among whom are the parties named as appellants in the title of this case, recovered their judgments after the commencement of said action, but before the decree of Judge Norton appointing a receiver, while the plaintiffs, Mann & Co.,

recovered their judgment by the same decree by which the receiver was appointed. Under the decree of Judge Norton, all of the creditors of J. T. Poole were required to prove their demands before the clerk of the court by a day certain, or be "barred of all benefit to be derived from the further decree of the court to be rendered herein in reference to the assigned estate of said debtor." Under this order the several judgment creditors, as well as sundry simple contract creditors, came in and established their claims, and one of the main questions in the appeal is as to the order in which such claims should be paid. The clerk made his report on the claims presented, together with the testimony, and upon such report the case was heard by his honor, Judge Watts, who rendered his decree, a copy of which should be incorporated in the report of this case, and from this decree several of the parties have appealed upon the several grounds set out in the record, which need not be stated here, as several of them are but repetitions of others; and we therefore propose to consider the several questions which we understand to be presented by these grounds, rather than to take up the grounds seriatim. These questions are: (1) What compensation, if any, should be allowed N. B. Dial, Esq., for his services while acting as assignee under the deed of assignment which has been set aside? (2) What fees, if any, shall be allowed plaintiffs' attorneys, and out of what fund paid? (3) In what order are the creditors who have established their demands against Poole entitled to be paid?

As to the first question, there can be no doubt that the deed of assignment, as between the immediate parties to it, was good and valid, and under the provisions of that deed, and the law relating thereto, the assignee assumed certain duties, which he was bound to perform promptly; and, what is more to the point, there is as little doubt that Mr. Dial was recognized and treated as assignee by the court in this very case, up to the time the receiver was appointed, and hence we do not think it admits of question that he is entitled to compensation as assignee. The fact that the deed of assignment was afterwards set aside for fraud, in which it is not even intimated that Mr. Dial participated, and for which he was in no wise responsible, cannot affect the question. As we have said, the deed, as between himself and the assignor, was good, and under it he assumed the performance of certain duties, which the evidence shows he did perform, not only promptly, but intelligently, and in such a manner as inured to the benefit of the creditors; and the only effect of the decree setting aside the assignment, so far as he was concerned, was to sever his connection with the assigned estate from that time forward. The next inquiry is, what is the amount of compensation to which Mr. Dial is entitled? Regard-

ing him as at least a de facto assignee, that question is answered by the express terms of the statute (section 2145, Rev. St.); and we are unable to see by what authority a court can go beyond this express statutory provision in the assignment law which provides for any extra compensation to an assignee for any extraordinary trouble in the management of the assigned estate, as there is in case of executors and administrators under section 2070, Rev. St. It seems to us, therefore, that there was error in allowing the assignee anything more than the amount fixed by statute, to wit, 5 per cent. on all money actually collected by him, and 2½ per cent. on all money paid out by him; not including, however, the amount turned over to the receiver under the order of the court, for to include that would be to subject that fund to double commissions. See *Floyd v. Priester*, 8 Rich. Eq. 248, which, though not actually in point, is somewhat analogous.

As to the second question,—whether any fees shall be allowed the plaintiffs' attorneys,—it seems to us that that branch of the question is concluded by the order of Judge Townsend, which was not only not excepted to nor appealed from, but also actually consented to in writing, and has therefore become the law of this case. This differs from the case of *Tillinghast v. Lumber Co.*, 39 S. C. 484, 18 S. E. 120, cited by one of the counsel; for there the question was whether a client would be bound by a private agreement, made outside of the court, whereby his attorney undertook to obligate his client to pay the fees of an attorney for the other parties, while here the question is as to the effect of an order of the court made upon the written consent of the attorneys representing the several parties before the court. The other branch of this question—the amount of the fees to be allowed the plaintiffs' attorneys—is more embarrassing. We must confess that the amount, as fixed by the circuit decree, does seem to be quite large,—perhaps too large. But this is a question of fact, and, under the well-settled rule, we do not see how we can disturb the finding of the circuit court, for there certainly was some testimony, and we are bound to say that the weight of the testimony seems to be, in favor of the view taken by the circuit judge. As to the fund out of which such fees are to be paid, no real controversy seems to be made. At all events, we concur with the circuit judge as to this point.

The third question is as to the order in which the judgment creditors are entitled to be paid out of the assets of the assigned estate in the hands of the receiver. These judgment creditors may be divided into three classes: (1) Those who obtained their judgments prior to the commencement of the action of *Mann v. Poole*; (2) those who obtained their judgments after the commencement of that action, but before the decree

appointing a receiver to take charge of the assets of the estate of Poole and administer the same under the order and direction of the court; (3) the plaintiffs' judgment obtained at the same time as the decree appointing the receiver was made, and in the same case.

As to the first class, we understand it to be conceded that these creditors are entitled to be first paid out of such assets as their judgments had a lien upon,—that is, the real estate; but, whether conceded or not, these judgments unquestionably are entitled to such preference, for it is well settled that when a deed is set aside it is, as to creditors, as if it never had existed,—*Gracey v. Davis*, 3 Strob. Eq. 55; *Clafin v. Iseman*, 23 S. C. 416; and *Younger v. Massey* (S. C.) 19 S. E. 125;—for when these judgments were obtained they at once became a legal lien upon all of the real property of the judgment debtor, except the homestead, situate in the county where the judgments were entered, or in a county where transcripts thereof were filed, from the time of such filing, notwithstanding the fact that the judgment debtor had made what proved to be an abortive attempt to convey away his real estate previous to the recovery of such judgments.

The next inquiry is as to the status of the judgments in the second class. It will be observed that the action of *Mann v. Poole*, while purporting to be a creditors' bill, lacks one of the features of such a bill, for while the plaintiffs say in the complaint that the action is brought "on behalf of themselves and of all others, the creditors of the defendant J. T. Poole, who shall in due time come in and seek relief by, and contribute to the expense of, this action," yet no injunction was ever asked for or obtained, restraining the other creditors from suing, or prosecuting their actions already commenced; and they further say that it is desirable to have a receiver appointed to take charge of the assets, and to make, under the orders of the court, an equitable distribution of the proceeds of such assets, not among all creditors, but among those "who shall in due time come in and seek relief by this action, and contribute to the expense thereof." And, so far as appears by the record before us, none of the other creditors ever did so come in, and were only brought in by the order of Judge Norton, requiring them to prove their demands before the clerk, which order or decree was not made until after the creditors belonging to this class had obtained their judgments. It is obvious, therefore, that these creditors were offered the option either to come in on the terms proposed, or to stay out, and pursue their legal rights in the ordinary way, from which there was nothing to forbid them; and, having adopted the latter alternative, it is difficult to conceive of any good reason why they should be deprived of any advantage which they may have legally obtained. In the case of *Gracey*

*v. Davis*, supra, which was stated to be a creditor's bill, although the pleadings are not set out in the report of the case, and recognized as such by the provision for the payment of the fees of the solicitor "who brought the general bill on behalf of the creditors," the rule was laid down by Dunkin, Ch., in delivering the opinion of the court, in the following language: "The effect of setting aside the deeds is to leave the creditors to enforce their claims and obtain satisfaction according to their legal priorities, or, if the court takes charge of the fund, to direct them to be paid according to their legal rank." The same principle was recognized in *Clafin v. Iseman*, supra, and *Curlee v. Rembert*, 37 S. C. 214, 15 S. E. 954, though the two cases last cited are not cited as exactly in point in the present case. The case of *Wiswall v. Sampson*, 14 How. 52, which seems to be relied upon by the circuit judge, is not in point, for the only point decided in that case, so far as the question we are considering is concerned, was that a judgment creditor having a lien upon the land of an insolvent debtor, which is in the possession of a receiver appointed by the court of chancery, under a bill by a creditor against the debtor and a third person to set aside a conveyance to the latter for fraud, cannot levy his execution upon such lands if he have notice of the fact that the property is in the custody of the law, but his remedy is to apply to the court of chancery, which will take care to protect his interest in making a sale, or in distributing the proceeds. This is exactly in accordance with the principle laid down in *Gracey v. Davis*, supra, to wit, that, if the court takes charge of the fund, it will direct that it be paid out to the creditors according to their legal priorities. So that, if the judgment creditors standing in the second class had undertaken to levy their executions upon the land of Poole after the court had taken charge of his assets and placed them in the hands of a receiver, then the case of *Wiswall v. Sampson* would have been precisely in point. But these creditors have not undertaken to do anything of the kind. On the contrary, they are pursuing the same course indicated as the proper course in the case of *Wiswall v. Sampson*; that is, asking the court to respect and provide for their legal priorities. It is true that Mr. Justice Nelson, in delivering the opinion of the court in *Wiswall v. Sampson*, does say "that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the court, pending the litigation, by the appointment of a receiver or by sequestration, the title is bound from the filing of the bill; and any purchaser pendente lite, even if for a valuable consideration, comes in at his peril." But, in the first place, this remark is manifestly a mere dictum, as no such question was presented in that case. And, in the second place, the distinguished justice, immediately preceeding the



remarks just quoted, makes a quotation from Chancellor Kent, who, in delivering the opinion of the court, as chief justice, in *Codwise v. Gelston*, 10 Johns. 522, uses this language: "That if a fund for the payment of debts be created under an order or decree in chancery, and the creditors come in to avail themselves of it, the rule of equity then is that they shall be paid *in pari passu*, or upon a footing of equality. But, when the law gives a priority, equity will not destroy it; and especially where legal assets are created by statute, as in case of a judgment lien, they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery." It will be observed that the dictum of Mr. Justice Nelson, above quoted, applies only to a case where property which is the subject-matter of a suit is purchased *pendente lite*, and nothing is said as to the effect of liens legally obtained upon such property after the commencement of the suit, but before the court has taken possession of the same, and placed it in the hands of a receiver, and the remarks quoted from Chancellor Kent seem to indicate that such liens would be respected. The case of *Meinhard v. Youngblood* (S. C.) 19 S. E. 675, has also been cited by counsel, in the argument here, in support of the view taken by the circuit judge. But an examination of that case will show that it differs widely from the present case. In that case certain of the creditors of Youngblood commenced action on their claims, and at the same time sued out warrants of attachment, which were levied upon the property of Youngblood. Thereupon the plaintiffs, *Meinhard Bros. & Co.*, commenced this action against Youngblood and the attaching creditors to set aside the attachments upon the ground of fraud, and soon thereafter obtained an order from his honor, Judge Wallace, enjoining and restraining the attaching creditors from prosecuting their suits and attachment proceedings. The defendants subsequently moved, before Judge Wallace, to vacate his order of injunction, which motion was refused. Subsequently the case came before his honor, Judge Witherspoon, for a hearing upon the merits, when the defendants interposed an oral demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the complaint dismissed, and from the order to that effect the plaintiffs appealed; and the order of Judge Witherspoon sustaining the demurrer and dismissing the complaint was reversed, and the case sent back for a hearing upon the merits, which resulted in a judgment in favor of the plaintiffs. While this appeal was pending, but before it was determined, the attaching creditors proceeded with their actions, and recovered judgments therein; and when, by final decree, the creditors were called to establish their demands, the attaching creditors set up their

claims as judgments, and the question was whether they were entitled to priority as such. The court held that they were not entitled to any such priority, practically for the reason that the injunction originally granted by Judge Wallace had never been legally dissolved, for, though Judge Witherspoon did grant an order sustaining the demurrer and dismissing the complaint, the practical effect of which would have been to dissolve the injunction, if such order had been sustained, yet as it was found on appeal to be erroneous, and was set aside, it was the same as if no such order had ever been passed; and hence these judgments recovered in violation of the order of injunction were illegally obtained, and could not be allowed any force or effect as judgments. But in the present case there never was any order of injunction restraining the creditors standing in the second class from commencing or prosecuting their actions, and nothing whatever to prevent these creditors from pursuing their legal rights in the usual way, and hence nothing to prevent them from obtaining the judgments which they now set up. The difference between the two cases is therefore very obvious and fundamental.

It is insisted, however, that by the order of Judge Aldrich, set out above, which was passed before the creditors standing in the second class obtained their judgments, the court, in effect, though not in form, took charge of the assets belonging to the assigned estate of Poole, and that no judgment obtained after that time could have any legal lien upon such assets. We do not see how the order of Judge Aldrich can be properly so construed. It certainly does not purport to take charge of the assets, and there is nothing in the language used which implies any such intention. On the contrary, the express object of the order was simply to restrain N. B. Dial from paying out any of the funds which had or might come into his hands under the alleged deed of assignment, except as therein excepted, pending the attack upon the validity of such deed. Its manifest and sole object was simply to preserve matters *in statu quo* while the court was investigating the validity of the deed of assignment. And the idea that the order of Judge Aldrich should be regarded as a recognition of the validity of the assignment, and hence that these judgments, having been obtained after the date of such deed, could have no lien upon the land therein conveyed, seems to us, if anything, still more far-fetched. Such a motion is utterly inconsistent with the declared purpose of the order, for, if Judge Aldrich considered the deed valid, what possible reason can be suggested why he should restrain the assignee from performing the duties imposed upon him by the deed? Besides, we would be very slow to believe that any judge would undertake to pass upon the validity of a deed assailed



by the pleadings without hearing the case upon its merits.

We are therefore of opinion that the judgment creditors standing in the second class above stated are entitled to priority in the distribution of the proceeds of the sales of such property as their judgments were a lien upon, after the liens of the judgment creditors standing in the first class are satisfied, in the order of the dates of the respective judgments held by the creditors standing in the second class, and we think that the circuit judge erred in holding otherwise.

It only remains to consider the third question,—whether the plaintiffs acquired any priority by instituting this action. It is difficult to conceive of any just ground upon which they can claim any priority. Their costs and counsel fees have been provided for, and why should they be any better provided for than any other creditors? But this question has been so conclusively determined by at least two authoritative cases that we need not pursue the subject further. In *Day v. Washburn*, 24 How. 352, it was held that, where a simple contract creditor (and such is the rank of the plaintiffs in this case) files a bill against his debtor and his assignee to set aside the assignment for fraud, the party filing the bill acquires no priority over other creditors who afterwards come in. In the absence of a lien by judgment or otherwise, the rule in equity, in such a case, is equity. The same doctrine is emphatically recognized by this court in the case of *Younger v. Massey* (S. C.) 19 S. E. 125. The judgment of this court is that the judgment of the circuit court be modified in accordance with the views herein expressed, and that in all other respects the said judgment be affirmed. Let the case be remanded to the circuit court for the purpose of carrying out the views herein announced.

(116 N. C. 756)

PEARSON v. CRAWFORD et al.

(Supreme Court of North Carolina. April 23, 1895.)

TRIAL—ARGUMENTS OF COUNSEL—TRESPASS—FINDINGS.

1. The discretion of the court in permitting comments on witnesses and parties will not be reviewed on appeal unless the remarks were grossly improper, and calculated to prejudice the jury.

2. In trespass, where plaintiff claimed title under a deed, and defendants denied that the grantors thereof were the true owners, the jury, under an instruction that plaintiff must first establish title to the land described in the complaint, and then, before a recovery could be had, prove its location, found that plaintiff's title was valid; that the location of the land had not been proved; that defendants had not trespassed thereon; that plaintiff had suffered no damage. *Held* that, under the charge, these findings, and the judgment thereon, were not inconsistent or contradictory.

Appeal from superior court, Rutherford county; Armfield, Judge.

Action of trespass by S. T. Pearson against J. R. Crawford and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. B. Batchelor, for appellant. Justice & Justice, for appellees.

MONTGOMERY, J. The plaintiff moved for a new trial on the ground that the verdict was contrary to the weight of the evidence. The motion was overruled, and the plaintiff excepted. There is nothing in the exception. The matter was one which ought to have been addressed to the discretion of his honor purely.

The plaintiff's objection to the argument of defendants' counsel, for the alleged reason that he abused his privilege as an attorney in speaking of the plaintiff as a speculator, buying the large boundary of land at 6¼ cents per acre, is without merit. There was proof tending to show that the plaintiff had bought the land claimed in his complaint (about 70,000 acres, wild and untillable mostly) at that price. Certainly, such an argument, being intended to show that the purchase of the land at such a price, under all the circumstances, was for the purpose of future sale and profit, was not a gross abuse of his privilege. In *Goodman v. Sapp*, 102 N. C. 483, 9 S. E. 483, the court said that a number of cases cited "and numerous other authorities settle the general principle that the extent to which counsel may comment upon witnesses and parties must be left ordinarily to the sound discretion of the judge who tries the cause, and this court will not review his discretion unless it is apparent that the impropriety of counsel was gross, and calculated to prejudice the jury."

There were no exceptions taken to any part of his honor's charge to the jury, and no prayers for special instructions asked by either the plaintiff or the defendants. The issues submitted to the jury were not objected to by either side, nor were any new ones suggested in the course of the trial.

We will now examine the real questions brought to this court for settlement. They concern the form and the substance of the issues, and the nature of the judgment rendered thereon. Issues and responses of the jury: "(1) Is plaintiff the owner of the land described in the complaint? Yes (11/12). (2) Where is the beginning corner of the Tate tract? We don't know. (3) Where is the southwest corner of the Tate grant? We don't know. (4) Where is the northeast corner of the Tate grant? We don't know. (5) Did defendants trespass on the land of plaintiff? No. (6) What damage has plaintiff sustained? None." Upon the verdict the following judgment was rendered: "It is considered by the court that plaintiff is the owner of the land described in the complaint, but that defendants have not trespassed on the land of plaintiff, and plaintiff

has not located his tract of land described in the complaint. It is therefore adjudged that the injunction granted in this cause be dismissed, and that defendants go without day, and recover of plaintiff the costs of this action." The plaintiff excepted as follows: "Plaintiff excepts to the foregoing judgment in open court, and the rendition thereof, on the ground that it was inconsistent and contradictory, as were the issues upon which it was based, the said issues having been framed in such a way as not to entitle the defendants to any judgment thereon; and plaintiff further insisted that the finding of the first issue, 'Yes,' must embrace the location of plaintiff's land as described in the complaint, and plaintiff was not entitled to have it declared in said judgment that plaintiff had not located his land." The exceptions were overruled, and the plaintiff appealed.

The issues in this case are not such as are usually submitted in actions of this nature, but, in the light of the charge of his honor, they are clear to a certainty, and in no sense inconsistent with each other or contradictory. They seem, in connection with the charge, to have been perfectly fair to the plaintiff, and more favorable to him than he might have had a right to demand. The plaintiff claimed the land described in his complaint, and on which the alleged trespass was said to have been committed, through mesne conveyances back to a grant from the state to William and Robert Tate, dated 1795. The direct and immediate conveyance under which the plaintiff claimed was one from the heirs at law of Maria Nixon. The defendants contended that the real heirs of Maria Nixon did not execute the deed, and that the persons who signed it were not the Nixon heirs, and that matter seemed to the judge to be one of so much importance on the trial that to prevent confusion he submitted the first issue to settle the question of the regularity of the paper title of the plaintiff to the land embraced in his deed. The instructions on this issue could not be misunderstood by the jury. The court said: "In considering the first issue you will not inquire into the location of the land described in the complaint, but only as to whether the plaintiff has made out his title thereto, i. e. whether he has shown you who the heirs of Maria Nixon are [here the testimony, the contention of the parties, and the law as to this point were stated fully to the jury]. There is no pretense that more than  $\frac{11}{12}$  of the interests of the heirs of Maria Nixon were conveyed, and, if you find by a preponderance of the testimony that the plaintiff is the owner of  $\frac{11}{12}$  of the land described in the complaint, you will answer the first issue, 'Yes,  $\frac{11}{12}$ ,' and will proceed to consider the other issues."

The plaintiff insists that the second, third, and fourth issues are not consistent with the first, and that the verdict involved a

contradiction. This view of the plaintiff is a mistaken one. His honor in his instructions on these issues pointed unerringly and with entire certainty to their meaning and purpose. He said: "If you answer the first issue, as to plaintiff's title, 'Yes,  $\frac{11}{12}$ ,' you will then proceed to consider the second, third, and fourth issues, as to the location of the land claimed by plaintiff. If plaintiff establishes his title, the burden is still on him to show by a preponderance of the evidence where his land is situated,—to locate it before he can recover [here the evidence as to location of grant was read to jury, contentions of parties stated, and jury fully instructed as to law applicable to this part of the case]. If you find from the evidence that plaintiff has located any line or lines or corner of his tract, you may locate the entire boundary by following the calls in his grant or deeds. If there is a natural object called for found, course and distance must give way to reach it. If plaintiff has located his tract of land, you will indicate by your answers to the second, third, and fourth issues the locations of the corners referred to, whether they be located where plaintiff claims or elsewhere. If plaintiff has not satisfied you by a preponderance of the evidence of the location of any part of the boundary set out in his grant, you will answer the second, third, and fourth issues, 'We don't know,' and the fifth issue, 'No,' and the sixth issue, 'Nothing.'" The jury must have understood what these issues meant, and why they were submitted in the form in which they were. And the counsel for the plaintiff were satisfied with them, for his honor told the jury that, if the plaintiff from the evidence had located any line or lines or corner of his tract, you may locate the entire boundary by following the calls in his grant or deeds. The judgment followed in form and substance the verdict of the jury, and is not objectionable in any aspect. The paper title of the plaintiff was declared regular, but, the location of the land not having been proved, the court made these statements in the judgment. This was favorable to the plaintiff, because it put his failure to recover of the defendant on the ground of his failure to locate his land, and not on the ground of any defect in his deed. No error. The judgment is affirmed.

AVERY, J., did not sit.

(116 N. C. 720)

RUSSELL v. TOWN OF MONROE.

(Supreme Court of North Carolina. April 23, 1895.)

DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE.

1. A person walking at night on a city sidewalk is only required to use ordinary care to avoid defects in the sidewalk, and is not required to remember the location of defects he

may have seen during the day, and to use more than ordinary care to avoid injury therefrom.

2. In an action against a city for personal injuries caused by defects in a sidewalk, the burden of proving contributory negligence is on defendant.

Appeal from superior court, Union county; Winston, Judge.

Action by Samantha Russell against the town of Monroe for personal injuries. From a judgment for defendant, plaintiff appeals. Reversed.

MacRae & Day, for appellant. F. I. Osborne and Battle & Mordecai, for appellees.

EVERY, J. The law imposes upon the mayor and commissioners of incorporated towns the imperative duty of "keeping in proper repair the streets and bridges of the town" (Code § 3803), and for a failure to fulfill its requirements they may subject themselves to criminal liability (State v. Commissioners of Halifax, 4 Dev. 345). The testimony fully warranted the jury in finding that the governing authorities of the town were negligent in leaving open a ditch three feet deep at the point where it crossed a part of the sidewalk, for sufficient space (two and a half by four feet) to admit the body of a person walking along such footway. Bunch v. Edenton, 90 N. C. 131. But the defendant did not appeal, and the response to the first issue, therefore, stands unchallenged. It has been held in many of the leading courts of this country that the previous knowledge of the injured person of the existence of defect in a sidewalk does not, per se, establish negligence on his part. Morrill, City Neg. p. 139, and authorities cited; Diveny v. City of Elmira, 51 N. Y. 512; Darling v. Mayor, etc., 18 Hun, 340; Diwire v. Basley, 131 Mass. 169; Gilbert v. City of Boston, 139 Mass. 313, 31 N. E. 734.

If the plaintiff was exercising reasonable or ordinary care for her own safety when she fell into the ditch, she had a right to demand that the jury respond in the negative to the second issue. Jones, Neg. Mun. Corp. § 221; Bunch v. Edenton, supra. The evidence is that the plaintiff had never actually noticed "the hole before," though she admits that she might possibly have seen it if she had been paying strict attention to her pathway when she fell. She had a right to expect and to act on the assumption that the authorities of the town had properly discharged their duty by keeping the streets in good repair. Bunch v. Edenton, 90 N. C., at page 435; Morrill, City Neg. pp. 136-138; City of Indianapolis v. Gaston, 58 Ind. 224. Perhaps the only exception to this rule is the reasonable requirement that persons must take notice of such structures as the necessities of commerce or the convenient occupation of dwelling houses render necessary, such as exterior basement stairs. Bueschung v. Gaslight Co., 6 Mo. App. 85. The case of Walker v. Town of Reidsville, 96 N. C. 382, 2 S. E. 74, is distinguishable from that at bar,

because there the pit into which the plaintiff fell was some distance from the sidewalk (56 feet), though it was excavated by the town and upon property owned by it, and the plaintiff had actual notice of its existence. The burden was on the defendant, under our statute, to prove contributory negligence, and, in order to thus avoid the consequences of its own carelessness, it was necessary to show that the plaintiff failed to exercise reasonable or ordinary care for her own safety. If she did not put herself in fault by careless conduct, she had a right to demand that the jury be instructed to answer the second issue in the negative. Jones, supra, § 221. To constitute contributory negligence (says Beach in his work on that subject, section 8), there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury. Perhaps, besides these two, there are no other necessary elements. Certainly they are the two points of difficulty in the question. "Did the plaintiff exercise ordinary care under the circumstances? Was there a proximate connection between his act or omission and the hurt he complains of?" We can conceive of no reason and we know no authority for holding the plaintiff to a higher degree of care than that involved in what is known as the rule of the prudent man. What is reasonable care is to be determined in some, probably most of, jurisdictions, largely by the jury, but with us, when the facts are undisputed, by the court. It is the universal rule, however, that there is no contributory negligence, where the plaintiff acts with ordinary prudence, in view of surrounding circumstances suggestive of danger. Morrill, supra, pp. 132, 140; Mason v. Railroad Co., 111 N. C. 482, 16 S. E. 698; Emery v. Railroad Co., 109 N. C. 589, 14 S. E. 352; McAdoo v. Railroad Co., 105 N. C. 742, 11 S. E. 316.

As a specific act or omission may be declared negligence at a particular period or under given circumstances, which had been held, with other surroundings, not culpable at all, so it will be found that the question whether a plaintiff has contributed by his own carelessness to bring about an injury complained of must be answered after a comprehensive consideration of the conditions confronting him at the time. It was unquestionably error to tell the jury that the plaintiff was required, in order to rid herself of culpability, to exercise, under any circumstances, more than ordinary care. While the rule of the prudent man is always the test of carelessness on the part of a plaintiff, what is reasonable care does not depend alone upon what a person does or omits to do, but also upon his environments at the moment when it is contended that his act or omission enhanced his danger. While the rule that a person, in order to avoid culpability, must exercise such care as a man of ordinary prudence would under similar circumstances use, is always the criterion for testing contributory negligence,

as well as negligence, the conditions at the moment may render the same act at one time characteristic of a cautious, at another of a careless, man. We do not understand the rule to be that where a defendant has, by carelessness, left the plaintiff exposed to peril as a natural consequence of its conduct, the failure of the plaintiff to exercise unusual caution to avoid the ensuing danger will be deemed the proximate cause of an injury that would not have been sustained had the defendant in the first instance been faultless. The plaintiff was not bound to exercise more than ordinary care, because she might possibly, before or at the time of sustaining the injury, have thereby discovered that the defendant had carelessly left persons, passing along the sidewalk at the particular place, exposed to danger. A defendant cannot take advantage of his own wrong to hold others to a more rigid rule of watchfulness. The plaintiff was warranted in acting on the assumption that the authorities of the town had done their duty. She was not required to see and treasure up in her memory the location of every defective place in the sidewalk which she had or might have seen during the daytime, nor was she expected to see all such places. She was not required to keep a sharp or constant lookout for what could not be reasonably expected, assuming that the authorities of a town had used ordinary care in the discharge of their duty. Locomotive engineers are required to keep a constant lookout for persons, animals, and obstructions on railway tracks in front of trains, because they have reasonable ground to apprehend that some such danger may confront them at any moment. A person is not negligent in failing to provide against what could not have been reasonably expected, much less against a danger that he is warranted in assuming does not exist. *Blue v. Railroad Co.* (decided at this term) 21 S. E. 299. Had it appeared that the plaintiff actually saw the hole, or that she was warned against it in time to have avoided falling into it, the case would have presented a different aspect. Having no actual knowledge of its existence before she stepped into it, she was not required to exercise the same degree of diligence that an engineer in charge of a train must use, because he has reason to apprehend and provide against danger to his passengers from obstructions, or to men or animals on the track at any moment, while she was justified in acting upon the belief that the authorities had done their duty by keeping the sidewalk in safe condition. There was error in instructing the jury that the plaintiff was expected to use more than ordinary care. The court should have told them that she was entitled to recover if the first issue was found in her favor, unless the defendant had shown by a preponderance of the testimony that she did not exercise reasonable or ordinary care. We think that the case, as the facts were developed on the trial, was governed by the principle laid down in

*Bunch v. Edenton*, supra, and that it was not shown that the injury was due to her own negligence. There was error, and the plaintiff is entitled to a new trial.

(116 N. C. 766)

**BOSTIC et al. v. YOUNG.**

(Supreme Court of North Carolina. April 23, 1895.)

**RELIEF AGAINST EXECUTION—INJUNCTION.**

1. An injunction will not be granted to restrain the sale of land under an execution against another.

2. Under Acts 1885, c. 147, § 1, providing that no conveyance of land shall be valid, as against creditors or purchasers for value, but from the registration thereof, a deed of trust is of no validity whatever, as against a judgment creditor, unless registered.

Appeal from superior court, Cleveland county; Robinson, Judge.

Action by J. B. Bostic and others against Samuel Young to restrain an execution sale of land. A temporary injunction restraining the sale was granted. From an order dissolving the temporary injunction and judgment thereon, plaintiffs appeal. Affirmed.

Webb & Webb, for appellants. J. A. Anthony and R. L. Ryburn, for appellee.

**MONTGOMERY, J.** It appears from the complaint that B. D. Suttle conveyed to W. C. Bostic the tract of land by deed dated December 10, 1890, but that the deed was not registered until the 12th of February, 1895; that the vendee paid \$8,000 for the land, \$3,000 in cash of his own means, borrowed of the plaintiff Crawford \$5,000, with which the balance of the purchase money was paid, and executed, together with his wife, a deed of trust on the land to J. B. Bostic, to secure the payment of the \$5,000 borrowed from Crawford; and that the deed of trust was registered in Cleveland county, where the land is situated, on the 25th of May, 1892. It further appears from the complaint that, because of condition broken, a sale of the land was made under the trust deed by J. B. Bostic on the 21st of January, 1893; and that Crawford, cestui que trust, bought the land at the price of \$5,350, went into possession, and is still in possession, enjoying the uses and profits thereof. No deed, however, has been executed by the trustee to the purchaser Crawford. It appears, further, from the complaint, that on the 23d of October, 1893, the defendant, Young, procured a judgment against B. D. Suttle, the original vendor, for \$421.25; had the same docketed in Cleveland county, where the land is situated; and that he had execution issued to the sheriff of Cleveland county on the 29th of January, 1895; and that the sheriff was about to sell the land when the plaintiffs commenced this action.

The question before the court for decision is whether the plaintiffs can invoke the equitable relief of the courts to prevent the de

defendant (the plaintiff in the execution) from proceeding to sell the land under his execution; and this involves, of course, the question as to whether this action can be maintained under Act 1893, c. 8; for, if such an action as this can be maintained under that act, then the plaintiff would be entitled to the relief by injunction which he seeks, if the facts warranted it. The point in the case, when the facts are summarized, is, briefly stated: The deed from Suttle (the defendant in the execution) to W. C. Bostic, though dated December 10, 1890, was not registered (although the purchase money was paid at the time of the execution of the deed) until the 25th of February, 1895. The judgment of Young, the defendant in this action, against Suttle, was obtained, and execution levied upon the land, before the registration of the deed, and the plaintiff Crawford is in possession of the land under the sale made by the trustee.

Where a party has a full remedy at law, the court of equity will not grant extraordinary relief by way of injunction. In this action, in case of a sale of the land under the execution, the purchaser, before he could assert title derived from the sale, would have to bring his action at law for the possession against the plaintiff, who is in possession, and prove his title to the property; and in such an action the plaintiff in this, the defendant in that, action, could raise every question involved in the controversy which he seeks to raise in this action. In that action he could set up in his defense the very matters he now alleges in his prayer for equitable relief. *Browning v. Lavender*, 104 N. C. 69, 10 S. E. 77; *Murray v. Hazell*, 99 N. C. 168, 5 S. E. 428; *Southerland v. Harper*, 88 N. C. 200. In *High on Injunctions*, at section 120, the writer says: "A court of equity will not interpose by injunction to prevent a sale of complainant's real estate under execution against another, since the question of title to real estate is ordinarily to be determined at law." The rulings of our court on this subject have sustained that principle. In *Gatewood v. Burns*, 99 N. C. 357, 6 S. E. 635, one of the plaintiffs in that case, Thomas May, alleged that he had purchased a tract of land from his coplaintiff, Gatewood, in 1882, and paid for the same before certain liens of judgment creditors of Gatewood had attached to the land, but that the deed was not made to him by Gatewood until the liens had been created by the judgments. May was in possession of the land, but, apprehending that Gatewood's execution creditors might sell it, he invoked the court to adjudge his title good, and to enjoin the creditors from selling the land. The court refused the relief sought, holding that "it is not the province of the court to interpose its authority to prevent the sale of the land. If the plaintiff has title to it, a sale or attempted sale of it under the execution would pass no title. If, on the other hand,

he has no title, and the land belongs to the defendant in the execution, then the creditor would have the right to sell it, if need be, to pay his debt." In *Bristol v. Hallyburton*, 93 N. C. 384, where the defendant sought to have an execution against his interest in a tract of land enjoined, on the ground that the interest of the defendant in the land was a contingent interest, and not subject to execution, the court refused the injunction; and Judge Ashe, in delivering the opinion of the court, said: "The application to stay the execution regularly issued upon a judgment at law because the sheriff has levied upon property not subject to the execution, or because the property belonged to another than the defendant in the judgment, is a procedure unknown to our practice. We cannot see how the sale of the land, although it may not be the subject of sale under execution, can work an irreparable injury to the defendant in the execution; for the sale and sheriff's deed have no other effect than to pass such interest as the defendant had at the time of the sale, subject to execution."

The facts in the present case are easily to be distinguished from those in the case of *Mortgage Co. v. Long*, 113 N. C. 123, 18 S. E. 185. There the conflicting claims to the land arose between judgment creditors and mortgage creditors of the defendant Long. No relief was sought by Long against either set of creditors. We think it proper to add that the court, in arriving at its conclusion, have also considered the final effect of this litigation; that is, whether the plaintiff would be entitled, finally, to the relief he seeks. "The court will not, upon application for an interlocutory injunction, shut its eyes to the question of the probability of the plaintiff's ultimately establishing his demands, nor will it, by injunction, disturb defendant in the exercise of a legal right, without a probability that plaintiff may finally maintain his rights as against that of the defendant." *High. Inj.* § 5. In this view of the case, we have arrived at the further conclusion that that part of Act 1885 (chapter 147, § 1) which reads as follows: "No conveyance of land, nor contract to convey, or lease of land for more than three years shall be valid to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof, within the county where the land lieth,"—settles the matters set out in the complaint against the plaintiff. The quotation from the act of 1885 is in precisely the same language used of deeds of trust and mortgages in the act of 1829 (Code, § 1254); and the uniform construction of the act of 1829 by this court has been to the effect that deeds of trust and mortgages are of no validity whatever as against purchasers for value and against creditors, unless they are registered, and they take effect only from and after registration. *Robinson v. Willoughby*, 70 N. C. 358; *Fleming v. Bur-*

gin, 2 Ired. Eq. 584; Leggett v. Bullock, Bush. 283. It is to be noted that the creditor in this action is a judgment creditor, and also that there is no allegation in the complaint that the plaintiff was prevented from registering his deed by the fraud of the defendant.

There is no error in the ruling of his honor dissolving the restraining order and refusing the injunction, and the same is affirmed.

(116 N. C. 968)

**SHADD v. GEORGIA, C. & N. R. CO.**  
(Supreme Court of North Carolina. April 23, 1895.)

**MASTER AND SERVANT—NEGLIGENCE OF VICE PRINCIPAL.**

Plaintiff, an inexperienced brakeman, was ordered by defendant's conductor to make a coupling which an experienced brakeman had volunteered to make. As plaintiff went between the cars, in obedience to the command, and while he was arranging a displaced link, the conductor signaled to the engineer to back the train, and at the same time loudly commanded the plaintiff not to miss the coupling. It was shown that the conductor stood where he could easily see plaintiff's danger and hear him striking the displaced link. *Held*, that it was error to charge that plaintiff could not recover for injuries received in so attempting to make the coupling.

Appeal from superior court, Union county; Robinson, Judge.

Action by Lewis Shadd against the Georgia, Carolina & Northern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Civil action for damages tried at January term, 1895, of superior court of Union county, before Robinson, Judge, and a jury. The following issues were tendered by the plaintiff, and submitted by his honor: (1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? (2) Did the plaintiff contribute to his injury by his own negligence? (3) If so, might the defendant, notwithstanding, by the exercise of proper care, have avoided the injury? (4) Is the paper writing relied on by the defendant as a release the contract of the plaintiff? (5) What damages, if any, has the plaintiff sustained? After all the evidence was in, his honor announced that he would instruct the jury that in no event could the plaintiff recover, and that if they believed the evidence they must find the first issue, "No," and that would be an end of the case. Upon this intimation the plaintiff declined to argue the case to the jury, whereupon his honor so instructed the jury, under the objection and exception of the plaintiff, and the jury answered the first issue, "No."

Lewis Shadd, the plaintiff, testified in his own behalf as follows: "On the night of December 18, 1893, I went on the railway to Abbeville, S. C., looking for a job. I there met Conductor Reid, who asked me if I wanted a job that would last always. He employed me as brakeman. I set in at once,

and came back, shifting and cutting off cars, until I got to Cross Hill, S. C. At this point, when I was about to make a coupling, Kelly Morrison, also an employé of the railway, said, 'Let me make the coupling, as you are a new hand'; but Conductor Reid, who was present, said, 'No; let Shadd make it. How will he ever know anything if you never let him do anything?' I then signed the engineer down, and the link had got cross-ways in the drawhead of the car nearest the engine, and there was no defect in the draw-heads or bumpers of the cars to be coupled, and both cars were standing still at that time, 8 or 10 feet apart. I struck with a pin to loosen it, and the conductor said, 'Don't miss the coupling, as I want to get away sometime to-night.' I struck it again, and it got loose, and he hollered again, 'Don't miss the coupling,' and I looked at the conductor, and he was waving the engineer back with his lamp. I looked to see how far the cars were from me, and they were right on me. I turned my body round, reached the link, and by that time the cars caught my hand. The conductor asked if I missed the coupling. I said, 'Yes; sign her ahead.' Kelly Morrison hollered that he had mashed me, and the conductor came where I was. My hand was cut and mashed. I thought a bone was broken. I have never been able to do a week's work with my hand since. I was not able to do any work until May. I tried in April, but failed after 3 or 4 days. I have never been able to do good service with my hand since. My hand swells and pains me up to my elbow. If I start to use an ax, I can't work more than three-fourths of a day. It pained me from the time I was hurt all the time until May, except some few days. I suffer now, if I do two or three days' work. Cross-examined: I did not tell Capt. Reid that I had been a brakeman on the Carolina Central, nor that I was recommended by Capt. Parham. I had never been brakeman before. I had shoveled dirt on the gravel train on the Carolina Central road. The conductor did not tell me what my duties were. Don't remember what he first told me to do. The first thing I did was to put on brakes. I did not cut loose cars before I got to Cross Hill, but don't remember what place I attempted to cut loose the first cars that were cut loose that night. Others might have been made. I ditched in April or May of 1894 for Frank Morgan. On February 14, 1894, I wrote letters to Gen. Manager Winder that I would go to work without fail on March 12th. I did not then know that my hand would not be well. I saw Capt. Reid at Abbeville, and asked for my place back. I wrote Winder about 21st December, 1893, asking for a pass to go to see him. Reid said after I got on the train that he would pay me about 85 cents per day. I only served the company the night I was hurt. I did not agree with Mr. Winder in Atlanta to execute a release. The pa-

pers were not read over to me in Atlanta. Prior to entering service of defendant company I had worked on farm at \$14 per month, and boarded myself. On January 6, 1894, four days after I was in Atlanta, I got \$19; in January, 1894, \$25.56; 14th March, 1894, \$12.75. My doctor bill was paid, or, at least, I have not paid it. Redirect: I went to Atlanta about nine o'clock, and left the same day. I was 31 years old the 9th of October, 1894. When I attempted to make the coupling I had my lantern in my right hand. My left hand was hurt. When I went in to make the coupling I had my lantern in my left hand, and changed. I carried my lantern in my hand about as far as to the back of this room. The cars were eight or ten feet apart, standing still, when I went in to make the coupling. When I went in I dropped all the pins and links I had, except one pin, which I retained to make the coupling. I said I did not know whether my hand was caught between the drawheads or between one of the drawheads and the end of the link that I was trying to straighten. Kelly Morrison was on the same side I was, and the conductor passed between the cars that were to be coupled, and was on the other side." Kelly Morrison, a witness for the plaintiff, testified as follows: "I know Lewis Shadd. Met him first on the night when he was hurt. I was working at that time as a brakeman for the defendant company between Monroe and Atlanta. Lewis Shadd was working on the night he was hurt for the defendant company as brakeman on the same train I was. He had just been employed that night by Conductor Reid, and was making his first trip. I was present at the time plaintiff was injured. I was first man, and plaintiff had asked me not to shove him in any close places until day. I promised him that, so far as I was concerned, I would not do it. I signed the engineer down myself, and asked Shadd to get away, and let me make the coupling. Mr. Reid said, with an oath, to get back, and let Shadd make the coupling. Shadd placed the lantern on his arm, and stepped in between the cars. The next thing I learned he was mashed. He then set his lantern down between the two tracks, and Mr. Reid told him to go back to the office and get a doctor. Shadd attempted to make this coupling at the instance of the conductor. Don't know who signed the engineer back. No coupling had been made at this time. Shadd did not have time to make the coupling. Cross-examined: I worked as brakeman in front of the train, and Shadd was swingman; that is, he broke from the cab to me. I had been working on this train about two weeks. Shadd had started work that night. Shadd was hurt a while before day. Shadd had no coupling stick when he made the coupling. Shadd was nearest the coupling. I was 3 or 4 steps away. Neither Shadd nor I had anything to do at that time but to make the coupling.

The conductor was at this time standing behind Shadd. I did not see Shadd set his lantern down when he went to make the coupling. He had made no coupling before this that night. I was about 3 or 4 steps away from Shadd when first heard he was hurt. There was nothing wrong with the car bumpers that I know of; nothing but Shadd's hand was hurt, that I know of. It was mashed. Shadd had lantern on his left arm when he started to make coupling. Mr. Reid and I had been making couplings previous to this. If Mr. Reid told Shadd to let me make the coupling, I did not hear him." Rev. D. L. Shadd, Thomas Robinson, Robert Wallace, and Dr. W. D. Pemberton testified as to the nature of the wound, its effect upon the plaintiff, etc., and M. L. Flow and R. A. Morrow testified as to the good character of the plaintiff; but this evidence is not deemed necessary to a proper understanding of the case, and is therefore omitted. It was in evidence, and also admitted, that Conductor Reid was authorized by the company to employ and discharge hands working under him. There was a verdict as hereinbefore set forth. Plaintiff moved for a venire de novo, and assigned as ground therefor that his honor erred in charging the jury that in no view of the case could the plaintiff recover, and that if they believed the evidence they must find the first issue, "No." Motion denied. Judgment as set out in the record. Plaintiff appealed.

F. I. Osborne, for appellant. MacRae & Day, for appellee.

AVERY, J. A more experienced brakeman proposed to go in and make the coupling between a car standing on the track and the rear car of the train to which the engine was attached, but the conductor, with an oath, ordered him back, and said: "No; let Shadd [the plaintiff] make it. How will he ever know anything, if you never let him do anything?" The plaintiff then "signed the engineer down," and, stepping in front of the stationary car, began to strike a link that had "gotten crossways" with a pin, which he carried in one hand, while he held his lamp in the other. The two cars at this moment were eight or ten feet apart, when the conductor, moving from the side on which he and his two brakemen were standing when the order was given, crossed between them to the opposite side of the track, and waved to the engineer to back his train. When the brakeman was striking the link to get it into its place, the conductor was saying to him, "Don't miss the coupling, as I want to get away some time to-night." As the pin was brought by a second blow into its proper place, the conductor again said, in a loud tone of voice, "Don't miss the coupling." While these urgent commands were being given, the train was all the while moving back, in obedience to the signal of Reid,

towards the new employé, who had gone between the cars under his express order, and was then exposed to peril that was becoming every moment more imminent, as the train approached the stationary car. The engineer's movements were regulated in direction, if not speed, by the conductor's lamp, until plaintiff's hand was caught between the drawhead of the front car and the link he had been adjusting or the drawhead of the rear car (he could not say confidently which), and was badly injured. It is settled law in this state that a conductor is, in his relation to those subject to his orders on the train in his charge, a vice principal acting for the company. *Mason v. Railroad Co.*, 114 N. C. 718, 19 S. E. 362, and *Id.*, 111 N. C. 482, 16 S. E. 698. It can but be admitted as a fact, looking at the testimony, as we must do, in the aspect most favorable to the plaintiff, that he went between the cars and exposed himself to peril at the command of the conductor, who, seeing him thus in danger, urged him to arrange the coupling as rapidly as possible, while he was at the same time causing the train to approach him. We think that these facts bring this case clearly within the principle established on the first appeal in *Mason's Case*, *supra*. This case is not exactly "on all fours" with that. It is really stronger for the plaintiff, in that the testimony sent up discloses no express agreement between the plaintiff and the company, such as was in evidence there, and in the further fact that the plaintiff in our case was sent between the cars by a direct order from the conductor, and was urged to expedite the coupling by him, he being all the while in a position to see that the servant had no stick,—nothing but a pin and a lamp. Another difference is that the conductor, Reid, was so near that he might have heard the sound made by the first lick at the displaced link, and, seeing how the plaintiff was delayed in adjusting it, might have desisted from giving the signal to move back the train till his position became less perilous. As the facts appear from the testimony sent up, the plaintiff was selected by the company itself (the conductor being the embodiment of its authority) instead of another servant, who volunteered to take his place, was ordered to discharge a hazardous duty without considering his previous training or his present preparation of suitable implements for performing the work, and was kept in a perilous position by urgent injunctions to expedite the coupling till, by his order to another servant, the train was so moved as to cause the injury. The plaintiff was brought within the reason upon which the liability was declared to depend in *Mason's Case*, *supra*, because from the moment when the first command was given till the injury was inflicted he was kept constantly in danger by repeated orders of an officer upon whose favor his chance of retaining his place depended. The servant's movements were directed by a living repre-

sentative of the authority of the company, and he was justified in assuming that discharge would inevitably follow disobedience. The consequence was that, if his acts would ordinarily have rendered him culpable, they must, under the circumstances, be imputed to the company which coerced him by the command of its officer, without regard to his own wishes or judgment. The sudden order, and the persistent urgency of the officer while it was being executed, doubtless intensified the apprehension of consequences that might flow from disobedience; but neither in this nor *Mason's Case* is it to be understood that the plaintiff's culpability depended upon the manner of giving the command, but upon the source from which it emanated. The error in the charge of the court entitles the plaintiff to a new trial.

(116 N. C. 751)

HELMs et al. v. AUSTIN et al.

(Supreme Court of North Carolina. April 23, 1895.)

DEED OF GIFT—CONSTRUCTION—FEE-SIMPLE ESTATE—PARTITION—PROCEEDING BEFORE CLERK—REFORMATION OF DEED—DELIVERY.

1. A deed by E. S., of the first part, and S. S., "his wife, and her heirs, named on the back of the deed," of the other part, conveyed to the wife and her "children" certain land. The deed was executed for the purpose of providing for the grantor's family, a life estate being reserved by him. On the back of the deed, after the indorsement of the names of the children, was indorsed the provision that, if the wife had any other children, they should have an equal share with the above "heirs." *Held*, that the wife and children took a fee simple.

2. Though, in an action for partition before the clerk, he cannot reform the deed under which plaintiffs claim, yet the superior court, in case the action is transferred or appealed to it, may grant such relief.

3. Where a voluntary deed acknowledged for the purpose of registration is recorded, the grantor's subsequent declarations are inadmissible to disprove its delivery.

4. The presumption of the delivery of a voluntary deed by a father to his wife and children, in which he reserves a life estate, arising from the fact of registry, is not overcome by the fact that the grantor retained possession of the deed and of the land which he listed for taxation, and by an indorsement on the deed by the probate judge reciting that "the cause of my giving my lands to my family by deed, as well as by will, is in order to give the courses and distances of the same."

5. The "Rule in Shelley's Case" has no application to a conveyance of land by a father to his wife and her "children."

Appeal from superior court, Union county; Winston, Judge.

Special proceeding by T. A. Helms and others against M. C. Austin and others for reformation of deed, and for partition of land. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

Shepherd & Busbee and F. I. Osborne, for appellants. Burwell, Walker & Canaler, for appellees.

FAIRCLOTH, C. J. This was an action for partition before the clerk, and was trans-



ferred to the superior court. The defendants denied that the plaintiffs had any interest in the land to be divided, which was equivalent to the plea of "sole seisin." The question arises upon three deeds made by Ennis Staton, of the first part, and "Sarah Staton, his wife, and her heirs, named on the back of this deed, of the other part," the said Ennis Staton reserving his life estate in the lands conveyed, and the consideration named is love and affection. On the back of each deed is indorsed the names of the several children of the grantor, the plaintiff's name being one each time. In the third deed the conveyance is to "Sarah Staton, his wife, and her children," and in the indorsement on the back thereof, after repeating the names of the same children as in the other two, it is stated, "and, if the said Sarah Staton should ever have any other child or children, that he or they shall have an equal share with the above heirs." These deeds are dated September 13, 14, and 15, 1869, and were registered, after probate, on August 26, 1870, and September 2, 1870.

It is a well-known rule that if two constructions can be put on a deed, or any part of it, that shall be given to it which is most beneficial to the grantee. These deeds were inartificially drawn, using the words "heirs" and "children" indifferently, by one having no legal conception of their technical meaning, but the intent is clear. It would be unreasonable to assume that the father, in providing for his family, meant to give them only a life estate leaving the fee undisposed of, after reserving his own life estate. We are entirely satisfied from the context and from the nature and purposes of the deed that it was the intention of Ennis Staton to convey a fee simple to his wife and children, and we declare that to be the effect of each of the deeds. *Fullbright v. Yoder*, 113 N. C. 456, 18 S. E. 718; *Holmes v. Holmes*, 86 N. C. 205; *Vickers v. Leigh*, 104 N. C. 257, 10 S. E. 308; *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. 668.

Here we might rest this branch of the case, but the plaintiffs prayed the court, in the event that the deeds did not convey a fee-simple estate, to be allowed to reform the deeds according to the true intention of the grantor. The defendants' counsel denied the power of the court to give this relief, inasmuch as the clerk, before whom the action was properly instituted, had no power to give such equitable relief. By the Code, § 102, the duties at first assigned to the probate judge are required to be performed by the clerks of the superior courts, as clerks of said courts, and their duties and connection with the court are fully explained in *Britain v. Mull*, 91 N. C. 498, and, under our new code system of practice, we see no reason why the court may not amend and give any relief that the parties may be entitled to, according to the facts, in any case sent up by the clerk, either by transfer or by appeal,

provided the original subject-matter be within the jurisdiction of the clerk. The advantage of such practice to the courts and to the parties litigant is manifest, and we hold that the equitable relief asked for, if it had become necessary, could have been given in the superior court. In 1875, when the code system was new, this court held, in a case much like the present, upon an appeal from the probate court in a special proceeding which was dismissed in that court, that the superior court could and should give such equitable relief as the parties were entitled to, upon the plea of fraud in procuring a deed for land, it being conceded that the probate judge had no such power. *McBryde v. Patterson*, 73 N. C. 478.

The defendants further insisted that these deeds were never delivered, and relied upon the indorsement on the deeds made by the probate judge at the time the deeds were acknowledged by the grantor and ordered to be registered, and upon subsequent acts and declarations of the grantor, to rebut the implication of delivery arising from the registration. The indorsement was as follows: "The cause of my giving my lands to my family by deed as well as by will is in order to give the courses and distances of the same." It is admitted that Ennis Staton retained possession of the deeds after their registration, and remained in possession of the land and listed it for taxes until his death. These admitted facts are all consistent with the fact that the grantor retained a life estate, and, taken alone, have no tendency to rebut the implication of delivery arising from the registration. In a case "on all fours" with the present, it was held by this court that where the donor went into court and acknowledged a deed of gift for the purpose of registration, and it was accordingly registered, that was a delivery, and that any subsequent declaration that it had not been delivered, and was not to have effect, did not invalidate it. *Alrey v. Holmes*, 5 Jones (N. C.) 142; *Ellington v. Currie*, 5 Ired. Eq. 21. These cases dispose of the defendants' exceptions to the exclusion of their proposed evidence. Where the maker once parts with the possession or control of a deed, he cannot afterwards recall it, and the donee's acceptance is presumed, especially when it is beneficial to him. Registration of a deed is only *prima facie* evidence of its execution, probate, and delivery, and not conclusive; for otherwise no fraud or mistake could be corrected in either respect. The presumption arising from this *prima facie* effect may be rebutted by sufficient evidence. To this effect is *Love v. Harbin*, 87 N. C. 249, and various other cases, including the textbooks. In *Mitchell v. Ryan*, 3 Ohio St. 377, it was held—First, that a recorded deed is *prima facie* evidence of delivery, and it is to be presumed that the maker means to part with the title, and that clear proof ought to be required to warrant a court in holding

otherwise; secondly, that, where a grant is a pure, unqualified gift, the presumption of acceptance can be rebutted only by proof of dissent. The indorsement on the deeds, "The cause of my giving my lands to my family by deed," etc., indicates plainly that he was trying to settle his property on his family, which he could only do, then, by having the deeds recorded. If to perpetuate the courses and distances was his only object, then an ordinary survey and plot would have done as well, and might have as well been registered as these deeds, if they were not intended to pass any title to the grantees. The rule in *Shelley's Case* has no application. *Leathers v. Gray*, 101 N. C. 166, 7 S. E. 657. The evidence of the clerk, as indicated, was insufficient to rebut the presumption, if it had been admitted. Affirmed.

(116 N. C. 733)

**HUNEYCUTT et al. v. BROOKS et al.**  
(Supreme Court of North Carolina. April 23, 1895.)

**PARTITION—DENIAL OF TITLE—EVIDENCE.**

1. When the plaintiff in partition of lands claims to hold as a tenant in common with the defendant, and defendant denies plaintiff's title, and claims sole ownership of the property, the burden of proof is on the plaintiff to establish his title.

2. Plaintiffs in ejectment claimed under the will of their father, devising the land to his widow during her widowhood, and then to plaintiffs. It was shown that the widow had died without marrying again, but there was no evidence that either she or plaintiffs had held possession of the land within 35 or 40 years prior to the suit. *Held*, that the evidence did not entitle plaintiffs to recover.

Appeal from superior court, Stanly county; Boykin, Judge.

Action by W. R. Huneycutt and others against W. R. Brooks and others for partition of land. From judgment for plaintiffs, defendants appeal. Reversed.

Brown & Jerome, for appellants.

**FURCHES, J.** This is a proceeding commenced in the superior court of Stanly county before the clerk for partition of the lands mentioned in the complaint. Plaintiffs allege that they are tenants in common with defendants in said lands. The defendants answer, and deny that plaintiffs are the owners of the lands mentioned in their complaint, and plead "non tenent insimul" (sole seisin in themselves), which is the "general issue" in a proceeding for partition. *Purvis v. Wilson*, 5 Jones (N. C.) 22. This makes the issue where the plaintiff claims to be the owner of land, and the defendant denies that he is the owner. In effect it becomes an action of ejectment, and the defendant is required to give bond for cost and damage before he can answer, as in an action of ejectment under section 237 of the Code. *Cooper v. Warlick*, 109 N. C. 673, 14 S. E. 106; *Vaughan v. Vincent*, 88 N. C. 116. This being so, the bur-

den of proof is on the plaintiff, the test being this: Suppose no evidence should be introduced, who would be entitled to recover? 1 Greenl. Ev. (14th Ed.) pp. 104, 105, and note B; *Clapp v. Bromagham*, 9 Cow. 530; 17 Am. & Eng. Enc. Law, 747; *Bailey, Onus Probandi*, 113; 1 Rice, Ev. p. 115; *Abb. Tr. Ev.* 723. Then, suppose no evidence had been introduced in this case, plaintiffs alleging seisin in themselves, and defendants denying it, and nothing appearing in the pleadings to estop defendants (as claiming under or through the same person) from denying plaintiffs' title, who would have been entitled to recover? The simple statement of this proposition, it seems to us, shows that defendants would be entitled to an instruction from the court to the jury directing them to return a verdict for defendants; and we are of the opinion that the court erred when it held that the burden was on defendants. If defendants had declined to introduce evidence, and the court had instructed the jury to return a verdict for plaintiffs, which the court would have done if it had followed the logic of its position that the burden was on the defendants, defendants would have been entitled to a new trial.

But defendants' plea of sole seisin did not only throw the burden upon plaintiffs to open the case, but also to prove their title, as in ejectment. The plaintiffs had to recover, if at all, upon the strength of their own title. It was not necessary that defendants should do anything until plaintiffs did this. After defendants had offered three deeds, running back to 1845, and a long-continued possession, which we do not deem it necessary to discuss in this appeal, the plaintiffs did introduce evidence, but, in our opinion, it fell far short of making out their case. They first introduced the will of David Brooks, probated at August term, 1842, which was, in substance, to his widow, Polly Brooks, during her widowhood, and then to his children; and it was shown that Polly Brooks never married again, and died in 1882 or 1883. But it was not shown that Polly Brooks or any of the plaintiffs had been in possession of this land (the 64½ acres of which defendants claim to be sole seised) for 35 or 40 years. In fact, plaintiffs failed to prove possession in Polly or themselves of any of the lands mentioned in the complaint. The will of David Brooks does not establish title in plaintiffs, by their showing, as they did, that they were the children and heirs at law of the said David. This will, without proving that plaintiffs or their mother, Polly, had held possession under it, proved no more than it would have proved in 1842, when it was probated. Suppose, then, that defendants had been in possession, and plaintiffs and their mother, Polly, had brought their action of ejectment against them, and offered this will in evidence, and stopped. Could it be contended that plaintiffs had made out their title and were entitled to recover? This proposition

must be answered in the negative. We are therefore clearly of the opinion that plaintiffs failed to establish their title to the land in controversy, and the court should have so instructed the jury. But, instead of so instructing, the court instructed them, if they believed the evidence, to find for plaintiffs. In this there was error.

This disposes of the appeal. But there are other questions presented by the record, which have been argued and will necessarily arise on a new trial, if plaintiffs succeed in making out their title. These are as to what estate this will conveyed to Polly Brooks, and as to the statute of limitations or possession; and our opinion is that if David Brooks owned the lands named in the will, and Polly Brooks never married again, she was the owner of the same until her death, unless she conveyed it, and then the assignee would be the owner until her death; and, this being so, plaintiffs would have no right to the possession of said land, and no right to sue for the same until after the death of Polly. So, if the 64½ acres, claimed by defendants, is a part of the David Brooks lands mentioned in his will, and he was the owner thereof, and had the right to convey the same by said will, then time did not commence to run against the plaintiffs until the death of Polly. And if defendants are tenants in common with plaintiffs, as they allege, it would require 20 years' sole possession by defendants from the death of Polly to defeat plaintiffs' claim. *Ward v. Farmer*, 92 N. C. 93, and cases cited. But if they are not tenants in common with plaintiffs, and hold under deeds from parties who are strangers (that is, others than plaintiffs), seven years' adverse possession would bar plaintiffs' right. The right of the feme defendant to dower has nothing to do with this proceeding. There is error, and defendants are entitled to a new trial; and it is so ordered. New trial.

(116 N. C. 679)

**HARMON et al. v. HUNT et al.**

(Supreme Court of North Carolina. April 23, 1895.)

**CREDITORS OF CORPORATION — ACTION AGAINST STOCKHOLDER — UNPAID SUBSCRIPTION — EVIDENCE—JUDGMENT AGAINST CORPORATION — REVIEW ON APPEAL.**

1. A judgment rendered on the report of a referee in an action to set aside an assignment by a corporation, together with the findings of the referee that one of the stockholders had subscribed for a certain amount of stock, and had been allowed to draw out, prior to the assignment, all he had paid on his subscription, was competent evidence against such stockholder in an action by the creditors of the corporation to recover the amount of his subscription, although he was not a party to the action in which such judgment was rendered.

2. One who has not objected to the admission in evidence of a referee's report made in a former action, to which he was not a party, cannot complain on appeal that the admission of such report was error.

3. Where a stockholder of an insolvent corporation, in an action against him by the corporate creditors, admitted the amount of his subscription, and that it was unpaid, and introduced no further evidence, it was proper to direct a verdict for plaintiffs.

Appeal from superior court, Forsyth county; Battle, Judge.

Action by D. W. Harmon and others against C. W. Hunt, assignee, R. S. Linville, and others, in the nature of a creditors' bill. From a judgment for plaintiffs, defendant Linville appeals. Affirmed.

J. S. Grogan, for appellant. Jones & Patterson and Glenn & Manly, for appellees.

**FURCHES, J.** We gather from the record in this case and the Exhibits "A" and "E," which it seems were offered in evidence on the trial, and made a part of the case on appeal, that some years ago—probably in 1881—there was a corporation formed in Forsyth county for the purpose of working and manufacturing tobacco; that a number of persons became subscribers to the capital stock of said company in various amounts, among whom was the defendant R. S. Linville, to the amount of \$200; that a number of these subscribers paid into said company, which was organized and known as the Kernersville Manufacturing Company, the amount of their subscriptions, while some of them paid only a part, and some of them paid nothing, or, if they paid any part, were allowed to withdraw what they had paid in. In 1885 this company failed in business, became insolvent, and made an assignment of its assets to the defendant Hunt, to secure certain of its creditors. That, sometime after the assignment, the plaintiffs, creditors of said company, commenced this action to set aside said assignment for fraud, and for judgment on their several indebtedness, and for general relief. This action was in the nature of a creditors' bill, and a reference was made to Mr. Gray to take and state an account of the whole matters involved, which he did, and reported to fall term, 1889, of Forsyth superior court. Both sides filed exceptions to said report, and it was continued until February term, 1891, when all the exceptions were overruled, report confirmed, and judgment rendered for amounts found due in the report. This judgment was appealed from (110 N. C. 99, 14 S. E. 501), and the judgment modified and affirmed, subject to the modifications made by this court. In said report the referee finds that the defendant Linville subscribed \$200, and that he paid in \$100, being one-half of his subscription, but afterwards he was allowed to withdraw the \$100 he had paid in, and the court gave judgment against said defendant for the amount so found against him; and, although this judgment was modified in this court on appeal, it was not modified or changed in respect to Linville. After this action was commenced,

the court made an order to issue summons to all the corporators, making them parties defendant, and it seems summonses were issued, and the defendant Linville was present, participating in taking the evidence in the reference, and it was supposed he was served. But the papers in the case were afterwards destroyed, and though they were partially, or, it may be, fully, restored by copies from the case on appeal in this court, no summons was found against the defendant Linville. The concern being insolvent, a summons in the original action was issued against the defendant Linville, which was served, and a supplemental complaint was filed, in substance (though very inartistically done) declaring that defendant subscribed \$200 to the capital stock of said corporation; that he paid in \$100, but afterwards drew it out; that he (Linville) was a party to the action when the account was taken and judgment rendered against him at February term, 1891. The defendant answers, and does not deny the subscription, but alleges that he was in the employment of the concern; that it did not keep its contract with him; that it was owing him in January, 1888, more than his subscription, and it compromised the matter, and he "surrendered," and it paid him back the \$100. He denied that he was served with a summons, or that he was a party to the suit at the taking of the account, or at the time of the judgment. Without objection or exception, two issues were submitted to the jury by the court: "(1) Was R. S. Linville a party to this action at the time of the hearing before the referee January 18, 1889, and when judgment was rendered confirming the referee's report? Ans. Yes. (2) In what amount, if any, is R. S. Linville indebted to the Kernersville Manufacturing Company? Ans. \$200, with interest from January 18, 1889." Upon these issues the court gave judgment against the defendant, and the defendant appealed, assigning the following grounds of error: "(1) That the judge allowed the jury to consider, in passing on the first issue, the statement in the referee's report that R. S. Linville was present at the trial before him. (The judge allowed this, and the referee also, as a witness, so testified.) (2) The admission of the referee's report as evidence. (When this report was introduced by the plaintiffs, the defendant Linville did not object.) (3) The admission of the testimony of the witnesses Buxton, Eller, Gray, Glenn, and Blalock. (4) The said defendant also insisted that on all the evidence the court should have instructed the jury to answer the first issue in the negative. (5) Said defendant also insisted that the court had no jurisdiction, the principal amount demanded of him being only two hundred dollars. (6) Said defendant also objected to the appointment of a receiver."

According to the view we have of this

case, we cannot sustain either of defendant's exceptions. The first issue, over which it seems the contest was made, in our opinion, was entirely immaterial, and should not have been submitted. But it did the defendant no harm, as we think the judgment would, or should have been, the same, if the jury had found this issue "No," instead of "Yes." The corporation was the defendant, and it represented the assets of the concern, and a judgment against it bound the assets. It was not necessary to make the individual corporators (the stockholders) parties, to do this; and if the defendant was one of the corporators, and had not paid his subscription to the capital stock, and the concern was insolvent, as was alleged and not denied, it was a part of the assets,—a trust fund for the payment of debts. *Blalock v. Manufacturing Co.*, 110 N. C. 103, 14 S. E. 501; *Heggle v. Association*, 107 N. C. 581, 12 S. E. 275, and cases there cited. The findings of the referee and the judgment of the court at February term, 1891, finding and adjudging that the defendant Linville was one of the corporators; that he subscribed \$200, and had not paid it, or that he had paid \$100 and taken it out again, and owed it now, was at least prima facie true, and was competent evidence, if not conclusive. And if the defendant Linville was not a party at the time of taking the account and judgment (and we are assuming that he was not), then we do not say that he might not have disputed the correctness of said judgment as to his liability to the corporation. But we do say that it was competent evidence, and established the indebtedness of the corporation to plaintiff. But as defendant introduced no evidence, and having admitted his subscription, and that he had not paid it, it was the duty of the court to instruct the jury, as he did, to find the second issue for the plaintiffs. If we are correct in this, the defendant's first exception cannot be sustained, as a part of the judgment at February term, 1891, confirming the report of the referee and judgment thereon, made the report a part of the judgment, and it was necessary to refer to the report to see what the judgment was.

In the case on appeal the judge says there was no exception to the introduction of the report in evidence, as stated in defendant's second exception, so this disposes of that exception, if we had not already disposed of it in what is said as to the first exception.

The third exception cannot be sustained, as we think (but we do not pass upon this), for the reason that it was as to an immaterial issue, the finding of which either way could not have affected the result.

The fourth exception has, in effect, been passed upon by what we have already said as to the judgment of February, 1891.

The fifth and sixth exceptions, as we understand, were abandoned on the argument;

but, if they were not, they cannot be sustained.

We also understood it to be stated on the argument that it would require all the defendant Linville was due the concern, together with all they would be able to realize from other stockholders, who had not paid their subscription, and what they would be able to realize from the property and effects of the concern, and more, to pay the indebtedness of the said corporation. And with this understanding we affirm the judgment of the court below. But if it should not require the whole of the unpaid subscriptions, together with the other assets of the concern, to pay said indebtedness, then defendant would only be required to pay his ratable part. Affirmed.

(116 N. C. 718)

**CRAWFORD et al. v. PEARSON.**

(Supreme Court of North Carolina. April 23, 1895.)

**INJUNCTION—RIGHT TO DAMAGES—PROCEDURE.**

1. In an action against defendant for wrongfully suing out an injunction, it is unnecessary to allege and prove that the injunction was issued without probable cause.

2. Code, § 341, providing that if the court shall finally decide that plaintiff was not entitled to an injunction the plaintiff shall pay such damages, as may be ascertained by reference or otherwise, as the judge directs, does not contemplate that a separate action shall be brought for damages sustained by the wrongful suing out of an injunction.

3. That the principal was sued without joining the sureties as defendants makes no difference.

4. In the action in which an injunction was issued, a motion to assess damages for wrongfully suing it out cannot be allowed before there is a final determination that the plaintiff was not entitled thereto.

Appeal from superior court, McDowell county; Allen, Judge.

Action by J. R. Crawford and another against S. T. Pearson for damages for wrongfully suing out an injunction. A demurrer to the complaint was overruled. Reversed.

J. B. Batchelor, for appellant. E. J. Justice, for appellee.

**MONTGOMERY, J.** Under chapter 251, Acts 1893, it is no longer necessary to allege want of probable cause in proceedings to recover damages against plaintiff in injunction suits.

The second ground of demurrer ought to have been sustained. The Code (section 341) does not contemplate that a separate action shall be brought on an injunction bond, but that the damages sustained by reason of the injunction shall be ascertained by proceedings in the same action, and in a mode most expeditious, and least expensive to the parties, consistent with the due administration of justice and with orderly proceedings.

v.21s.E.no.9—36

**North Carolina G. A. Co. v. North Carolina O. D. Co., 79 N. C. 48.**

That the defendant was sued alone in this action, and not his sureties on the injunction bond with him, makes no difference. The undertaking does not impose any new liability on the defendant, but simply provided an additional security; and therefore the damage which the plaintiff suffered, if any, should have been assessed in the same manner as if the sureties on the undertaking had been moved against, i. e. in the same action in which the injunction was issued.

The motion made by the plaintiff in the action in which the injunction was issued, to have his damages assessed, was premature. Before that motion could have been allowed, there must have been a final determination of the action. *Thompson v. McNair*, 64 N. C. 448. There was error in the ruling of the court below. The demurrer ought to have been sustained. Error.

**AVERY, J., did not sit.**

(116 N. C. 785)

**MOOSE et al. v. MARKS.**

(Supreme Court of North Carolina. April 23, 1895.)

**APPLICATION OF PAYMENTS.**

Plaintiff held two notes against defendant,—one as executor, the other in his own right, as assignee, without defendant's knowledge; and in answer to his request for money, made on the ground that "one of the heirs" needed it, defendant remitted a check. *Held*, that the same should be applied on the note held by plaintiff as executor.

Appeal from superior court, Stanly county; Robinson, Judge.

Action by J. H. Moose and others, executors, against W. S. Marks, on a promissory note. From a judgment for plaintiffs, defendant appeals. Reversed.

Brown & Jerome, for appellant. Montgomery & Crowell, for appellees.

**FAIRCLOTH, C. J.** It is agreed all round that the debtor may direct the application of his payment, and, on his failure to do so, the creditor may make the application; and, if he fails, then the law will make it to the debt with least security. Here the plaintiff held a note for \$600, in his right as executor, against defendant, and another for a less amount, as assignee, in his individual right. The latter holding, however, was unknown to the defendant. The plaintiff applies by letter for \$75, "as one of the heirs is in a strain, and needs it very much." The defendant answers: "Find check for \$57.50. \* \* \* I will send you some more as soon as I can raise it,"—which was equivalent to saying, "I send you this amount to relieve the heir in distress," and, in legal effect,

was a request to apply it on the \$600 note, and good faith required that it be done. Judgment reversed.

(116 N. C. 761)

CLARK v. HODGE.

(Supreme Court of North Carolina. April 23, 1895.)

COMPETENCY OF WITNESS—CHattel Mortgage—EXECUTION BY CORPORATION—VALIDITY.

1. Since Code, § 1351, removes the disqualification of witnesses interested in the suit, a mortgagee in a chattel mortgage is competent, as a subscribing witness, to prove the execution thereof.

2. One claiming under a chattel mortgage purporting to be executed by a corporation, and having the corporate seal attached, is not bound to show that its execution was authorized.

3. It is competent to show that the seal affixed to a chattel mortgage purporting to be executed by a corporation was not affixed by corporate authority.

4. A chattel mortgage recited that a certain corporation was indebted to the mortgagee, "for which he holds my note," and to secure the same "I do" convey to him certain property owned by the corporation; and "if I fail" to pay the debt the mortgagee may sell, allowing an attorney fee to be charged to "me." The attestation was, witness "my" hand and seal, and the mortgage was signed by the president of the corporation as "president," with his private seal, and by others who signed as "treasurer" and as "stockholder," the corporate seal being set opposite their names. *Held*, that the execution was the president's personal act.

5. Since the property described in said mortgage was, at the time of the execution, the property of the corporation, and in the adverse possession of a third person, the mortgage was properly excluded in replevin by the mortgagees for said property.

Appeal from superior court, Rutherford county; Boykin, Judge.

Replevin by R. B. Clark against Joseph Hodge. From a judgment for defendant, plaintiff appeals. Affirmed.

The property in suit was owned by a corporation, and plaintiff claimed the same under a chattel mortgage, which he offered in evidence. To the introduction of the paper defendant interposed the following objections, to wit: (1) The paper writing was not attested by the secretary of the corporation, as required by Acts 1891, c. 118, p. 104. (2) It was not shown that the parties who executed the paper had any authority from the members of the corporation to make it. There was no evidence that the corporation authorized the execution of the mortgage. (3) The paper was void, because the pretended mortgagee was the sole subscribing witness thereto. His attestation alone would not and did not sufficiently prove the execution of the paper so as to authorize the clerk to order the registration. (4) The corporation could not make a mortgage or deed of trust on the property, because at the time the mortgage was made it did not have possession of the

property; it (the property) being in possession of defendant. The court ruled the paper out, and plaintiff excepted. Upon this ruling, plaintiff took a nonsuit, and prayed an appeal.

E. J. Justice, for appellant. S. Gallert, for appellee.

CLARK, J. It was not a sufficient objection to the introduction of the mortgage that the subscribing witness thereto, by whom its execution was proved when admitted to probate, was the mortgagee therein. The Code (section 1351) removes the disqualification attaching formerly to witnesses having an interest. The mortgagee in this case, not coming within any of the exceptions (Code, § 590; *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043), was competent as subscribing witness, to prove the execution of the mortgage to himself; but such practice is not commended nor to be encouraged, for the probate is *ex parte*, without opportunity for cross-examination. Nor was it incumbent upon the party offering the mortgage to show that its execution was duly authorized. The common seal being affixed, is *prima facie* evidence that it was affixed by proper authority. 1 *Devl. Deeds*, § 341. It was competent for the opposite party to go behind the seal, and show that it was not affixed by the legally exercised authority of the company. *Duke v. Markham*, 105 N. C. 131, 136, 10 S. E. 1017. But the instrument, on its face, is not the mortgage of the corporation. It recites that the corporation (naming it) is indebted to the plaintiff, "for which he holds my note. \* \* \* To secure the payment of the same, I do hereby convey to him \* \* \* the following articles of personal property, to wit, \* \* \* now in the Hodge Hotel, belonging to the said company; and if I fail to pay said debt by the 13th of April, 1892, [then follows power of sale, with provision for allowance of ten per cent. to attorney for collection] charging said fee to me, and, after paying said debt, interest, costs, and fee, the surplus to be paid over to said Clark [the mortgagee]. Witness my hand and seal, this 13th April, 1892." To this D. N. Hitchcock affixes his signature as "president," adding his private seal. Two others signed respectively "treasurer" and "stockholder," the seal of the corporation being set opposite to the three names. Act 1891, c. 118 (since repealed, and re-enacted with some modification by Act 1893, c. 95), is, like Code, § 685, an enabling act, additional to, and not exclusive of, the common-law mode of executing deeds. *Bason v. Mining Co.*, 90 N. C. 417. This instrument might possibly, therefore, be admitted as executed in behalf of the corporation, so far as the common seal and the signing of the officers are concerned; but from the attestation clause, the body of the deed, and the conveying words it is clear that it

is the conveyance of D. N. Hitchcock, and not that of the corporation, acting through him. It is the personal act and deed of its president. *Clayton v. Cagle*, 97 N. C. 300, 1 S. E. 523; *Davidson v. Alexander*, 84 N. C. 621; *Insurance Co. v. Hicks*, 48 N. C. 58; *Plemmons v. Improvement Co.*, 108 N. C. 614, 13 S. E. 188. It is admitted that the property embraced in the description was, at the time of the execution of the mortgage, the property of the corporation (not of said Hitchcock), and was in the adverse possession of the defendant. The mortgage offered was therefore properly excluded. No error.

(116 N. C. 1061)

## STATE v. MILLS.

(Supreme Court of North Carolina. April 23, 1895.)

## SLANDER—EVIDENCE.

On trial for slander of a woman, after the defendant, as a witness, had admitted the innocence of the prosecutrix, and had undertaken to justify the words spoken on the ground that he had only repeated a rumor, without wrong motive, an affidavit made by him, at a prior term of court, to secure a continuance on the ground of the absence of a witness by whom he expected to prove the unchastity of the prosecutrix, was properly admitted.

Appeal from superior court, Union county; Robinson, Judge.

Red Mills was convicted of slander, and appeals. Affirmed.

The Attorney General, for the State.

**FAIRCLOTH, C. J.** The defendant was indicted for slandering an innocent woman. At some term of court before the trial term, the defendant filed an affidavit for a continuance because of the absence of certain witnesses by whom he expected to prove an actual, sexual intercourse of the prosecutrix with another person. At the trial, after the state rested its case, the defendant caused himself to be examined as a witness in his own behalf, when he admitted the innocence and virtue of the prosecutrix, and undertook to justify the words spoken by swearing that he was simply repeating a rumor that he had heard, that he meant no harm by it, and that he had requested the party to say nothing about it. After defendant's evidence was closed, the state offered the affidavit above referred to for the purpose of showing defendant's animus in speaking the words charged in the indictment. This evidence was objected to, but admitted, and the defendant excepted. Verdict of guilty.

The affidavit was competent evidence. The plea of justification put on the record is an aggravation, if the defendant either abandons the plea at the trial, or fails to prove it. Words written or spoken before or after those sued on are admissible to show the animus of the defendant, also the mode and extent of their repetition. *Odger, Sland. &*

*L. §§ 178, 272; Folk. Starkie, Sland. § 580; Newell, Defam. p. 331, § 31; Id. p. 348, §§ 58, 58. Any words spoken before or after action begun are competent to show the degree of malice. Brittain v. Allen, 2 Dev. 125; James v. Clarke, 1 Ired. 397. No error.*

(116 N. C. 1049)

## STATE v. LILLY.

(Supreme Court of North Carolina. April 23, 1895.)

## CARRYING WEAPONS—EVIDENCE.

In a trial for carrying a pistol concealed, the evidence showed that it was worn under an overcoat, but did not show whether the overcoat was open or buttoned. There was also evidence that the pistol could "be seen." *Hdd*, that the questions as to whether the evidence was sufficient to rebut the presumption of concealment raised by statute (Code, § 1005) upon proof that defendant has the weapon on his person off his own premises, and as to whether the pistol was actually concealed, were for the jury.

Appeal from superior court, Stanly county; Robinson, Judge.

Joel Lilly was convicted of carrying a concealed weapon, and appeals. Reversed.

Bennett & Bennett, for appellant. The Attorney General, for the State.

**CLARK, J.** The statute raises a presumption that the weapon is concealed upon proof that the defendant has it about his person off his own premises. Code, § 1005. The defendant, to rebut this presumption, relies on the evidence "that the pistol could be seen either when the defendant was sitting down or standing up." On the other hand, the state relies on the fact that the defendant had it on under his overcoat. It does not appear how the overcoat was worn, whether open, displaying the weapon, or partly buttoned up. It could not have been buttoned up entirely, since the weapon "could be seen." Whether the presumption of concealment was rebutted, whether the weapon was in fact concealed, but a close scrutiny might have enabled one to see it, or whether in fact it was worn openly, the overcoat unintentionally in certain positions, obstructing the view, was a question which should have been left to the jury. The indictment is for carrying a concealed weapon, not for simply carrying the weapon. *State v. Dixon*, 114 N. C. 850, 19 S. E. 364. The gist of the offense is the manner of carrying it. The jury should have been told that the burden was on the defendant to rebut the presumption of concealment, and, upon the evidence, whether that presumption had been rebutted, should have been left to them under proper instructions. Possibly his honor's view on the facts was right, if he had been sitting as a juror, but, as different conclusions might have been drawn from the evidence, the case should have been left to a jury. New trial.

(34 Ga. 388)

**MATHIS v. WESTERN UNION TEL. CO.**<sup>1</sup>  
(Supreme Court of Georgia. Aug. 31, 1894.)  
**TELEGRAPH COMPANIES — PENALTY FOR DELAY —**  
**STIPULATION AS TO PRESENTING CLAIM**  
**—PUBLIC POLICY.**

The statute imposing upon telegraph companies a penalty for default in the transmission or delivery of messages is based upon public policy, and has for its object the quickening of the diligence of these companies in the performance of their duties to the public. With this object in view, it seeks to encourage both the sender and the sendee of messages to sue for the penalty, by offering to the one who shall first sue the whole amount of the recovery. For a company to protect itself against payment of the penalty by a contract with the sender, made at the time of receiving from him the message to be sent, that it will not be liable unless a claim for the penalty is presented to it or its agents, in writing, within 60 days after the message is filed for transmission, would be contrary to the policy of the legislature in enacting the statute, and all such contracts are void and of no effect. *Simmons, J., dissenting,*

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by J. E. Mathis against the Western Union Telegraph Company to recover the statutory penalty for default in delivering a message. Judgment for defendant, and plaintiff brings error. Reversed.

Hardeman, Davis & Turner, W. T. Lane, and Jas. Dodson & Son, for plaintiff in error. Gustin, Guerry & Hall, for defendant in error.

**LUMPKIN, J.** Mathis brought an action against the telegraph company for the statutory penalty. The blank upon which his message was written had printed upon it the following stipulation: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." The only question presented for our determination is whether or not the company is relieved from the penalty in a case where the claim for it was not presented within the time prescribed by this stipulation. The court below adjudicated in favor of the telegraph company upon this question, and the majority of the court are of the opinion that this judgment was erroneous. In *Hill v. Telegraph Co.*, 85 Ga. 425, 11 S. E. 874, it was held that a stipulation on a blank upon which a telegraphic message was written, to the effect that the company would not be liable for damages in any case where the claim was not presented within 60 days after sending the message, was a reasonable regulation, and therefore obligatory upon the sender. But in *Telegraph Co. v. Janes*, 90 Ga. 254, 16 S. E. 83, it was held that the contractual limitation of 60 days for presenting a claim for damages against a telegraph company did not apply to the statutory penalty. To the same effect, see *Telegraph Co. v. Cooledge*, 86 Ga. 104, 12 S. E. 264. Thus it has been settled

that a claim for damages and a claim for the penalty are separate and distinct things. In none of the cases above mentioned, however, was the question presented in the case at bar made or passed upon. The identical question arose and was decided in *Telegraph Co. v. Jones*, 95 Ind. 228, in which it was held by the supreme court of Indiana that a telegraph company may lawfully contract that a claim for a statutory penalty shall be made within a reasonable time, and that, in the absence of special circumstances, 60 days is not unreasonable. The Missouri court of appeals, in *Montgomery v. Telegraph Co.*, 50 Mo. App. 591, decided that the terms "any claim," in a telegraph message blank, included a statutory penalty; and in the same case it was held that a stipulation in such a blank that the company would not be liable for damages unless the claim therefor was made in writing, and presented to the company, within 60 days after receipt of the message, would protect the company from liability for the statutory penalty where no claim had been presented by the plaintiff, and his action was instituted more than 60 days after delivery of the message to the company. We cannot follow these courts in the conclusions above announced. Our statute imposing a penalty upon telegraphic companies for default in the transmission or delivery of messages is based upon public policy, the object of which is to quicken the diligence of these companies in the performance of their duties to the public. This policy cannot be annulled or defeated by mere regulations adopted by a telegraph company, or by stipulations printed upon its blanks in pursuance of such regulations. The company has no right to require a customer to use a blank with a stipulation upon it as to penalty, such as that which was printed on the blank upon which the message of the plaintiff was written. The mere fact that a customer voluntarily uses such a blank without objection is of no consequence. As he could not be compelled to use it, his so doing is really without consideration, so far as he is concerned, and is not binding upon him. Besides, this is not a matter for contractual negotiations between the parties. In *Telegraph Co. v. Taylor*, 84 Ga. 498, 11 S. E. 396, it was said that "the penalty is for the wrongful violation of a public duty, and neither in whole nor in part for a mere breach of contract"; and this conclusion is borne out by the reasoning of Chief Justice Bleckley on pages 413, 414, 84 Ga., and page 396, 11 S. E., and the authorities there cited. We have not the slightest idea that in enacting the statute now under consideration the general assembly ever supposed or intended that a telegraph company would be able to protect itself against the payment of a penalty in the manner here attempted. On the contrary, we feel certain that to allow this to be done would be violative of the legislative policy, and, in a large measure, would defeat the purpose for which the statute was passed.

<sup>1</sup>—Dissenting opinion of Simmons, J., see 21 S. E. 1039.



It was argued that our statute was adopted from that of Indiana, after the decision in 95 Ind. 228, and consequently that the construction of that statute by the supreme court of that state should be followed by this court. Our statute is not identical with that of Indiana; and besides we find, upon examination, that similar statutes, varying more or less in terms, have been passed in a number of the states of this Union, from several of which it might, with equal propriety, be said our statute was taken. But granting, for the sake of the argument, that ours is an adoption of the Indiana statute, the answer to the above contention is that the Indiana case in no sense involved a construction of the meaning of any words or phrases used in their statute. The court was simply passing upon a contract, or an alleged contract, of which the statute said nothing, and which was urged as a defense to a case arising under the statute. The court was not undertaking to interpret the statute itself. We understand the rule invoked to be applicable where one state adopts legislation existing in another, the courts of which have construed and interpreted the meaning of language used in the statute. An illustration which occurs to us at the moment may be found in the case of *Steamship Co. v. Way*, 90 Ga. 747, 17 S. E. 57. There it appeared that the term "trinkets," as used in the English carriers' act, from which our act of congress was borrowed, had been given by the English courts a certain meaning; and it was held that, in adopting the English statute, congress advisedly used the word "trinkets" as having the meaning which the English courts had attached to it. On the whole, we do not feel under any restraint, from any source, to do otherwise than follow our own conclusion upon the question at bar, which we have deliberately reached after a most anxious and careful consideration. Judgment reversed.

SIMMONS, J., dissenting. [See 21 S. E. 1039.]

(95 Ga. 528)

**WALKER v. WESTERN UNION TEL. CO.**  
(Supreme Court of Georgia. Oct. 22, 1894.)  
TELEGRAPH COMPANIES—STIPULATION AS TO PRESENTING CLAIM FOR PENALTY.

This case is controlled by *Mathis v. Telegraph Co.* (decided August 31, 1894) 21 S. E. 564.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by J. L. Walker against the Western Union Telegraph Company to recover damages for failure to transmit and deliver a telegram with due diligence. There was a judgment of nonsuit, and plaintiff brings error. Reversed.

The following is the official report:

Walker sued the telegraph company for the statutory penalty for failure to transmit

and deliver with due diligence, etc., a dispatch sent to him at Waycross, Ga., on July 24, 1893. A nonsuit was granted in the case upon the ground that plaintiff had failed to prove that a demand in writing for the penalty had been made upon the defendant within 60 days after the original message was filed with the defendant for transmission. Plaintiff excepted. Upon the trial there was no evidence of such a demand, nor of a waiver thereof. Upon the back of the original telegram was the statement that defendant would not be liable for damages or statutory penalty in any case where the claim was not presented in writing 60 days after the message was filed with the company for transmission; and upon the telegram, as delivered, was the statement that defendant would not hold itself liable for errors or delays in transmission or delivery of unrepeatable messages, where the claim was not presented in writing within 60 days after the message was filed with the company for transmission, and that this was an unrepeatable message, and was delivered, by request of the sender, under said conditions.

W. M. Toomer, for plaintiff in error. Orvatt & Whitfield, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 359)

**UNITED UNDERWRITERS' INS. CO. et al.**  
v. POWELL et al.

(Supreme Court of Georgia. Aug. 31, 1894.)

APPEALABLE ORDERS—OVERRULING DEMURRERS—INSURANCE—FLOATING POLICY—CONDITION AS TO OTHER INSURANCE.

1. The action being against several defendants, and some of them having demurred severally to the petition, as presenting no cause of action against them, and the court having overruled their demurrers, they were entitled, by virtue of the act approved October 16, 1891, amending section 4250 of the Code, to bring that decision, by a direct writ of error, to this court for review, although the suit was still pending below as to a defendant who did not demur.

2. A floating policy of insurance, which declares that it does not cover cotton on which there is any more specific insurance, does not embrace or apply to any cotton which is specifically insured in another company, and therefore is not subject to share with the other company the burden of loss sustained by the latter or by the insured in respect to the cotton covered by the more specific insurance; and for this reason, the company issuing the floating policy cannot be called upon to contribute to a loss resulting from destruction of the cotton covered by the more specific insurance, although the policy, touching the latter, contained a clause declaring that "in case of any other insurance upon the property hereby insured, whether made prior to or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether by specific or floating policies."

(Syllabus by the Court.)

Error from superior court, Coweta county; S. W. Harris, Judge.

**Action by T. N. Powell & Co. against the United Underwriters' Insurance Company and others.** From an order overruling demurrers to the complaint, the United Underwriters' Insurance Company and two of the other defendants bring error. Reversed.

Jackson, Leftwich & Black, for plaintiffs in error. Dorsey, Brewster & Howell, for defendants in error.

SIMMONS, J. 1. Powell & Co. filed their petition against the Macon Fire Insurance Company, the Liverpool & London & Globe Insurance Company, the United Underwriters' Insurance Company, and the Hartford Fire Insurance Company. The three companies last named filed demurrers on similar grounds, which demurrers were overruled, and to this ruling they excepted. The Macon Fire Insurance Company did not demur, and the action is still pending in the court below against it. The other companies sued out their bill of exceptions to this court, and when the case was called here the defendant in error moved to dismiss it on the ground that the judgment was not final in the court below, but the case was still pending therein. The act approved October 16, 1891, amending section 4250 of the Code (1 Acts 1890-91, p. 82), adds to that section the words, "or final as to some material party thereto," so that the section, as amended, reads: "No cause shall be carried to the supreme court upon any bill of exceptions, so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the case, or final as to some material party thereto," etc. If the demurrers filed by the three insurance companies which are now plaintiffs in error here had been sustained, the judgment of the court below would have been final as to them; and, under the amendment above recited, we think they had a right to except to the ruling of the court below, and bring the case here, although the suit was still pending against one of the defendants who did not demur, and, by reason of the decision complained of, against the excepting defendants also. These plaintiffs in error were material parties to the action, as brought in the court below; and, if there was no cause of action set out against them in the equitable petition, it was useless to keep them in court until the action against the fourth company had been finally disposed of. This may have been the reason for the passage of this act of the legislature, but, whatever the reason may have been, it is sufficient for us to say that the law is thus written.

2. It appears from the petition that Powell & Co. procured insurance upon certain cotton in a particular warehouse in Newnan, Ga., with five different insurance companies, to the amount of \$2,000 in each company. They afterwards took out other insurance, to the

amount of \$10,000, in what are called "floating policies," with four insurance companies. A fire occurred, and cotton to the amount of \$13,000 in value was burned. Four of the five companies which had issued what are called "specific policies" on the cotton in the particular warehouse paid up their losses, to the amount of \$2,000 each; and the companies which had issued the floating policies paid the loss in excess of \$10,000, to wit, \$3,000, pro rata among themselves. When the fifth of the companies which had issued specific policies, to wit, the Macon Fire Insurance Company, was called upon to pay its \$2,000 of specific insurance, it declined to do so, on the ground that its policy contained a clause declaring, "In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether by specific or floating policies." The Macon Fire Insurance Company claimed that under this clause of its policy it was not liable for the whole amount thereof, but was only liable to pay its proportion of the total amount of insurance, counting the floating and specific policies, and refused to pay any more. The petition, after alleging that the Macon Fire Insurance Company was indebted to the petitioners the full amount of its policy, and praying judgment for that amount (\$2,000, with interest), contained an alternative prayer that, if the court should hold that the Macon Company was not liable for the full amount of its policy, the other companies which had been made defendants, and with whom the petitioners had settled upon their floating policies, as before mentioned, be required to pay, in addition to what they had already paid, their part of such sum as, by a proper construction of the policy of the Macon Company, the court might find to be due by said companies.

The policy of the Macon Fire Insurance Company recited that it was "on cotton, in bales, \* \* \* contained in Smith's Warehouse, situate in Newnan, Ga." The floating policies recited that they were "on cotton, in bales, \* \* \* in all or any of the stores, presses, warehouses, sheds, yards, railroad yards, and wharves, \* \* \* or while in transit in, or while on any of the streets in, ——" No particular warehouse, and no cotton stored in any particular warehouse, was mentioned. Each of the floating policies contained also the following condition: "This policy shall not apply to or cover any cotton which may at the time of loss be covered, in whole or in part, by \* \* \* any more specific insurance." The policies containing this condition do not, in our opinion, embrace or apply to any cotton specifically insured in another company, and therefore are not subject to share with the other company the burden of loss sustained by the latter or by the insur-

ed in respect to the cotton covered by the more specific insurance; and for this reason the companies issuing the floating policies cannot be called upon to contribute to a loss resulting from destruction of the cotton covered by the more specific insurance, notwithstanding the clause in the Macon Company's policy, already quoted, under which that company claimed exemption from liability for anything more than the proportion its insurance bore to the whole insurance, counting floating as well as specific policies. According to their express language, the floating policies do not apply to or cover the same cotton which was insured by the Macon Fire Insurance Company, for the latter company insured cotton in a designated warehouse. and this is specific insurance,—certainly it is more specific than that of the floating policies. Such being the fact, the companies issuing these policies have protected themselves by their contract with the insured against liability, whether by contribution or otherwise, for the loss of any cotton which the policy of the Macon Fire Insurance Company covers. Where the property insured is not the same, there is no common insurance, and consequently no contribution. Judgment reversed.

(94 Ga. 308)

#### RAHN v. HULL.

(Supreme Court of Georgia. Aug. 20, 1894.)

##### DISSOLUTION OF ATTACHMENT—DISCRETION OF COURT.

There was no abuse of discretion in refusing to remove the attachment on the petition of the defendant in the attachment proceeding.

(Syllabus by the Court.)

Error from superior court, Effingham county; R. Falligant, Judge.

Action by A. B. Hull against E. R. Rahn and another on a money claim. Plaintiff sued out an attachment, and from an order overruling a motion to dissolve the attachment E. R. Rahn brings error. Affirmed.

The following is the official report:

On October 31, 1893, Hull sued out an attachment, alleging that E. R. Rahn & Bro., a firm composed of E. R. Rahn and J. N. Rahn, are indebted to him \$337.45; that defendants were doing business at Guyton, Ga., until about September 29, 1893; petitioner was informed that J. N. Rahn had retired, and that E. R. Rahn would continue the business, assuming all liabilities; that petitioner has never consented to release J. N. Rahn from liability on the debt; that about October 27th, E. R. Rahn, for the purpose of avoiding the payment of his debts, conveyed his stock of goods in his store at Guyton to J. L. Weltman and Gassie Griner, which stock was liable for the payment of the debts of E. R. Rahn; and that E. R. Rahn conceals his property liable for the payment of his debts for the purpose of avoiding the payment of the same. Where-

fore, petitioner prayed for an attachment against the property of E. R. Rahn, and for such other relief as he might be entitled to under a proceeding of this sort. The allegations in the petition for attachment were verified by the affidavit of Hull, and the judge of the superior court of an adjoining circuit,—the judge of the superior court of the county in which the petition was brought being absent from the state,—upon the presentation of the petition and consideration of the proof submitted, ordered that the attachment issue, and issued an attachment, which was levied upon all the stock of goods at Guyton, "being the stock of goods sold by E. R. Rahn to the firm of Weltman & Griner on October 20, 1893," and on ——— acres of land. Thereafter Rahn petitioned the judge of the circuit in which the proceedings were pending to have the attachment removed, and, after a hearing had upon said petition, it was denied, and the attachment allowed to stand, to which ruling Rahn excepted. Upon said hearing, Rahn put in evidence his own affidavit, to the following effect: October 20, 1893, he sold his entire stock of goods to Weltman & Griner. Before the sale he made an inventory of all the goods he had in stock, and they amounted in value to \$317; that being their full value, and being the amount received from them for the same. On the same day he sold the goods, he rented to them the storehouse in which the goods were located, and they then and there took possession of the storehouse and goods, and opened a mercantile business in the name of Weltman & Griner. At the time he made the sale he owed Hull \$337.45. He at once notified Hull that he had made a sale of his entire stock, and as soon as he could arrange to do so he would pay him the amount he then owed him. A few days afterwards, Hull called upon him at Guyton; and they had a conversation as to the disposition he had made of his stock, during which he stated to Hull that he was involved in liability upon the bond of D. G. Morgan, but at no time stated to Hull that he made a sale of his goods to avoid liability on that bond, nor to avoid any other liability. Deponent sold the goods to Weltman & Griner in good faith, and there was no trust for himself, or any person appointed by him. The reason he made the sale was to pay a debt of \$300 that he then owed Miss Cornelia Dasher, and in the conversation he had with her in reference to the sale he made the same statement. Movant also produced the affidavit of Weltman & Griner, to the following effect: On October 20, 1893, they bought of Rahn the stock of goods in his store at Guyton. Before they did so, Weltman, with Rahn, went through the stock, and made a complete inventory of all the goods in the store, and they amounted, at cost price, to \$317, which deponents then and there paid,—\$17 in cash, and the balance by giving Miss Cornelia Dasher six promissory notes, of \$50 each, due

every third month thereafter. Weltman inquired of Rahn whether there was any outstanding lien that could come against the goods, and Rahn assured him there was none. The firm bought the goods in good faith, and without notice that Rahn owed a dollar; and, if there was any intention on the part of Rahn to defraud his creditors, it was unknown to Weltman. On the same day, and a different time, they bought from others a large quantity of goods, and placed them in the store with the goods purchased from Rahn, and opened a mercantile business, and operated it until November 2, 1893, when the attachment was levied upon their entire stock, and their store closed, causing large damage. Also the affidavit of Miss Cornelia Dasher: Rahn owed her \$300 for borrowed money on October —, the same being for money borrowed from her about September —, 1892, which amount was then due. She was advised and believed that he was largely indebted, and his property liable to be seized at any time for the payment of his debts. She had no security for the \$300, save the naked promise of Rahn that he would pay the same. After being informed that Rahn was financially embarrassed, she called upon him to pay her the \$300. He told her he had no money, but could and would sell the stock of goods that he then had in his Guyton store to the firm of Weltman & Griner, and would make the notes that he got for the stock payable to her, for the purpose of securing to her the payment of the \$300. On October 20, 1893, Rahn did sell to Weltman & Griner all the goods he had in his store, and they then gave her six promissory notes, of \$50 each, payable every third month thereafter; and she accepted these notes as the payment of the \$300 then due her by Rahn,—accepted them in good faith, and not through fraud, or collusion with Rahn. Hull introduced his affidavit: On October 28, 1893, he went to Guyton to see Rahn for the purpose of collecting the debt for which the attachment was sued out. Rahn then stated to him that he was one of the bondsmen of Morgan; that suit was about to be brought against Morgan and his bondsmen, and that Rahn apprehended that a judgment would be obtained against him as such bondsman, and for this reason had conveyed his stock of goods in Guyton to Griner & Weltman for a stated consideration of \$317; that only \$17 had been actually paid, and he had been careful to have the notes given by them for the remaining \$300 made payable to the order of Miss Cornelia Dasher, so they could not be reached. Deponent then stated to Rahn that, as there was no consideration for the notes passing from the payee, deponent thought his creditors could reach them, and subject them to the payment of defendant's debts, to which defendant replied he could fix that by buying something from Miss Dasher. Defendant offered, then and there, to have the notes trans-

ferred to deponent as collateral security for the debt which he owed deponent; but deponent declined to accept the offer, being convinced that the pretended sale to Weltman & Griner conveyed no title, and learning that Griner was a minor. Rahn stated to deponent that he then had the notes for \$300 in his possession; that they were upstairs. Weltman is present before the court now sitting, hearing the motion of Rahn to remove the attachment.

R. W. Sheppard, for plaintiff in error. A. C. Wright, for defendant in error.

LUMPKIN, J. This was a petition for the removal of an attachment which had issued and been levied under the law providing for attachments against fraudulent debtors. No question of law is involved. The sole question for our determination is whether or not the circuit judge abused his discretion in refusing to remove the attachment. This depends entirely upon the evidence, a condensed statement of which appears in the official report. An examination of it will show that the conclusion reached by the judge was fully warranted. Judgment affirmed.

(94 Ga. 352)

SAVANNAH, F. & W. RY. CO. v. McCONNELL.

(Supreme Court of Georgia. Aug. 20, 1894.)  
RAILROAD COMPANIES — KILLING OF ANIMALS —  
REBUTTING PRESUMPTION OF NEGLIGENCE.

By two witnesses, who knew the facts with absolute certainty, the presumption of negligence was fully overcome; and, apart from the presumption, there was no proof whatever of negligence. Consequently the verdict was without evidence to support it.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by T. M. McConnell against the Savannah, Florida & Western Railway Company for damages for the killing of stock. Plaintiff had judgment, and defendant brings error. Reversed.

Erwin, Du Bignon & Chisholm and Hitch & Myers, for plaintiff in error. Leon A. Wilson and John C. McDonald, for defendant in error.

LUMPKIN, J. There was a verdict against the railway company for damages resulting from the killing of a horse and two mules belonging to the plaintiff. The only error complained of in the bill of exceptions is the overruling of the defendant's motion for a new trial, based upon the grounds that the verdict was contrary to law, the evidence, and the charge of the court. The plaintiff depended for a recovery solely upon the presumption of negligence which the law raises against a railway company. That the animals were killed by the defendant's train was admitted; but by the evidence of two witnesses for the

company,—the engineer and the fireman,—who knew with absolute certainty the facts of the transaction, it was conclusively shown that the company and its servants in charge of the train were free from all negligence in the premises. So the legal presumption against the company was fully overcome. It is true, the plaintiff did introduce two witnesses, who, according to their testimony, exhibited wonderful and extraordinary powers of vision in seeing through a dense fog at or about daylight in the morning. They did not, however, see the catastrophe, and what they swore amounted to no proof of negligence, and should not have been allowed to overcome the positive testimony of the engineer and fireman, the former of whom appears, from the report of his evidence, to have been an unusually straightforward, candid, and honest witness. We think the verdict was unsupported by the evidence, and ought to have been set aside. Judgment reversed.

(94 Ga. 348)

**WADE v. JOHNSON et al.**

(Supreme Court of Georgia. Aug. 20, 1894.)

**EJECTMENT—EVIDENCE—ADVERSE POSSESSION—TITLE TO SUPPORT.**

1. Where the plaintiff in ejectment claimed by a prescriptive title, and the defendant claimed through a sheriff's sale, evidence that at the time the color of title in the plaintiff's lessor originated such lessor admitted that the premises now in dispute belonged to the defendant in *fi. fa.*, and said that he, the plaintiff's lessor, wanted to buy the other half of the tract, was admissible; there being other evidence showing that he in fact purchased only half of the tract, but took a conveyance covering the whole of it, and also that he afterwards disclaimed ownership of the premises in dispute, and declared that only the other half of the tract belonged to him.

2. Possession of land under a color of title, however long continued, will not ripen into a prescriptive title, nor serve for tacking to make out the full term of prescription, if, instead of being attended with a claim of right, such right be expressly disclaimed pending the possession.

3. Can a trustee for his present wife and all the children of his first wife recover in ejectment by virtue of a conveyance made to him in 1886, without showing that the children were minors when the trust was created, and that they had not arrived at majority when the action was brought,—*quaere*? And as to the interest of the wife, was not the trust executed when the deed was made, there being nothing appointed for the trustee to do in her behalf,—*quaere*?

(Syllabus by the Court.)

Error from superior court, Pierce county; J. L. Sweat, Judge.

Action of ejectment by Charles S. Youmans and Lemuel Johnson against A. P. Wade. Judgment for plaintiffs, and defendant brings error. Reversed.

S. W. Hitch and L. A. Wilson, for plaintiff in error. W. G. Brantley, for defendants in error.

SIMMONS, J. Charles S. Youmans, as trustee for his wife and children, brought an action of ejectment against Wade for the re-

covery of the north half of lot No. 2 in the Fourth district of Pierce county, containing 245 acres. He commenced his chain of title with a deed from the heirs of James Carter to J. B. Strickland, executed on the 9th of February, 1867, conveying the whole of lot No. 2. He also introduced a deed from S. R. Jenkins, trustee, and Mary Strickland, cestui que trust, to Lemuel Johnson, conveying the whole of lot No. 2, containing 490 acres, dated September 28, 1872; also a deed executed August 25, 1886, from Lemuel Johnson to Charles S. Youmans, which recited that Lemuel Johnson, in consideration of \$1,200, granted, bargained, sold, and conveyed to Charles S. Youmans, to be held in trust for his wife, Mary E. Youmans, and all the children of said Charles S. Youmans by his first wife, their heirs and assigns, the north half of lot No. 2 in the Fourth district of Pierce county, containing 245 acres, "to hold the same to the use, benefit, and behoof of the said Charles S. Youmans, in trust for his wife, Mary E. Youmans, her heirs, and all the children of the said Charles S. by his first wife, their heirs, executors, administrators, and assigns." There was proof of possession by Johnson under the deed from Jenkins, trustee, and Mary Strickland, up to the time he sold to Youmans, trustee. The defendant introduced an execution against Charles S. Youmans, and a sale thereunder by the sheriff, of the north half of lot No. 2, June 8, 1887, and a deed from the sheriff to Wade for the north half of the lot, and proof of possession under this deed. As the plaintiff showed no regular chain of title from the state to him, the right of recovery depended on his color of title and seven years' adverse possession thereunder by himself and his vendor, Lemuel Johnson, under a claim of right. If he could show that Johnson had held continuous and adverse possession of the north half of lot No. 2 for seven years prior to the sheriff's sale, under a claim of right, he would have been entitled to recover. To meet this theory of the plaintiff, the defendant offered to show by Jenkins, who made the deed to Lemuel Johnson, that at the time he sold to Johnson the latter said that Youmans owned half of the lot, and that he wanted to buy the other half from Mrs. Strickland. This evidence the court, on objection of the plaintiff, ruled out, and the defendant assigns error on this ruling. We think the evidence was admissible. It would have negatived to some extent the theory of the plaintiff, and would have indicated that, although Johnson obtained a deed from Jenkins covering the whole lot, he knew at the time that Youmans owned the north half, and that Jenkins, as trustee, could only sell the other half, and had no right to sell the north half. If this was true, although he went into possession of the whole lot, and remained in possession for seven years or more, he did not and could not

have a claim of right to the north half. The evidence, if admitted, would also have corroborated other parts of the evidence wherein it was shown that Johnson in fact purchased only half of the lot, but took a conveyance to the whole, and that he afterwards disclaimed ownership of the north half, and declared that only the other half of the lot belonged to him.

2. If the above-recited facts are true, the possession of Johnson, however long continued, could not ripen into a prescriptive title. Knowing that Jenkins had no right to sell the north half, and having disclaimed title to that half after he obtained a deed from Jenkins, his possession cannot be counted by tacking it to the possession of others in order to make out the seven years. Under the facts stated, he could not have a bona fide claim of right to the north half.

3. The deed being from Johnson to Youmans in trust for his present wife and all his children by his first wife, can Youmans recover the trust estate without showing that the children were minors when the trust was created, and that they had not arrived at majority when the action was brought? So far as the wife was concerned, was not the trust executed when the deed was made, there being nothing appointed for the trustee to do in her behalf? If some of the children are still minors, of course the trustee would represent them; but can he represent those who have attained majority, and his wife, as to whom the trust seems to have been executed, or will they have to be made parties plaintiff to the action? On these questions we express no opinion, but leave them to be determined on the next trial. Judgment reversed.

(94 Ga. 347)

**REYNOLDS et al. v. PADGETT.**

(Supreme Court of Georgia. Aug. 20, 1894.)

**ASSUMPSIT FOR WRONGFUL INJURY TO PROPERTY.**

Although the owner of personal property which another wrongfully takes and converts permanently to his own use may waive the tort, and maintain an action *ex contractu* on account for the value of the property, yet where such property was taken without leave, but with no intention to convert it permanently, and was injured by a temporary wrongful use, the wrongdoer holding it afterwards for the owner, and with no purpose to use, claim, or dispose of it as his own, he is liable for the tort in a proper action, but is not chargeable with the value of the property in a suit based on account as for goods sold and delivered.

(Syllabus by the Court.)

Error from superior court, Appling county; J. L. Sweat, Judge.

Action by Reynolds Bros. against E. P. Padgett on an implied contract. Defendant had judgment, and plaintiffs bring error. Affirmed.

G. J. Holton & Son, for plaintiffs in error. T. A. Parker, for defendant in error.

**SIMMONS, J.** All the authorities agree that one who takes and sells personal property belonging to another without the consent of the owner is liable for its value in an action upon an implied promise to pay for the property. The authorities differ as to whether such an action will lie where the person taking the property does not sell it, but retains it for his own use; but the weight of authority seems to be that the action will lie where the person who takes the property enriches himself or makes a profit from the property, either by selling it, or by retaining it and using it himself, with the intention to convert it permanently. Pom. Code Rem. §§ 567, 569, and notes. The defendant in this case did neither of these things. He found the wagon in the street, and hitched his horses to it, for the purpose of going upon a fishing excursion for one day; but, upon starting to go, the tongue of the wagon was broken by one of the horses, and he unhitched the horses, and left it in the street. It was finally carried to his lot, and left there, but there is no evidence that he ever made any claim to the wagon or any further use of it, nor was anything further proven tending to show that he intended to convert it permanently to his own use. On the contrary, the indications are that he was holding it for the use of the owner. We, therefore, think the trial judge was right in holding that an action upon an implied contract would not lie, but that the plaintiff must sue in tort for the damage to his property. Judgment affirmed.

(94 Ga. 335)

**ALLISON et al. v. JOWERS.**

(Supreme Court of Georgia. Aug. 20, 1894.)

**BILL OF EXCEPTIONS—TIME OF SETTLING—DISMISSAL.**

It appearing that on the 28th day of September, 1893, the court directed a verdict in favor of the plaintiff below; that the term of the superior court at which this was done was finally adjourned on the 3d day of November thereafter; that, before such final adjournment, counsel for plaintiff in error, on October 21st, tendered the presiding judge a bill of exceptions, which the judge was unwilling to certify because of errors and inaccuracies therein; that the judge kept this bill of exceptions until November 11th, and then returned it to the counsel, with a statement in writing of his objections to the same; and that subsequently another bill of exceptions was certified by the judge on the 27th day of January, 1894, more than 60 days after the date of the decision complained of, and more than 30 days (indeed, more than 70 days) after the first bill of exceptions was returned by the judge to counsel for plaintiff in error; and it not appearing on what day this last bill of exceptions was tendered to the judge,—the writ of error must be dismissed, it not having been certified within the time prescribed by law, and no sufficient reason for the delay appearing. In the absence of an affirmative statement that the bill of exceptions was tendered to the judge at a different time, the legal presumption is that it was tendered at the time the certificate to it bears date.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by J. J. Jowers against Allison & Davis. Judgment for plaintiff, and defendants bring error. Dismissed.

E. H. Williams and J. H. Martin, for plaintiffs in error. E. D. Graham, for defendant in error.

LUMPKIN, J. The material facts appear in the headnote. Under section 4257 of the Code, which is still of force, notwithstanding the passage of the supreme court practice act of 1889, if the judge is unwilling to sign the bill of exceptions as tendered to him, he may, in case he does not see fit to make the needful corrections, return the same, within 10 days, with his objections in writing. The section is silent as to the length of time the party to whom it is returned, or his attorney, will be allowed to remove the judge's objections, and tender a corrected bill of exceptions, but he certainly should not be allowed for this purpose (in the absence of some good reason for delay) longer than 30 days. In this case more than 70 days elapsed after the first bill of exceptions was returned by the judge to counsel for the plaintiffs in error. In arriving at this conclusion, we assume that the bill of exceptions brought to this court was tendered to the judge on the day it was certified, there being nothing to show it was tendered at an earlier or different time. No reason whatever appears, or was suggested, for delaying so long, after the judge had declined to sign the first bill of exceptions, to tender the second. We have no hesitation in deciding that the latter was tendered too late. See *Joseph v. Railway Co.*, 92 Ga. 332, 18 S. E. 294; *Pusey v. Sweat*, 92 Ga. 809, 19 S. E. 816.

Writ of error dismissed.

(94 Ga. 332)

MONTGOMERY v. EAST TENNESSEE, V. & G. RY. CO.

(Supreme Court of Georgia. Aug. 20, 1894.)

RAILROAD COMPANIES—NEGLIGENCE—PROXIMATE CAUSE.

Although obstructing the public street by leaving a freight train standing across it for a considerable length of time was an unlawful act on the part of the railway company, the company was not liable in damages to one who, in attempting to climb over a flat car, which formed a part of the train, put his foot in a stirrup attached to the car, and accidentally fell to the ground, and, by reason of his foot hanging in the stirrup, was seriously injured. The unlawful act of the railway company was not the proximate cause of the injury, but the same was the result of a pure accident, for which the company cannot be held responsible.

(Syllabus by the Court.)

Error from superior court, Dodge county; J. M. Griggs, Judge.

Action by J. C. Montgomery against the East Tennessee, Virginia & Georgia Railway Company for personal injuries. From a judg-

ment dismissing the action, plaintiff brings error. Affirmed.

The following is the official report:

The declaration alleges that plaintiff is a physician, and dependent upon his profession and practice of medicine for support and maintenance, and that defendant has damaged him \$10,000, by reason of the following facts: On October 18, 1887, he bought of defendant a ticket on its road from the town of Chauncey, of which town he was a citizen and resident, to the city of Atlanta, intending to become a passenger on its train due at Chauncey about 2 o'clock a. m. Shortly before the time for the train to arrive, he went to the depot where defendant's trains customarily stopped for passengers. The train on which he was to become a passenger was several hours late. The night was dark. It was raining, and the depot was closed. Defendant had failed to provide lights at and around the depot, so that persons could see, and protect themselves against injury in the rain and darkness; and defendant had standing on its side track, in front of the depot, one of its freight trains, which extended many hundred feet above and below the depot, and completely blockaded and obstructed the public street at the depot, and prevented foot travelers and other passers from crossing at the public crossing over the railroad tracks. While waiting for the passenger train, plaintiff had important business, and was wet and cold, and went to warm and dry himself, when he was called to the other side of the railroad from where he was. It was dangerous to go around either end of the freight train, which had been standing there many hours, by reason of the steep embankments, ditches, gullies, holes, and precipitous declines on either side of the railroad track at either end of the freight train. To avoid said dangers, plaintiff, in company with others, some of whom were employes and officers of defendant, who thus had knowledge of all the facts and circumstances, in order to go where he desired, endeavored to cross the freight train at the place where it blockaded the crossing, this being the most advantageous crossing offered, by reason of said blockade; and plaintiff used all possible care and diligence in making said crossing, and was entirely free from fault, and the accident resulted from the failure of defendant to exercise ordinary and reasonable diligence to prevent it, whereby he had his foot caught in an iron stirrup suspended from a flat car, and he was thrown to the ground, with his foot hanging in the stirrup, and his right leg was broken in three places, etc. Defendant was entirely to blame for the accident, by stopping up the crossing, and failing to provide means for persons to cross the track, by failing to have lights, and by leaving the freight train for so long a time across the public street in violation of the law, and thus forcing those passing to go across its cars; the surroundings rendering it impossible, or at least more dan-

gerous and hazardous, to attempt to surround the blockading train than to attempt a passage by going over the cars. Then follow allegations as to the damages sustained, which need not be stated here.

J. H. Martin, for plaintiff in error. De Lacy & Bishop, for defendant in error.

**LUMPKIN, J.** The action of Montgomery against the railway company was dismissed on the ground that no cause of action was set forth in the declaration, and the plaintiff excepted. He further excepted to the consideration by the court of the motion to dismiss, over his objection that it was not made at the appearance term. The contents of the declaration are set forth, in substance, by the reporter. It has been repeatedly ruled that a motion to dismiss an action may be made and sustained at any term, if the declaration fails to set forth any cause of action whatever. Under the facts alleged, we have no difficulty in holding that the court was right in dismissing the case. The obstruction of the public street in the manner alleged was undoubtedly an unlawful act on the part of the company, but it was not *malum in se*. Neither was it an act which would reasonably or probably cause an injury to the plaintiff in the manner set forth. Indeed, such a consequence was nothing more than a remote possibility, and it therefore falls within the domain of pure accident, for which the company cannot be held responsible. Judgment affirmed.

(94 Ga. 330)

**TRIPP et al. v. FAUSETT et al.**

(Supreme Court of Georgia. Aug. 20, 1894.)

**EJECTMENT—EVIDENCE—IMPROVEMENTS AND TAXES.**

1. The tract of land in controversy being one containing 202½ acres, and it affirmatively appearing from the evidence that the testator under whom the plaintiffs claim title was in actual possession of a part of the tract only, the plaintiffs could not recover on this mere possessory title (no written color in the possessor being shown) any of the tract, except such as was embraced in this possession; and inasmuch as the evidence failed to identify the part which was in possession, and distinguish it from the part which was not, the verdict should have been for the defendants.

2. As the possession of the testator could not be aided by the subsequent appraisalment of the land as a part of his estate, or by any return made by the executor in respect to his own dealings with the land, these dealings not having been followed up either by continuous possession in himself as executor, or by turning the land over to the tenant for life, or otherwise administering it under the will, the appraisalment and the return and the parol evidence in relation thereto were irrelevant, and should have been excluded when offered in evidence. The will, however, was relevant and admissible, although it contained no description of the land, but disposed of the testator's estate as an entirety.

3. One who enters upon land under a conveyance from one not in possession, and, so far as appears, not having any color of title, enters and improves the premises at his peril. The

true owner is under no obligation to account to him for taxes paid, or for the cost of improvements over and above the meane profits accruing from the land during the period of his occupation. (Syllabus by the Court.)

Error from superior court, Dodge county; C. O. Smith, Judge.

Action by G. F. Fausett and others against G. J. Tripp and others to recover land. Judgment for plaintiffs, and defendants bring error. Reversed.

De Lacy & Bishop, for plaintiffs in error. Jordan & Watson and E. A. Smith, for defendants in error.

**SIMMONS, J.** This was an action for the recovery of a tract of land containing 202½ acres, to which the plaintiffs claimed title under the will of John C. Rawlins. No written title or color of title in the testator was shown, but the plaintiffs based their claim upon his prior possession of the land. The testimony showed that he was in actual possession of only 25 or 30 acres of the lot. To entitle the plaintiffs to recover the whole lot, it was necessary to show either a deed or other written color of title in the testator covering the whole lot, or that he had actual possession of the whole. If they were entitled to recover at all, under the evidence, they could only recover the quantity of land which was actually in the possession of the testator at the time of his death; but inasmuch as they failed to show what part of the lot was then in his possession, and distinguish it from the part which was not, the verdict should have been for the defendants.

2. It was error to allow the plaintiffs to prove that the executor had the whole lot appraised, and that he made certain returns to the ordinary concerning it. The appraisalment and returns could not aid or enlarge the possession of the testator, it not being shown that the executor followed up the possession of the testator by continuous possession of the land himself, or that he turned it over to the tenant for life, or otherwise administered it under the will. The will, however, was relevant and admissible, although it contained no description of the land, but disposed of the testator's estate as an entirety.

3. When the case was announced ready for trial, the defendant Tripp offered, in addition to his pleas of the general issue and prescription, an amendment in the nature of an equitable plea, in which he claimed that he had entered upon the land in good faith, believing he had a good title, and placed valuable improvements upon it, and paid the taxes, and he prayed that, if the title he held should prove invalid, the amounts so paid out should be allowed him. He did not state in the plea from whom he purchased the land, if he did purchase it from any one, nor whether the vendor had any title or color of title. The court did not err in striking this plea. One who enters upon land under a conveyance from one not in possession, and, so far as ap-



pears, not having any color of title, enters and improves the premises at his peril; and the true owner is under no obligation to account to him for taxes paid, or for the cost of improvement over and above the mesne profits accruing from the land during the period of his occupation. Judgment reversed.

(94 Ga. 328)

# SOUTHERN EXP. CO. v. BRANCH.

(Supreme Court of Georgia. Aug. 20, 1894.)

## APPEAL—QUESTIONS OF FACT.

This case involving nothing but questions of fact, which were solely for determination by the jury, and the jury having found in favor of the plaintiff, and the verdict having been approved by the trial judge, this court cannot interfere.

(Syllabus by the Court.)

Error from superior court, Berrien county; A. H. Hansell, Judge.

Action by W. Branch against the Southern Express Company to recover money intrusted to defendant. Judgment for plaintiff, and defendant brings error. Affirmed.

F. G. Du Bignon and D. H. Pope, for plaintiff in error. C. W. Fulwood and D. W. Rountree, for defendant in error.

**LUMPKIN, J.** A package of money was sent by express to the state treasurer, in Atlanta, by Branch, the tax collector of Irwin county. Branch testified that he counted and delivered \$562.96 to the express agent at Tifton, to be sent to R. U. Hardeman, the treasurer. He stated positively he delivered that identical amount, and identified the express envelope into which the money was put. He further testified that both he and Bowen, the company's agent, wrote their names on the back of the envelope after it was sealed; that Bowen counted the money in his presence, put it in the envelope, sealed it, and stitched it through and through with a thread, and put wax and seal upon it in his presence; and that undoubtedly all the money was sealed up in the envelope. This witness also stated that the money, up to \$550, was in \$100 and in \$50 bills; that there was one \$10 bill, and the balance in coin; and that, if the package was received in Atlanta in good order at the treasurer's office, it was obliged to contain the sum of money already mentioned, which he and Bowen had put into it. Bowen, the company's agent, corroborated this testimony in every particular, except that he did not remember the size of the bills. He further testified that he forwarded the package, in good order, by the first express, and knew that all the money was in the envelope when forwarded. According to the testimony of R. U. Hardeman, Speer, his clerk, and another witness, the package was received at the state treasury in good order, but upon being opened, and the money counted, it contained only \$517.96,—

a shortage of \$45. Branch sued the express company for the amount of the principal and interest, and the costs of an execution issued against him by the comptroller general on account of the shortage in his account as tax collector, occasioned by the failure of the \$45 to reach the treasurer. The jury found for the plaintiff the full amount sued for, and the court below overruled the defendant's motion for a new trial, on condition that the plaintiff would write off the amount recovered for interest and costs upon the *fi. fa.* This the plaintiff did, and the only question is whether or not the verdict in the plaintiff's favor for the \$45 is contrary to law and the evidence.

We feel constrained to affirm the judgment. We are unable to account for the disappearance of the \$45. All the parties concerned in this transaction appear to be upright and honorable gentlemen, and no fraud or wrong is imputable to any of them. The case simply presents an unsolvable mystery. Inasmuch, however, as it affirmatively appears that the plaintiff did deliver to the express company \$562.96, and this fact being admitted under oath by the company's own agent, we cannot say that the jury were wrong in so far as they held the company liable for the \$45, or that the court erred in refusing to set the verdict aside after ordering the excess of that amount to be stricken, and the plaintiff had complied with this order. Judgment affirmed.

(94 Ga. 336)

# WESTERN UNION TEL. CO. v. RYALS.

(Supreme Court of Georgia. Aug. 20, 1894.)

## TELEGRAPH COMPANIES—PENALTY OF DELAY—PREPAYMENT OF CHARGES.

A telegraphic company does not incur liability for the statutory penalty because of delay in transmitting or delivering a message, unless the delay occurs after actual payment or tender of the charges. Where, by mutual agreement of the sender and the company's agent or operator, the charges are held open as a debt to be subsequently paid by the sender, or by him and a third person jointly, this is neither actual payment nor any substitute therefor, with reference to the penal element of the statute; and it makes no difference that the message is forwarded over the wire nominally as a prepaid message.

(Syllabus by the Court.)

Error from superior court, Telfair county; C. C. Smith, Judge.

Action by Mrs. J. H. Ryals against the Western Union Telegraph Company to recover the statutory penalty for default in delivering a message. Judgment for plaintiff, and defendant brings error. Reversed.

Gustin, Guerry & Hall, for plaintiff in error. D. C. McLennon, for defendant in error.

**LUMPKIN, J.** This case is controlled by the ruling announced in the headnote. A telegraph company is not liable for the penalty

imposed by the act of 1887 except in cases where there has been a "payment or tender of the usual charge, according to the regulations of such company." This statute, being penal in its nature, should be strictly construed; and accordingly, after careful consideration, it is our judgment that where, by mutual agreement of the sender of a message and the company's agent or operator, the amount due for sending the message is charged to the account of the sender, or of himself and a third person jointly (thus holding it open as a demand to be subsequently paid), this is not, within the meaning of the statute, and with reference to its penal element, either actual payment or a tender of the same. While marking a message "Paid" would, in the absence of proof to the contrary, raise the presumption against the company that it was a prepaid message (as we held in *Conyers v. Cable Co.*, 92 Ga. 619, 19 S. E. 253), yet, where it affirmatively appears that the charge for the message was not paid in advance, forwarding it nominally as a prepaid message would not make it such in fact. If a customer of the telegraph company chooses to do business with it on credit, he cannot hold the company liable to him for the penalty because of delay in transmitting or delivering a message. If he wishes the company to transact his business at its peril with reference to the penalty, he must either pay in cash, or make the tender required by the statute. Of course, if any negligent delay occurs, either after actual payment or tender of the charges, the rule would be different. Judgment reversed.

(94 Ga. 363)

**MORGAN v. PERKINS et al.**

(Supreme Court of Georgia. Aug. 29, 1894.)

**TRESPASS—REMOVING TIMBER—COSTS—BILL OF EXCEPTIONS.**

1. One who sold standing timber of a certain description upon a tract of land, the purchaser having died before he severed the timber and removed it, is not concerned with the question whether persons authorized by the administrator of the purchaser to cut and appropriate the timber did so as legal purchasers from the administrator, or only as his licensees. Relatively to the vendor of the timber they stand as the administrator himself would have stood had he, in behalf of the estate which he represented, done the work in person or by his servants or employees.

2. Timber, while standing on land on which it grew, being realty, a written contract made in the spring of 1885, by which the owner of the land sold to another "all of the saw timber measuring twelve inches and over in diameter at the stump on lot of land ninety-three [district and county], \* \* \* timber to be cut off the land by December 25, 1886," passed title to only so much of the timber described as was cut before December 25, 1886, unless this limitation as to time was subsequently waived by the seller. If it was waived by expressly fixing another limit, whether orally or in writing, this new limit took the place of the former one, but there was no right to act after the new limit expired. The controlling question in the present case is whether the fund in controversy was produced by timber cut before the new limit

had expired or not until afterwards. Let the new trial as to the ownership of the fund be confined to a determination of this question.

3. Where a defendant, having been sued separately by two plaintiffs, causes them to interplead, the losing party in the interpleader may be charged with the costs of the interpleader and of the action brought by himself, but cannot be charged with the costs of the other action, to which he was no party.

4. When the last day for tendering a bill of exceptions is Sunday, the following day is superadded by Code, § 4, par. 8.

(Syllabus by the Court.)

Error from superior court, Pulaski county: W. H. Fish, Judge.

Action of trespass by one Morgan against J. O. Perkins, administrator, and others, for cutting and removing timber. Defendants had judgment, and plaintiff brings error. Reversed.

J. H. Martin and Pate & Bright, for plaintiff in error. W. L. Grice, for defendants in error.

SIMMONS, J. 1. In February, 1885, Morgan sold to Perkins all the saw timber measuring 12 inches and over in diameter at the stump in lot of land No. 93 in Pulaski county, and a conveyance of the timber was made in writing, in which it was stipulated that the timber was to be cut off the land by December 25, 1886. Perkins died before that time, and his administrator sold the timber that had not been cut to Thompson & Co. Morgan, the vendor, is not concerned with the question whether Thompson & Co. cut and appropriated the timber as purchasers or only as licensees. If they cut the timber within the time agreed upon, it was the same thing to Morgan as if the administrator had cut it by himself or his servants. If he had sold it, and received payment for it, it made no difference to him whether the administrator cut it, or whether Thompson & Co. cut it, if it was cut in the stipulated time.

2. As before stated, it was stipulated in the writing conveying the timber that it would be cut and removed by the 25th of December, 1886. Perkins having died prior to that date, and, the timber not having been cut and removed, Morgan entered into a parol agreement with the administrator extending the time for its cutting and removal. The evidence seems to be conflicting as to the length of time the privilege was extended, Morgan insisting that it was cut and removed after the time had expired, and the administrator of Perkins contending that it was cut and removed within that time, and that, whether it was or not, it made no difference, as he had a right to cut and remove it after the time agreed on had expired. Morgan contends that, the timber not having been cut within the time agreed upon, the administrator forfeited his right to enter upon the land, and cut and remove the timber, and that, when Thompson & Co. did so, they committed a trespass, and are liable to him (Morgan) in damages. The courts in some of the states

have held that, where standing timber is sold, and a time is agreed upon in which it is to be removed, and it is not removed within the time agreed upon, the purchaser does not lose his right, after the expiration of that time, to enter upon the land and remove it. See *Holt v. Stratton Mills*, 54 N. H. 109; *Irons v. Webb*, 41 N. J. Law, 203. These rulings are based upon the ground that standing timber is personalty, and not realty. If it is personalty, these decisions are right; but this court has held that standing timber is not personalty, but realty. *Coody v. Lumber Co.*, 82 Ga. 793, 797, 10 S. E. 218. The timber being realty, the purchaser acquires by the written conveyance an interest in the land, subject to be divested if he fails to remove the timber within the time limited by the conveyance. This is a limitation upon the estate granted, and, if the timber is not removed within the time prescribed in the limitation, the estate terminates. On this subject, see *McIntyre v. Barnard*, 1 Sandf. 52; *Bolsaubin v. Reed*, \*41 N. Y. 323; *Pease v. Gibson*, 6 Me. 84. If the time limited in the conveyance had expired, and Morgan, the seller, agreed orally or in writing with the administrator to extend the time, this was a waiver on the part of Morgan of the first limitation, and the new limit agreed on between him and the administrator took the place of the former one (*Colcord v. Carr*, 77 Ga. 105, 3 S. E. 617; and, if the administrator or his vendees cut and removed the timber within the time fixed by the new limit, they would not be liable to Morgan for a trespass. Morgan, having assented to the extension of the time, cannot complain of their entering upon his land and cutting and removing the timber. If, however, they entered upon the land after the new limit expired, they would be liable to him. This seems to be the controlling question left in the case, viz. whether the fund in court was produced by timber cut before the new limit expired, or not until afterwards. Let the new trial as to the ownership of the fund be confined to the determination of this question.

3, 4. Other questions in the case are ruled by the headnotes. Judgment reversed, with direction.

(94 Ga. 356)

# MUNNERLYN et al. v. AUGUSTA SAVINGS BANK.

(Supreme Court of Georgia. Aug. 29, 1894.)

BANKS AND BANKING—LIABILITY OF TRUST FUND DEPOSITED AS SUCH—EVIDENCE—LIMITATION OF ACTIONS.

1. The action not being by the beneficiaries of the trust for a breach thereof, but by the trustee himself upon the alleged contracts of deposit (and the joinder of them with him as coplaintiffs being of no consequence), there can be no recovery if the trustee withdrew the trust money by checks or otherwise, although he may have done it for his own benefit, with the knowledge of the officers of the bank, and although the bank, with his consent, may have received

some of the funds in payment of debts owing to it from him. If the trustee misapplied any part of the money, and the bank participated therein, there would be a cause of action in behalf of the beneficiaries on their equitable title, but there would be none in behalf of the trustee on the contracts of deposit. In so far, if at all, as the bank may have appropriated the trust fund without direction of the trustee, and without any check or draft upon it by him, individually or otherwise, there can be a recovery in this action; and the question whether the trustee had authority from the bank to draw upon his own credit, together with collaterals deposited by him, and did so draw, instead of checking on the trust fund, should have been submitted to the jury. In so far as any of the fund or its proceeds went to the benefit of the trust estate, whether drawn out irregularly or not, the bank is not chargeable in this action or any other.

2. On the facts in evidence the statute of limitations had no application to the case.

3. The admissions of the trustee, he being the plaintiff in the action, were admissible as tending to negative his ownership of the fund in his capacity as trustee. That these admissions were contained in a plea filed in another case did not render them inadmissible.

(Syllabus by the Court.)

Error from superior court, Richmond county; H. C. Roney, Judge.

Action by John D. Munnerlyn, trustee, and others, against the Augusta Savings Bank, to recover deposits. Judgment for plaintiffs, and defendant brings error. Reversed.

Frank H. Miller and W. K. Miller, for plaintiff in error. J. R. Lamar, for defendants in error.

SIMMONS, J. 1. Munnerlyn, as trustee for his wife and minor son, and the two latter in their own right, sued the Augusta Savings Bank for certain money alleged to have been deposited with the bank by Munnerlyn as trustee. The bank pleaded payment to Munnerlyn on divers checks drawn by him. The action is upon the contract of deposit, and the theory of the plaintiffs is that the bank, with full knowledge of the trust, paid Munnerlyn the money, knowing that he was using it for his individual benefit, and not for the benefit of the trust estate. After a careful consideration of the case, we have come to the conclusion that if the bank paid the money to Munnerlyn, or upon his order, no recovery can be had in this action. We think, where a trustee makes a contract of deposit with a bank, and draws out the money on his own checks, the law will not allow him to recover upon the contract. In such case there is no breach of the contract, for the bank complies with its contract when it pays out the money upon his checks or order; and this is true, although the officers of the bank knew that the money was drawn out for his own use, and received part of it in payment of an individual debt due by him. If he paid a part of the money to the bank upon his individual indebtedness, with the knowledge of the officers of the bank that the money paid was a part of the trust fund, the beneficiaries might recover, not upon the contract of deposit, but upon the wrong and injury to

the trust estate by the misappropriation of the trust fund. They could follow that fund upon their equitable title. The fact that they are joined with the trustee as plaintiffs in this action is of no consequence. He is the real plaintiff, seeking to recover upon a contract, which, if the money was paid to him or his order, as claimed by the defendant, was fully discharged, so far as he is concerned. The cestus que trustent would have a cause of action upon their equitable title for any misapplication of the trust fund in which the bank participated, but there would be no cause of action on the legal title upon the contract of deposit. Whenever a trustee misapplies the trust fund, and it can be traced into the hands of third parties, with notice on their part of the misapplication, the beneficiaries of the trust can sue for the fund, and recover it. On this subject, see *Foxton v. Banking Co.*, and cases cited, 44 Law T. (N. S.) 406. The trustee in this case insists that the checks were not drawn upon this fund, but that he had made arrangements with the bank for a loan to himself individually of \$10,000, and had deposited a large amount of collaterals as security therefor, and, although the loan was never fully consummated, it was understood that these checks should be paid upon his individual credit. The court refused to instruct the jury upon this theory of the case. We think the court ought to have submitted this theory to the jury, and let them pass upon the question whether the checks were really drawn against the trust fund or upon the individual credit of the trustee. In so far, if at all, as the bank may have appropriated the trust fund without direction of the trustee, and without any check or draft upon it by him individually or otherwise, there can be a recovery in this action. In so far as any of the fund or its proceeds went to the benefit of the trust estate, whether drawn out irregularly or not, the bank is not chargeable in this action or any other.

2, 3. Other questions in the case are covered by the headnotes. Judgment reversed.

(94 Ga. 324)

**JOHNSON et al. v. MERCANTILE TRUST & DEPOSIT CO.**

(Supreme Court of Georgia. Aug. 31, 1894.)

**RAILROAD BONDS—VALIDITY—ESTOPPEL.**

Where a railroad company incorporated under the general law procures the legislature to amend its charter by special legislation, and afterwards, with the knowledge of its stockholders, and without any hinderance or attempted hinderance from them, exercises the rights and powers ostensibly conferred by such special legislation, and contracts debts and obligations, whether in its original name or by a name which it has assumed and used by reason of supposed legislative authority for changing its name, it is nevertheless a corporation de jure, not only with reference to transactions referable to the general law under which it was incorporated, but also as to those referable to the special legislation, whether that legislation be valid or invalid. If it be invalid, acts based upon it

would be, at most, ultra vires; but in a court of equity they would not on that account be of less binding force upon the corporation and its stockholders, the corporation having by the negative permission and acquiescence of its stockholders held itself out as competent, under color of law, to perform these acts, and by their performance having procured credit and induced creditors to part with their money on the faith of its contract to secure and repay the same. No just application of the doctrine of ultra vires will allow a corporation to get value received and then refuse to pay, whether the refusal be at its own instance or at the instance of its stockholders, or a portion of the same.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by Johnson & Harrold and others against the Mercantile Trust & Deposit Company of Baltimore, trustee. Judgment for defendant, and plaintiffs bring error. Affirmed.

Berner & Bloodworth, H. D. D. Twiggs, and J. E. D. Shipp, for plaintiffs in error. Bacon & Miller, Guerry & Son, Gustin, Guerry & Hall, and E. A. Hawkins, for defendant in error.

**SIMMONS, J.** The railroad company was organized under the general law which authorized railroad companies to obtain charters. It therefore became a valid and legal corporation. It subsequently applied to the legislature for an amendment to its charter, increasing its powers and changing its name. This was done with the knowledge of its stockholders, and without any objection on their part to the special legislation. After the amendment it exercised the additional rights and powers conferred upon it, contracted debts and issued bonds in its new name. The fact that the legislature, by the amendments above mentioned, increased its powers and changed its name, did not destroy the original charter, nor make two railroad companies where there was one before. It was still a corporation de jure, not only in regard to the powers it exercised under the original charter granted under the general law, and the contracts it made thereunder, but also in regard to the powers it exercised and the contracts made by reason of the amendments granted by the legislature. Even if these amendments should be held invalid, the acts done by the corporation thereunder would be at most ultra vires. Where a corporation, with the permission and acquiescence of the stockholders, holds itself out as competent to contract and carry on its business under color of law, and procures credit and induces creditors to part with their money on the faith of its contract to secure and pay the same, these contracts will be binding in a court of equity, not only on the corporation, but on the stockholders. No application of the doctrine of ultra vires will allow a corporation to get value received and then refuse to pay, whether the refusal be at its own instance

or at the instance of its stockholders, or a portion of the same. These stockholders who are now complaining stood by and saw the powers of this company increased by the legislature and its name changed, and made no objection. They knew for nearly five years that it was performing all the acts of a corporation, running its road, contracting debts, and issuing bonds; and now that the corporation has failed to pay the interest on its bonds, and has been put into the hands of a receiver, these stockholders come forward and claim that it was an illegal corporation, and that their part of the property belonging to the original corporation is not bound for these debts. To allow this claim would be manifest injustice, and no court of conscience should allow it. Judgment affirmed.

(94 Ga. 636)

**PENNSYLVANIA STEEL CO. v. GEORGIA RAILROAD & BANKING CO.**

(Supreme Court of Georgia. July 23, 1894.)

**CARRIERS—LIEN FOR FREIGHT—SALE—STOPPAGE IN TRANSITU.**

Where the same vendor, under a single contract of sale, shipped by rail several consignments of goods to the same vendee, each shipment embracing several car loads, the carrier had the right to retain out of any one or more of the consignments enough of the goods in value to pay the charges for freight and storage upon all, without respect to the particular consignments out of which the goods were retained. And this right of the carrier has the same relation to the right of stoppage in transitu by the vendor which it has to the right of the consignee to claim delivery of the retained goods where no stoppage occurred. Payment of the freight and storage must be made before the consignor can obtain possession under the right of stoppage in transitu.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Ewe, Judge.

Action by the Pennsylvania Steel Company, for the use of its receiver, against the Georgia Railroad & Banking Company. Defendant had judgment on demurrer to the declaration, and plaintiff brings error. Affirmed.

The following is the official report:

The Pennsylvania Steel Company, suing for the use of the receivers of said steel company, brought suit against the railroad company in trover, setting out substantially the following facts: In February, 1893, the steel company, in Philadelphia, Pa., by means of fraudulent representations of one Wheless, sold to the Richmond County Belt-Line Railway Company a number of tons of rails, with spikes, bolts, and switches to go therewith. These rails were shipped, consigned to said Belt-Line Railway Company, at Augusta, Ga., being shipped in carload lots at different dates, and came into possession of defendant, at Atlanta, Ga., as one of the connecting lines of carriers from Pennsylvania, and were transported by it from Atlanta to Augusta. For each shipment of rails the Pennsylvania Rail-

road issued one bill of lading, and the defendant received the cars under said bill of lading and one waybill. On March 4, 1893, defendant received 9 cars, delivered 7, and retained 2, on which it claims freight and demurrage, \$980.90; March 7th, it received 10 cars, delivered 8, and retained 2, on which it claims freight and demurrage, \$1,047.89; on March 8th, it received 5 cars, delivered 4, and retained 1, on which it claims freight and demurrage, \$436.45; and, on March 17th, it received 2 cars, delivered 1, and retained 1, on which it claims freight and demurrage, \$130.25. After discovering the fraud by which the credit was obtained, and learning of the insolvency of the Belt-Line Railway Company, the steel company, on June 9, 1893, served notice of stoppage in transitu on the defendant for the six cars held by it under its claim of lien for freight; tendering to it \$1,021.14, being the full amount of all charges on the specific cars stopped. Defendant refused to deliver the six cars unless the steel company would also pay it \$1,981.86, being the amount due it for freight and demurrage on cars of iron previously delivered to the consignee; defendant claiming that its lien for freight and charges on the cars delivered, as well as those undelivered, was superior to plaintiff's right of stoppage in transitu. The value of the iron stopped being about \$3,000, and the entire amount of freight and charges claimed by defendant on cars delivered and undelivered being \$3,003, defendant refused to deliver possession, plaintiff having refused to make any further tender than the \$1,021.14. Plaintiff claims that no title passed to any of the property, because of the fraud in obtaining the credit, but, even if title did pass, that it exercised its right of stoppage in transitu upon learning of the purchaser's insolvency, and that while the carrier's claim on the cars stopped might be good, as against the consignee, for freight due both on cars delivered and undelivered, its claim was inferior to plaintiff's claim, so far as freight was demanded on cars delivered. Plaintiff further claimed that each car contained a different number of tons of rails, and that the waybill showed the weight and number of tons on each car, and that the amount of freight due on each car was readily ascertainable; therefore, that each car, so far as plaintiff's rights were concerned, constituted a separate consignment, and that, in delivering the freight to the consignee, defendant departed from its general custom, which was to require cash before delivering freight, but upon refusal of the general freight agent to deliver without payment of freight the consignee arranged with some superior officer of the company, and thereupon obtained the cars delivered without payment of freight. Defendant demurred upon the ground that its lien for freight on the cars delivered was superior to plaintiff's right of stoppage in transitu; and, the plaintiff having refused to tender freight and charges on

cars delivered, defendant declined to deliver the six cars upon tender only of freight and charges on cars stopped. The court sustained the demurrer, and ordered that the declaration be dismissed, unless plaintiff tendered to defendant the amount of freight and charges on cars delivered as well as those undelivered, it appearing from the pleading that the value of those undelivered was not equal to the freight and charges claimed by defendant. This plaintiff having refused to do, the declaration was dismissed. Plaintiff excepted, alleging that the court erred (1) in holding that defendant's lien for freight on the cars delivered was superior to plaintiff's right of stoppage in transitu; (2) in holding that it was necessary for plaintiff to tender defendant the full amount of freight and charges on all the cars before it was entitled to receive the six cars stopped; (3) in refusing to hold that each car constituted a separate consignment; (4) in refusing to hold that defendant's lien was lost on cars unconditionally delivered, as against plaintiff's right of stoppage; (5) in sustaining the demurrer and dismissing the declaration.

J. S. & W. T. Davidson, for plaintiff in error. J. B. Cumming and Bryan Cumming, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 622)

BALDWIN et al. v. MCCARTHERN et al.

(Supreme Court of Georgia. July 23, 1894.)

AGRICULTURAL LIEN—ASSIGNMENT BY LANDLORD—RIGHTS OF ASSIGNEE.

Where a landlord's lien for supplies is actually created by special contract in writing, executed by the tenant before any supplies are furnished by a third person, supplies thereafter furnished by the latter to the tenant on the tenant's credit, in consequence of a parol agreement with the landlord that he will assign the existing lien, come under the security of the lien, although the written assignment be not actually executed until after the greater part of the supplies have been furnished by the assignee.

(Syllabus by the Court.)

Error from superior court, Burke county; H. C. Roney, Judge.

Action by Baldwin & Co. against one German. There was judgment for plaintiffs, and the sale of defendant's property under execution thereof. McCarther, McElmurray & Banks intervened, claiming the fund. From the judgment rendered, plaintiffs bring error. Affirmed.

The following is the official report:

The sheriff of Burke county having in his hands for distribution \$136.84, raised from a sale under levy of a common-law *fi. fa.* in favor of Baldwin & Co. against German, Baldwin & Co. and McCarther, McElmurray & Banks were the contesting creditors claiming the fund. The matter was left to the decision of the judge below upon an agreed

statement of facts, which was in brief: The *fi. fa.* in favor of Baldwin & Co. was issued prior to 1889, and was for a larger amount than the funds in hand. Said funds were the proceeds of a crop raised by German during 1889 on lands rented by him from G. B. Banks. McCarther, McElmurray & Banks claimed the funds under a lien *fi. fa.* against German, regularly foreclosed, and issued in the fall of 1889, before the sale of the property, large enough to take the funds. The writing upon which the lien *fi. fa.* was founded was from German, tenant, to Banks, landlord, was dated April 6, 1889, was to secure Banks for making advances, gave to Banks and his assigns full lien on the entire crop of German on the land whereon he farmed during 1889, and contained an agreement that the landlord's lien should be transferable, so as to vest the power to collect the same in the transferee as fully as the landlord could. On August 6, 1889, Banks transferred, in writing, this agreement to McCarther, McElmurray & Banks, in consideration that the latter would furnish the articles agreed to be furnished by Banks to German, "with full power to foreclose and enforce collection of the same as I might do." The supplies furnished German during 1889 by McCarther, McElmurray & Banks were charged on their books to German. The amount advanced up to August 6, 1889, was \$144.38, and after August 6, 1889, was \$8.35. The crops of German had not matured August 6, 1889. McCarther, McElmurray & Banks had no security for the supplies furnished German for 1889, except said transferred landlord's lien. Said account of McCarther, McElmurray & Banks was for guano, supplies, and provisions furnished by them to German during 1889, to make said crop, and were furnished with the distinct understanding between that firm, German, and G. B. Banks, had before any supplies were advanced, that German was to give the written landlord's lien to Banks, and Banks was to transfer the same to the firm, as security for the advances. Banks was a member of the firm. (Baldwin & Co. objected to the competency of the above evidence about the understanding between the parties, but what objection was made at the time the evidence was admitted does not appear.) The judge held that the landlord had a lien, and that it could be foreclosed in the hands of the transferee in the same manner as if the landlord had himself furnished the supplies, and ordered that the funds be paid over to McCarther, McElmurray & Banks. Baldwin & Co. excepted, alleging that the court erred in not awarding the funds to them. Also, because the court held that the lien could be foreclosed in the hands of the transferee in the same manner as if the landlord had furnished the supplies,—the error being that under the evidence no supplies had been furnished by the landlord before the transfer, and the transferees could only foreclose for

supplies furnished after the transfer. Further, because the court did not exclude and rule out from the agreed statement of facts the statement as to the understanding between McCarthern, McElmurray & Banks, German, and Banks,—the error being that said evidence was inadmissible to confer any right on, or create any lien in favor of, the transferees, or to entitle them to foreclose the lien for advances made by them before the transfer of the lien; and the error further being that said agreement was not in writing, and such an agreement could be valid only when signed by the parties.

R. O. Lovett and J. R. Lamar, for plaintiffs in error. E. H. Callaway, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 637)

### HOBBS v. GROSS.

(Supreme Court of Georgia. July 23, 1894.)

#### SALE—ACTION FOR PRICE—CONTRACT.

An action on account for goods sold is not supported by evidence that the defendant did not want the plaintiff's goods, but agreed that, if he would sell them to some one else, he would pay the difference between a certain amount and the price they brought, and that the plaintiff afterwards sold them to a third person at a price which left a certain balance chargeable to the defendant, according to the terms of his agreement.

(Syllabus by the Court.)

Error from superior court, McDuffie county; H. C. Roney, Judge.

Action by B. M. Gross, assignee, against F. M. Hobbs for the price of goods sold. There was judgment for plaintiff, and defendant brings error. Reversed.

The following is the official report:

Gross, as assignee of the McDuffie County Exchange, sued Hobbs in a magistrate's court upon an account "to one lot of goods \$50," credit "by cash from H. F. & W. A. Norris, \$16.66," leaving \$33.34, for which, with interest, the suit was brought. The jury in the magistrate's court found for the plaintiff for the amount sued for. Defendant took the case by certiorari to the superior court, alleging that the verdict was contrary to law, to the evidence, without evidence to support it, and that there was no evidence whatever showing any consideration for the contract; also alleging certain errors as to the admission of evidence and refusal to admit evidence. The certiorari was overruled, to which ruling Hobbs excepted, alleging that the court erred, because the verdict was contrary to law, evidence, etc.; because of errors as to evidence alleged in the petition for certiorari; because the evidence does not show a sale of any goods to Hobbs by Gross as sued for, there being no identification of the goods claimed to have been sold, nor any agree-

ment to dispense with it; and because the court erred in holding that the verdict was not contrary to law, because the contract as set up was within the statute of frauds, it being a claim for failure to take \$50 worth of goods, and the agreement not in writing. Upon the trial in the magistrate's court, Gross testified: "When the McDuffie Exchange made an assignment to me, it owed two notes, one held by the Bank of Thompson and the other by Hickman. These notes were assigned by twenty-five stockholders of the exchange, who were liable for their payment, and indorsed to these parties. We were anxious to have the assets pay these debts, and when I saw it was doubtful, and there was difficulty in disposing of the goods except at a sacrifice, I called a meeting of the parties who signed these notes, made a statement of the facts to them, and asked them to each take \$50 worth of the goods at cost price, so as to enable me to pay the note. Those present agreed to do so. Several took goods who were not at the meeting. Hobbs was not there. I saw him afterwards, just before the March term of the superior court, in the store, and asked him to enter into the scheme. He told me he did not want any goods, but for me to sell the goods, and he would make up what they lacked of bringing \$50. I sold the goods to H. F. & W. A. Norris for 33½ per cent. of their cost. I saw Hobbs afterwards, and told him I had sold the goods as above, and he owed me \$33.34. He asked me when I wanted the money, and asked me to wait till fall, and he would then pay it. I saw him again in the fall, and asked him for the money. He said he had not sold cotton, but as soon as he did he would pay it. He finally refused to pay it. Seventeen of the twenty-five men on the notes agreed to take the goods. I said nothing to the other eight, because I did not think them financially responsible. All who agreed, except Hobbs, took the goods,—some more and some a little less than \$50 worth. The note the bank held has been paid. I don't know how much is due on the Hickman note. It was for \$2,000. There have been several credits on it. I don't think there is a thousand dollars now due on it. The exchange assigned about the first of February, 1892. There was about \$1,600 worth of stock at the time of assignment. I commenced selling the stock at cost, and closed it out as fast as possible. Don't know how much the sales amounted to. After I had been selling about thirty days, I called a meeting. Sixteen men then took \$50 worth of goods, on an average. Some taking, I think, as low as \$41 or \$42 worth. I have never asked any of those who did not take \$50 worth to pay the difference. Defendant is the only man I have sued. After the sixteen men got their goods, I put up the balance of the stock, and sold it at auction to H. F. & W. A. Norris for 33½ per cent. of the cost. I never set aside any particular goods for defendant. I sold the whole

business at auction, and charged him with the difference between what I got and the cost." The following testimony of the witness was admitted over objection of defendant, the objection being that what other parties did ought not to affect defendant, and that the testimony was irrelevant; and as to the admission of this evidence error was assigned in dismissing the certiorari: "Some of the parties who took the goods did not need them, and lost money on them. Boyd took \$50 worth, and sold them, without removing them from the store, for twenty per cent. discount." For the defendant, Hobbs testified: "I never bought any goods from plaintiff, nor authorized any one to buy any on my account. I never agreed to take the \$50 worth, as stated by him, and never told him that I did not want any goods, but that he could sell the goods and I would pay the difference between what he got for them and the cost price. I was one of the directors of the alliance store, and was opposed to the assignment, and would have nothing to do with it. I never had any such conversations with him as he states. I saw him one time in the summer, and he told me he thought he could get us out. I saw him again in the fall, when he first mentioned the matter to me, and wanted me to give him a note for it. I refused to do so, and told him I did not owe it, and would not pay it. He then threatened to sue me, and I told him he could do so, for I would not pay it. Some of the directors requested me to take the goods. I declined, but told them at the time that when the business was closed out I was ready to pay my part of the balance due on the Hickman note. I have never received any goods as charged in the account, nor authorized Gross to sell them to any one for me, nor received any benefit from the account. If Gross sold any goods for me, it was without my authority, knowledge, or consent." Plaintiff here asked the witness the amount now due on the Hickman note. Defendant's attorney objected, and the court sustained the objection. In the petition for certiorari it was alleged that the court erred in refusing to allow defendant to show the amount now due on the Hickman note. Dunne testified for defendant that he was one of the signers of the Hickman note, and a stockholder in the exchange. Was not present at the meeting of the signers of the note, but did afterwards buy \$50 worth of the goods. Here defendant offered to prove by the witness that he was in Thompson just before March court, when defendant was in Thompson, and when Gross says defendant agreed to take the goods and authorized him to sell them; that he saw defendant, and talked with him about the store, and urged him to go into the arrangement, and take the goods; and that defendant positively refused to take any goods, or have anything to do with it. Upon objection of plaintiff's attorney, the court excluded this evidence. The conversation was not in the presence of plain-

tiff. It was alleged in the petition for certiorari that this was error.

P. B. Johnson, for plaintiff in error. J. T. West, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 721)

CENTRAL RAILROAD & BANKING CO.  
v. KELLER et al.

(Supreme Court of Georgia. July 23, 1894.)  
NEW TRIAL—BRIEF OF EVIDENCE—STIPULATION  
OF COUNSEL—ESTOPPEL.

A written agreement of counsel, entered upon a brief of evidence, the agreement being expressed in such terms as necessarily to imply a waiver of objection that the day fixed by order of the court for presenting the brief, having it approved, and filing it, had already passed, together with subsequent co-operation with counsel for the movant and the presiding judge in having the brief corrected (the judge having approved it before correction, with a reservation that it was subject to correction), will estop such counsel and his client from subsequently taking the position, for the first time, and insisting by a motion to dismiss the motion for a new trial, that the brief was presented, approved, and filed too late, because done after the time limited by the order had expired.

(Syllabus by the Court.)

Error from superior court, Effingham county; R. Falligant, Judge.

Action by F. B. Keller & Bro. against the Central Railroad & Banking Company. There was judgment for plaintiff, and from a judgment dismissing a motion for a new trial defendant brings error. Reversed.

The following is the official report:

The case of Keller & Bro. against the railroad company was tried at the May term, 1893, of Effingham superior court, and there was a verdict for plaintiffs. During the same term, defendant filed a motion for new trial, upon the general grounds, and upon the ground that the verdict was excessive in amount; and the grounds of the motion were approved by the court, and an order passed allowing the motion to be heard and determined in vacation. The case was tried on May 9, 1893. On June 6, 1893, defendant presented a brief of the testimony to the judge below for his revision and approval, there being entered upon said brief an agreement of counsel, counsel for plaintiff agreeing, "subject to make such corrections as are just and correct in the hearing of the motion for new trial"; said agreement being dated June 6, 1893. And the judge approved the brief, "subject to correction at hearing," and ordered it filed, in pursuance of which order it was filed on June 7, 1893. Thereafter, the motion coming on for hearing, plaintiff moved to dismiss it on the ground that no order was taken at the term at which the cause was heard and determined, authorizing the filing of a brief of the testimony in the case during vacation, and because the brief was not filed at the term. Previous to the filing of the motion to dismiss, plaintiff's counsel suggest-



ed certain changes in the brief of evidence, which were accepted and agreed to by defendants' counsel previous to the filing of the motion to dismiss. The motion to dismiss was sustained, and to this ruling defendant excepted.

A. R. Wright and A. C. Wright, for plaintiff in error. H. B. Strange, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 639)

CHARLESTON & S. RY. CO. v. VARNA-DORE.

(Supreme Court of Georgia. July 23, 1894.)

EJECTION OF PASSENGER—DAMAGES—REVIEWING CONFLICTING EVIDENCE.

1. Though the amount of the verdict is large, it is not so large as to justify the imputation of bias or prejudice; and, the presiding judge having approved the finding, this court, while not fully concurring, has no legal power to interfere.

2. Though the evidence was directly conflicting, it was the function of the jury to settle the conflict.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Lucius Varnadore, by his next friend, against the Charleston & Savannah Railway Company. There was a verdict for plaintiff, and a new trial denied. Defendant brings error. Affirmed.

The following is the official report:

Varnadore, by his next friend, sued the railway company for damages from an alleged illegal ejection from its car, of him, while a passenger on its train, and after payment of fare by him. His petition alleged that he was ejected forcibly by defendant's conductor, and the most abusive language was used to him by the conductor, and that after being ejected he was forced to walk about 10 miles to a station, where he obtained transportation to Savannah, his original destination. The jury found for him \$800, and, defendant's motion for new trial being overruled, it excepted. The grounds of the motion were that the verdict was contrary to law, evidence, etc., and excessive in amount. The evidence was quite conflicting. That for plaintiff was to the effect that after he had paid his fare the conductor approached him the second time for the fare, and, although assured by him and by his companion that he (plaintiff) had paid his fare, insisted that he had not, and said to him (plaintiff), "You lie. You have not paid your fare," and, "If you do not pay again, I will have to put you off"; and as plaintiff and his companion were getting off (his companion going with him, through choice) the conductor said, "You stinking, rascally scoundrel." The conductor first insisted that neither of them had paid their fare, but recalled the fact that plaintiff's companion had paid, the companion telling

the conductor that he had paid mostly in nickels. There were but few passengers on the car, and they were all strangers to plaintiff. The ejection occurred about two miles from Coosahatchie. Plaintiff and his companion walked to Coosahatchie, and as there was no convenient place to stop there they walked to Rigland, a distance of about 12 miles, where they took the train, at 5 o'clock, for Savannah. Plaintiff at the time was about 19 years old. For the defendant, the evidence was to the effect that he did not pay his fare, and was ejected for this reason; that the conductor stopped the train and put him off at a flag station; and that no abuse of any kind was used towards him, nor indignity put upon him.

Erwin, Du Bignon & Chisholm, for plaintiff in error. Garrard, Meldrim & Newman, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 592)

MCNEALY v. STATE.

(Supreme Court of Georgia. June 4, 1894.)

SUNDAY LAW—RUNNING OF FREIGHT TRAINS.

The indictment being founded on section 4578 of the Code, and charging the running of a "freight train" on the Sabbath day, and the evidence showing that the train run consisted only of a locomotive and cab, and it not appearing that any freight was carried, offered to be carried, or invited for carriage, the indictment was not supported by the evidence; a locomotive and cab, when not run for carrying freight, nor intended to be presently used for such carriage, not being a freight train. The court erred in charging the jury that, "if that was a freight engine, and had a car attached that usually went with a freight train, and that the purpose of it was to facilitate the carrying of freight, it was a freight train."

(Syllabus by the Court.)

Error from superior court, Clayton county; R. H. Clark, Judge.

T. C. McNealy was convicted of running a freight train on the Sabbath day, in violation of Code, § 4578, and brings error. Reversed.

Hall & Boynton and Watterson & Kimsey, for plaintiff in error. J. S. Candler, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(94 Ga. 604)

SUGARMAN v. ATLANTA CONSOLIDATED ST. RY. CO.

(Supreme Court of Georgia. June 18, 1894.)

AMENDING DECLARATION.

A declaration, brought by a father to recover "for the services," during its minority, of a minor child, negligently killed by a railway company, in which it was alleged "that, as she advanced in years, her services would have become of great value to him," though it does not distinctly aver that at the time of the killing the child was capable of rendering services of any value, is amendable by alleging that the

child was old enough to render, and did in fact render, certain specified services, and the same were, at the time of her death, of a stated value per month.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Louis Sugarman against the Atlanta Consolidated Street-Railway Company. Defendant's motion to dismiss the action for insufficiency of declarations was granted, and plaintiff brings error. Reversed.

The following is the official report:

The cause of Sugarman against the street-railway company coming on to be heard, defendant moved to dismiss the case, because the declaration contained no cause of action. Plaintiff resisted the motion, and also tendered an amendment to the declaration. The court refused to allow the amendment, and sustained defendant's motion to dismiss, to which judgment plaintiff excepted.

The declaration alleged: About June 12, 1892, petitioner's child, Lena, was crossing Whitehall street, Atlanta, at or near its intersection with Mitchell street, and was struck by a car of defendant, and killed. The injury was caused by the running of the car of defendant, because its agents failed to exercise all ordinary and reasonable care and diligence while in charge of the car. Petitioner was free from fault or negligence, and could not have avoided the injury by the use of ordinary care. Whitehall street is constantly frequented by passers-by, especially at the time when Lena was killed. Defendant's agents, by the exercise of ordinary care, could have seen the child in time to have stopped the car, and before striking it. They failed to check and continue to check the car on approaching the street, the same being a public crossing; and also failed to give the signal required by law and by the circumstances. There is a valid municipal ordinance of Atlanta, prescribing the speed at which street cars shall travel (setting it out), and defendant's agents on this occasion violated this ordinance, by reason of which violation and negligence the child was killed. At the time of the child's death she was four years and nine months old. As she advanced in years her services would have become of great value to plaintiff. The occupation of plaintiff's wife is that of a hair dresser, and it was his intention to prepare his child, had she lived, for the same calling. He brings this, his suit, for the services of said child during its minority up to the age of 21, and avers that by reason of the death of said child he has been damaged in the sum of \$2,500.

The proposed amendment alleged: Lena was old enough to render service to him, and did render service to him in nursing her younger brother, his son, and in waiting upon and attending to various wants of her mother, petitioner's wife, in connection with

the discharge of her duties to his household and family, which service was at the time of her death of the value of five dollars per month, and would have greatly increased in value. Petitioner and his wife are poor. They follow daily labor for their support, and on that account hired no servants to do their household work. They tried to keep their child out of the street as much as practicable and possible, but had no yard or space in which she could exercise in open air, and she sometimes got into the street unattended, without their knowledge. At the time of receiving the injury of which she died, petitioner was absent from home, his wife was cooking supper for herself and family, and the child went into the street without their knowledge or consent, with a sister seven years old. Defendant was negligent in running its car at said time and place at a greater speed than four miles an hour, under an ordinance of the city which limited the speed of the car to four miles an hour at said time and place.

Smith & Pendleton and Morris Macks, for plaintiff in error. N. J. & T. A. Hammond, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 605)

#### DE GIVE v. GRAND RAPIDS SCHOOL FURNITURE CO.

(Supreme Court of Georgia. June 30, 1894.)  
INTERNATIONAL LAW—JURISDICTION OF RESIDENT FOREIGN CONSUL.

A citizen of the kingdom of Belgium, duly accredited by the government of that kingdom to the government of the United States as a consul of the former, is subject to the jurisdiction of the courts of the state of Georgia, in which state he resides, in a civil action to recover an alleged debt due upon an account for articles purchased by him to furnish his opera house. No treaty between the two governments has exempted the consuls of either from suits of this nature in the country of their residence, nor are they exempt by the principles of international law. And neither the constitution nor the statutes of the United States confer exclusive jurisdiction in such cases upon the federal courts, where a foreign consul is to be sued in this country, and, since the repeal of the 8th clause of the 711th section of the Revised Statutes of the United States, concurrent jurisdiction is not denied to the state courts.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by the Grand Rapids School Furniture Company against L. De Give. There was judgment for plaintiff. A motion by defendant to set aside the judgment was denied, and he brings error. Affirmed.

The following is the official report:

De Give sought to set aside a verdict and judgment against him in favor of the Grand Rapids School Furniture Company. The presiding judge denied the motion. De Give excepted to this ruling, alleging that the judge erred in not setting aside the ver-

dict and judgment on the grounds set forth in his affidavit and amended affidavit; in not setting them aside on the ground that the court had no jurisdiction of the person of defendant; and in not holding that defendant was exempt from the suit because he was a Belgian consul. The affidavit of De Give was as follows: He is informed that on September 18, 1893, plaintiff took a verdict against him for \$586.56 principal and \$23.37 interest. He was not indebted to plaintiff, but plaintiff was to him \$400.74, because of the following facts: As will be seen by an inspection of plaintiff's bill of particulars, defendant purchased from it certain chairs, amounting to \$6,615.50, upon which he paid \$6,070.24, leaving a balance of \$545.26, February 23, 1895. The chairs were to be like, in all particulars, a model sent. When they were received, they had the outward appearance of being like the model, and were immediately placed in position, and he made the payment above mentioned. Afterwards he discovered that the chairs did not come up to the model in particulars mentioned, which materially affected their value, to the extent, as estimated by him, of \$946. He then wrote to plaintiff, complaining of this bad treatment, and it offered to deduct \$100 from the bill, which he refused on the ground that it was wholly inadequate. He offered to submit the matter to arbitration, which it refused. After the claim was in the hands of plaintiff's attorney, deponent communicated to the defendant his position in the matter, and refused to pay. On August 16, 1893, a copy of plaintiff's complaint was served on him, but, being a foreigner, never having been naturalized, and being unacquainted with the recent change in the law in regard to the terms of the city court, he supposed that he had during the whole term in which to file his answer, and, being very busy, laid the paper down, intending to carry it to his attorney before the time was out for the purpose of defending him, and did not know that a judgment had been taken against him until so informed by a friend. He is a foreigner, has never been naturalized, and is now and has for years been a Belgian consul residing in Atlanta, and is advised that the court has no jurisdiction to try any case against him. By his amended affidavit, he alleged: He is a citizen of Belgium, residing in Atlanta as consul of the Belgian government, duly commissioned and accredited by it, and recognized as such by the government of the United States on February 13, 1860, by an annexed exequatur duly executed and signed by the then president; and under the commission of the Belgian government, and said exequatur, he has continuously, ever since the date of the latter, up to the present time, exercised the functions of consul of the Belgian government in Atlanta. Copy of the exequatur was attached.

Goodwin & Westmoreland, for plaintiff in error. Bishop & Andrews, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 606)

HOME FRIENDLY SOCIETY v. BERRY.  
(Supreme Court of Georgia. June 30, 1894.)

MUTUAL INSURANCE—FORFEITURE BY FALSE STATEMENTS—NOTICE TO AGENT—CONSTRUCTION OF CONTRACTS BY COURT.

1. Where one residing in Atlanta, Ga., who was already a member of a beneficial society, having its headquarters and principal office in Baltimore, Md., and who was the holder of a certificate of membership which embodied and embraced a policy of insurance by the society upon his life, made at different times two written applications for membership in the same society, and in each of them made several material representations, among them that he was not a member of that society, and thus obtained on each application a separate certificate of membership and policy of insurance upon his life, which declared upon its face that, if the representations upon which the certificate was granted were not true, the certificate should be void, both these certificates should, after the death of the member, be treated as void, and of no effect, unless the company had notice at some time before receiving the last dues upon some one of the three certificates that the same identical person was a member when he applied for and procured one or both of the additional certificates, and the cumulative insurance which they provided for.

2. Notice to the society's local agents at Atlanta, who received the applications and collected the dues on all three of the certificates of membership, but who, so far as appears, had no power to represent the company in making contracts or in waiving conditions expressed therein, the applications having separately and at different times been forwarded to Baltimore for acceptance, and the certificates of membership having there, separately and at different times, been issued by the society's general officers, would not be notice to the society of the falsehood of the representation as to nonmembership contained in the applications, unless it appeared that no such representation was actually made to the agent who received and filled out the applications, but that he inserted the false statement without authority from the applicant, and without his knowledge.

3. Where two writings are in evidence, their construction being for the court, it is no invasion of the province of the jury for the presiding judge to announce that the writings are or are not necessarily inconsistent in substance and meaning as to a particular element, such as the representations they respectively make touching a person's age.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Laura Berry against the Home Friendly Society. Plaintiff had judgment, and defendant brings error. Reversed.

The following is the official report:

Laura Berry sued the Home Friendly Society for \$510, besides interest, and 25 per cent. upon the principal, and \$100 for her attorney's fees in bringing the suit, upon three certificates of membership in the society, issued to Stephen Berry, her husband, she being the beneficiary named in each. The

first of these certificates was for \$148, dated May 27, 1889, and numbered 16,029; the second, for \$270, dated October 21, 1889, and numbered 24,963; the third, for \$92, dated December 15, 1890, and numbered 55,280. Copies of these certificates were attached to the declaration. In each of them it is stated that one-fourth of the amount of the insurance was payable within the first six calendar months the certificate was in force; one-half after six calendar months, and the full amount after one year. Also, that the certificates were issued in consideration of the representations and agreement in the application therefor, which application was made part of the policy. Also that, if any of the statements made in the application upon which the certificate was issued should be found untrue, then the certificate should be null and void, and all money paid and all rights and benefits which may have accrued to the member should be forfeited. Further, that if the representations upon which the certificate was granted were not true, or if the conditions of the certificate were not in all respects observed, the certificate should thereupon become void. Further, that the policy was incontestable, after two years from date, for any cause. The second of the certificates contained the provision that only one-half of the stipulated sum would be paid for sickness or death caused by consumption or rheumatism for one year from the date of the certificate, and the third contained a similar provision, except that eighteen months was substituted for one year. The third also contained the provision that the certificate should be void if the member should, without written permission of the president or secretary, engage in certain occupations, "or while there is in force upon the life of the insured a certificate previously issued by this society, unless the certificate first issued contains an indorsement, signed by the president or secretary, authorizing this certificate to be in force at the same time." The first and second certificates did not show such indorsement. The third also contained the provision that, in case of mistreatment or mistake in age, the society could only be held liable for the amount on its tables at the proper age, and the beneficiaries must prove the proper age satisfactorily. The defendant pleaded that in the application for the policies plaintiff's husband represented and warranted that he had no other insurance in said company, or any other company, when in truth he did hold policies in other companies, having two policies in the defendant company at the time of the issuance of the last policy and one at the time of the issuance of the second policy; that in said application he falsely represented his age, in one claiming to have been born in 1848, in the other in 1851, and in the other in 1852, when in truth he was born in 1846; that he represented himself as being in good health at the date of the application, and

having no disease which affected his health, denying he had or suffered from any of the diseases mentioned in the application, when in truth at the date of each of the applications he was suffering from many diseases, and especially was afflicted with consumption, and had been so afflicted for a long time, and afterwards died from its effects; and made many other false and fraudulent representations in the application, which, under the terms of the application and policies, if any of said statements, representations, and warranties were untrue, rendered the policies void. Defendant had no notice that any of them were false, and not until he died did it know he was holding all of said policies, but up to that time believed each of the policies was held by separate and distinct persons; and, if it had known the same person held all of them, it would have canceled them, and this fact was concealed in order to defraud it, which made the policies all void. Further, that the last policy, by its terms, did not bind defendant to pay more than one-half of the amount for which it was issued, for the policy holder died in one year from the date of its issue. It appeared from the evidence that Stephen Berry died November 14, 1891. The evidence was conflicting as to his age. He was a negro, and seemed to have been formerly a slave. He died with consumption. It did not appear how long he had had it. His wife testified that he was just sick a little while; just took his bed two weeks before he died. The physician who attended him in his last illness testified, among other things, that during two years he attended him for different troubles, two or three attacks of biliousness, and one or two of bronchitis, and he was relieved and got all right again, and worked until about a month before the last illness; that witness never examined his lungs until his last illness, and then discovered they were gone; that witness thinks his left lung was almost entirely gone; that he meant, by putting down in his report that Berry had consumption for two years, that that was just a conclusion he came to; that he could not say how long Berry had consumption; he might probably have suffered with it all his life, or but for a short time. Another witness testified that Berry was sick some two or three years before his death, but kept on working; that Berry said he was taking medicine; that he did not remain big and fat and stout, but began to get lean; that he seemed to have good health before he took sick, but never was a large man, was always sorter thin, but from the disease he was not stout like he was,—kinder grew weak, witness supposed. A physician who examined Berry for insurance testified that Berry was in perfect health, to the best of his (witness') knowledge and belief, and had no organic trouble that witness could discover; that witness made the examination at the instance of defendant, and defendant

paid him for it; that his examination was in September, 1889; that there was no absolute rule as to the length of time consumption might continue before death, though ordinarily it was a disease of slow progress, but sometimes lasted but a few months. The applications for membership were put in evidence. The first, dated May 10, 1889, stated the age at 37 years; the second, dated October 12, 1889, at 38 years; the third, dated December 15, 1890, age next birthday, 42 years. The applications stated that the applicant was never very sick, and was not, at the time of the application, a member of defendant or any other beneficial society. Also, that if the applicant failed to conform to any of the rules of the society, or had concealed anything relating to his health, or should make any misrepresentations as to the questions preceding (one of which was as to his age), he bound himself, his heirs and assigns, to surrender all claims to moneys previously paid, and forfeit all benefits absolutely to the society. Also, the declaration of the applicant, that he was in first-class health, and free from all diseases, at the date of the application. There was a verdict for plaintiff for \$464 principal, \$36.08 interest, \$116 damages, and \$100 attorney's fee. Defendant moved for a new trial, which motion was overruled, and it excepted.

The motion contained the grounds that the verdict was contrary to law, evidence, etc., and the following: Error in the following charges: "There is no necessary disparity in the statement of Stephen Berry's first and second application. There is a disparity of several years between the age stated in the second and third applications." "Stephen Berry represented in those three applications that he had no other insurance or life membership in defendant's company. If this was a material misrepresentation, in the sense I have charged, it would avoid the second and third policy, unless the plaintiff shows such conduct on the part of the company that will waive this representation." "If the defendant knew the identity of Stephen Berry in each of the three policies, and continued to accept premiums from him after such knowledge was had, they should be held to have waived insistence on the truth of the representation as to other insurance with them. Indeed, it would be a fraud upon the assured in the company, after the knowledge that he was, in point of fact, the same Berry insured with them three times, to go on collecting premiums from him from week to week and year to year, and then set up that the policies were void on that ground. And in determining whether the company knew it or not you are at liberty to consider any knowledge which the evidence discloses the defendant's agents in Georgia had on that subject, provided the knowledge of such agents was acquired in the course of the defendant's business in reference to such applications and policies, and within the scope of

their employment; and you may look also to the recitals contained on the face of the applications themselves. If, however, the company did not know that the Stephen Berry of the three policies was the same Stephen, and in good faith went on collecting premiums on all three of them, believing the assured was a different individual in each; and you further believe from the evidence that the representation that there was no other insurance with them, changed the nature, character, or extent of the risk,—the company would not be bound by the last two policies, and you would disallow plaintiff's claim *pro tanto*."

Dorsey, Brewster & Howell, for plaintiff in error. Westmoreland & Austin, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 694)

#### KREITZER v. CROVATT et al.

(Supreme Court of Georgia. Aug. 20, 1894.)

APPEALABLE JUDGMENTS — PARTIES — RAILROAD MORTGAGE—FORECLOSURE—SALE TO ATTORNEY OF RECORD.

1. The decision denying the motion to set aside the receiver's sale was not merely interlocutory, but final in its nature. It was therefore subject to review on a separate writ of error, and the parties to the same were sufficient, the receiver himself not being a necessary party.

2. The attorneys to foreclose a mortgage made to a trustee for the security of bondholders—the same attorneys being also attorneys for the receiver—are disqualified, by their professional engagement and relation, from purchasing for their own benefit the mortgaged property, when sold by the receiver under the decree of foreclosure. The consent of the trustee, without the consent of the bondholders, will not remove the disqualification. The associates of the attorneys in making the purchase are affected by the disqualification of the latter. And inasmuch as it admits of some question, under the evidence, whether the property brought its full value, the application of one of the bondholders, made in due time, and before the sale was confirmed, to set aside the sale, should have been granted, and a resale ordered.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Hoyet & Co. and others against the Brunswick Street-Railroad Company for the appointment of a receiver, and other relief. A receiver was appointed and a sale of property ordered, which was made to A. J. Crovatt and others. G. A. Kreitzer moved to disapprove the action of the receiver and set aside the sale. This motion was overruled, and Kreitzer brings error. Reversed.

The following is the official report:

In the case of Hoyet & Co. et al. v. The Brunswick Street-Railroad Company, a receiver was appointed for the defendant. The Farmers' Loan & Trust Company, as trustee for the holders of the first mortgage bonds of the railroad company, became a party by intervention. By consent of the counsel for all

parties, a decree was taken for a sale by the receiver on the first Tuesday in April, 1893, after advertisement, of all the properties, rights, credits, and franchises of the railroad company, at public outcry, to the highest bidder, for cash, under certain provisions. The sale was made at the time stated, and the property was sold to Allison, Land, Whitfield, and Crovatt for \$10,000, they being the highest bidders, which sum was paid to the receiver, who thereupon made them a deed to the property. He reported to the next (May) term of the superior court his actions in making the sale and paying out the proceeds thereof, asking that said actions be confirmed. At the same term, Kretzer, representing himself to be a holder of 39 of the bonds of the railroad company, of the face value of \$500 each, filed his motion to disapprove the actions of the receiver, and to set aside the sale and cancel the deed. The motion was heard in vacation and was overruled, and movant excepted. The consent decree provided "that the purchaser at such sale may, if he so elect, pay over to said receiver, at the time of making such sale, not less than the sum of ten thousand dollars, cash, of the purchase price, and the remainder thereof may be paid by the delivery, upon the part of said purchaser, to said receiver, of the first mortgage bonds of the defendant company, to an amount, at their face value, equaling the pro rata sum which said bonds, thus tendered, bear to the entire issue of said bonds; and said receiver shall be authorized to make good and sufficient titles to the purchaser at said sale." It was further decreed that from the proceeds of the sale the receiver pay, first, costs of the case, and the expenses incurred by the receiver under approval of the court; that \$500 be paid, as attorney's fees, to the counsel for the receiver, and \$1,200 to the receiver, for his services, and \$500 attorney's fees to Goodyear & Kay, the attorneys filing the petition and bringing the fund into court, and \$50 fee to L. J. Brown, as attorney for the defendant; that \$380 be paid to laborer's lien creditors in full settlement of their claims, amounting to \$566, and \$770 to the holders of a steamboat lien for coal furnished, in full settlement of their claim for \$1,140; that the Farmers' Loan & Trust Company be paid \$1,000 as its compensation as trustee for the bondholders under the mortgage, and \$2,000 be paid to Crovatt & Whitfield, as the attorneys for said trustee; and that the rest of the proceeds of sale be paid to said trustee upon account, to be credited upon said mortgage deed executed and delivered by the railroad company to said trustee for the bondholders, which mortgage was for \$150,000 principal, and which is hereby finally foreclosed, etc. The grounds of the motion to set aside the sale are, in brief, that Crovatt & Whitfield, being the counsel for the receiver and also for the trustee, had no right to purchase the property at the receiver's sale for their individual benefit and profit, and that the property was

worth over \$50,000, and the price at which they purchased (\$10,000) was grossly inadequate. At the hearing of the motion it appeared that the original record, with the exception of the decree previously referred to, had been lost, and, after search, could not be found.

C. P. Goodyear testified: He was president of the railroad company until it went into the hands of the receiver. Its property consisted of about  $7\frac{1}{2}$  miles of rail laid in the city of Brunswick, and about  $1\frac{1}{2}$  miles of track rail laid on St. Simons Island; 14 cars; 40 mules; 2 steamboats (the Pope Catlin and Egmont); a depot lot, originally costing about \$3,000, with a depot building thereon costing between five and seven thousand dollars. The property, if sold as old junk,—that is, marketed for what it would bring as property, without regard to the franchises,—was worth far in excess of \$10,000. He considered the steel rail worth as much as \$18,000, the steamboats worth \$5,000, and the depot building and lot, mules, and cars worth enough more to make a total value of property, without regard to the value of franchise, of \$28,000. During the period of about five years in which the railroad had been operated, it had been done at a loss of from three to five thousand dollars per annum. A. J. Crovatt and Bolling Whitfield, composing the firm of Crovatt & Whitfield, were attorneys for the Farmers' Loan & Trust Company in the original cause, intervened therein for said company, as trustee of the first mortgage bondholders, and prayed foreclosure of the mortgage or deed of trust, and sale of the property to satisfy the lien of the first mortgage bondholders. They continued of counsel in the cause to and including the day of sale, and were counsel of the trustee at the time the bid was made for the property. Witness was not present at the day of sale, but had been told by Crovatt that he had bid in the property for himself, Whitfield, A. H. Lane, and others. Witness belonged to the firm of Goodyear & Kay, who represented creditors in the cause, and were paid out of moneys derived from the sale, and provided for in the consent decree, and clients of theirs had been paid, under the terms of said decree, out of the fund derived from the bid made by Crovatt at the sale.

James Calnam, Sr., testified: He had been engaged in railroad construction over 39 years; had been in the employment of the Brunswick Street-Railroad Company; had laid portions of its track, and superintended repair of other portions. Under the use to which this track had been subjected, it had not depreciated in value more than 5 per cent. He would be willing to give \$5,000 for the mile and a half of track constituting the St. Simons Island Line, with the franchises accompanying the same, and the cars and mules belonging thereto, conditioned on Hotel St. Simons being kept open, and in connection therewith; and he would consider

the entire property of the line a bargain, if he had the money, at \$30,000. He was present at the day of sale. Did not bid on the property. Heard nothing said about it, but his impression was that it was being bid in for the bondholders, and had he known it was being bid in for the personal benefit of Crovatt, Whitfield, and Lane, they would not have got it for \$10,000. (At this juncture, Crovatt, for himself and associates, offered the property to the witness, or any one else who would buy it, either for \$10,000, or perhaps \$11,000, without the offer being accepted.)

Crovatt testified: His firm were the attorneys of the trustee, and as such intervened in the original cause, joined in the consent decree, and were attorneys of the trustee on the day of sale. He was the bidder thereof for himself and associates. His client, the Farmers' Loan & Trust Company, authorized him so to bid if he wished, as it would cause the property to bring more. Prior to the sale he and his associates had acquired by purchase \$70,000 of the total issue of \$150,000 of bonds of the railroad company. He believed all the other bondholders knew the sale was to take place. He had sent copies of the newspapers containing the advertisements of sale to parties in New York (the Farmers' Loan & Trust Company), who assured him they would send a copy to each bondholder, and he believed it had been done. In his judgment, the property of the railroad company was not worth more than the amount bid at the sale. It was duly advertised. Quite a crowd were present. Everything was open and fair, and only one other bid, of \$1,000, was made. The money was paid and disbursed, a bill of sale or deed executed, and the possession of the property turned over to them by the receiver, and no notice ever given of any objection or contest until this proceeding was begun. He believed the property of the company, including its steel rail, had depreciated at least 50 per cent. He had no experience as a railroad man, but the rail showed it was badly worn, and much depreciated. The depot building was almost valueless, and the mules were inferior Texas mules, and the cars second class. The steamboats sold for a sum exceeding \$3,500, and less than \$4,000. He would not state the exact amount, or terms of sale. He and Whitfield were bidders at the sale for themselves, and not for their client, the Farmers' Loan & Trust Company. In his opinion, to dismantle the property, and sell it as old junk, or for what it would bring to the market, would not net, for the whole property, over \$10,000. He and his associates stood ready to take the amount they gave for it, or some slight increase thereon, but could not find a purchaser.

J. E. Du Bignon testified: He did not believe the steamboat Pope Catlin was worth in excess of \$3,500, and would not be willing to give for her over \$3,000, and did not think the steamboat Egmont worth over \$600. He

thought \$10,000, the amount for which the property sold, was about all it was reasonably worth.

Goodyear further testified that Crovatt & Whitfield, as attorneys for the trustee, filed their intervention in said cause, attaching to it a copy of a deed of trust, reciting that it was the deed of trust under which the bonds of the railroad company were issued; that the railroad company answered, admitting this to be true, and that under this deed a total of \$150,000 of first mortgage bonds were issued; and that 39 specified bonds (introduced in evidence as the property of movant) were issued under said deed, each bond being for \$500.

S. R. Atkinson and Goodyear & Kay, for plaintiff in error. Crovatt & Whitfield, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 686)

# FLANNERY et al. v. BALDWIN FERTILIZER CO.

(Supreme Court of Georgia. Aug. 20, 1894.)

MORTGAGE FORECLOSURE—SERVICE OF PROCESS—WHO MAY QUESTION—RES JUDICATA.

Where the service in a statutory proceeding to foreclose a mortgage on realty was regularly returned by the sheriff as made upon a special agent of the mortgagor, a creditor of the mortgagor who had a general judgment junior to the mortgage could not dispute the legality of the service by showing, on a rule to distribute money, that the person served was not in fact a special agent of the mortgagor at the date of the service; it not appearing that the mortgagor had repudiated the service, or taken any steps to traverse the sheriff's return, or to have the judgment of foreclosure set aside. In rendering the judgment of foreclosure, the superior court necessarily adjudicated upon the fact of service and its sufficiency, the mode of service being one of those expressly enumerated by statute. Code, § 3962.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

An action by John Flannery & Co. against one Coleman to foreclose a mortgage, wherein the Baldwin Fertilizer Company intervened, claiming the fund in the hands of the sheriff. From the judgment rendered, plaintiffs bring error. Reversed.

Following is the official report:

A rule for distribution of money in the sheriff's hands was brought by John Flannery & Co. The Baldwin Fertilizer Company intervened, claiming the fund upon its execution, and alleging that, while the mortgage of Flannery & Co., upon which their execution issued by foreclosure, was senior to intervenor's judgment in attachment, it was not entitled to the fund raised by the sheriff's sale, for the reason that the mortgage foreclosure was void, there having been no service of the rule nisi upon Coleman, the defendant in execution, nor acknowledgment of service, nor appearance and pleading, nor other waiver.

er by said defendant; the only pretense of service being upon Peacock as special agent of Coleman whereas Peacock was not the special agent of Coleman upon whom service could be perfected; and that, notwithstanding the sale was under the execution of the intervener, the sheriff failed to make an entry thereon to that effect, but indorsed on the execution of Flannery & Co. an entry that the property had been sold under both executions, which entry intervener traverses in so far as it refers to the Flannery execution. Flannery & Co. alleged that the property was sold under both executions, and that they were entitled to the fund under their mortgage and *fi. fa.* issued upon the foreclosure thereof, which was superior to the attachment *fi. fa.* of intervener, and older than the levy of the attachment. They denied the right of the intervener to participate in the distribution, or to inquire into the validity of the mortgage *fi. fa.* and judgment of foreclosure, or to make the issue that Peacock was not in fact the special agent of Coleman, the mortgagor, this being a personal privilege and right of Coleman alone. They further alleged: The mortgage foreclosure was perfectly regular upon its face in every particular, and plaintiffs believed in good faith that it was sufficient at the time of the foreclosure and at the time of the sale, and that the entry of service on Peacock as special agent was true and correct, and that Peacock was in fact such special agent, he never having denied the fact, but having allowed the foreclosure to proceed to judgment absolute without informing plaintiffs to the contrary, and the mortgagor having acquiesced therein, and permitted a sale of part of the mortgaged property without objection. Under these circumstances plaintiffs on the day of sale placed their mortgage *fi. fa.* in the hands of the sheriff, and consented for the property to be sold unincumbered and free from the lien of the mortgage, and under the mortgage *fi. fa.* after due advertisement, as well as under the attachment *fi. fa.*; and, acting under this belief, plaintiffs in good faith purchased the property at the sale, and paid the purchase money to the sheriff. Wherefore their mortgage lien on the property sold was lost, the purchasers acquired a good title, and the same could not be resold under another foreclosure of the mortgage, should the court hold that the foreclosure already had was insufficient; and the only remedy plaintiffs now have is upon the fund in court. The mortgagor is, and has for several years been, a nonresident of the state, and is utterly insolvent. The case was submitted to the judge without a jury. He awarded the fund to the intervener, with costs against the plaintiffs, and, further, adjudged that the judgment foreclosing the mortgage was void for want of legal service, the allegation of the intervener on this point being true, and the entry of service being untrue, and that Peacock was not the special agent of Coleman at the time of said service.

To these rulings the plaintiffs excepted. They also excepted to the overruling of their objection to the testimony of Peacock that he was not the special agent of Coleman at the time he was served with the rule nisi to foreclose the mortgage; the grounds of objection being as stated in their pleadings, already recited.

De Lacy & Bishop, for plaintiffs in error.  
E. A. Smith, W. M. Clements, and E. Herrman, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 615)

#### PEASE v. STATE.

(Supreme Court of Georgia. June 30, 1894.)

#### LARCENY — OBTAINING GOODS BY FALSE STATEMENTS.

1. To obtain fraudulently a contribution of clothing suitable for use in preparing the corpse of an indigent person for burial, on the pretext and false representation that a certain person, known to the contributor, and in whose interest the latter would be likely to feel a benevolent interest, is dead and unburied, when in fact he is alive, would not necessarily be simple larceny, even if the wrongdoer solicit and obtain the contribution with intent to retain the clothing for himself and convert it to his own use, and should subsequently carry the intention into effect. Were the contribution made as an immediate gift of the clothing to the impostor, the latter would, on receiving possession, acquire the title, which would vest in him, subject to be divested at the election of the donor upon discovering the fraud. A trust *ex maleficio* would arise, by operation of law, for the benefit of the contributor. As the impostor would have a title derived from the contributor, though procured by fraud, he could not steal the goods, so long as the title remained in him. Were the contribution made, on the contrary, as a bailment of the clothing, to be applied to the specific charity, as the property at that time of the contributor, the title would remain in the contributor, and the execution by the impostor of his pre-existing purpose to appropriate the goods fraudulently to his own use would constitute simple larceny.

2. It results from the foregoing that, in a given instance of a fraudulent attempt to obtain such a contribution by such means, it cannot be known whether the attempt in question was to commit simple larceny, or only to cheat and swindle, unless it can be ascertained from the evidence to which class the solicited contribution, had it been made, would have belonged; that is, whether it would have been a gift to the impostor, consummated in order that he might gratify his supposed benevolent inclinations, or a bailment for application by him, as agent of the contributor, to the charitable object. In this respect the facts of the present case are too meager and too indeterminate in their bearing to warrant a conviction for the alleged attempt to commit simple larceny. Whether the clothing would have been given to the accused, or merely bailed to him, had his representations been credited, and had delivery been made accordingly, is not ascertainable. Most probably, his design was to obtain the articles as a donation, and not as a mere bailment. The person of whom the contribution was solicited had no intention that the would-be impostor should become either donee or bailee, but took care not to trust his representation as a basis for delivering possession, whether with title or without it.

(Syllabus by the Court.)



Error from criminal court of Atlanta; T. P. Westmoreland, Judge.

Palmer Pease was convicted of attempt to commit simple larceny, and brings error. Reversed.

The following is the official report:

Pease was convicted of an attempt to commit the offense of simple larceny. His motion for new trial was overruled, and he excepted. The grounds of the motion were that the verdict was contrary to law, to evidence, without evidence to support it, and without law to support it. The evidence was to the following effect: Pease came to the house of Col. Maddox, and told Mrs. Jackson, Col. Maddox's daughter, that Joe Read, a negro who had worked for Col. Maddox at one time, was dead, and said that he wanted them to give him something to help bury Read. This was in the morning. She did not give him anything at that time, but sent Willis Scott to the place where defendant said Read was. Scott found nobody dead on that street. Pease came back in the afternoon, and wanted Mrs. Jackson to give him some clothes in which to bury Read. She did not give them to defendant, but gave Scott some underwear, shirts, etc., for the purpose of burying Read, and told Scott to go with defendant to where Read was, which Scott started to do. Defendant went with Scott a certain distance, and then gave Scott the dodge, before they got to where Read was, and Scott went back to Col. Maddox's house with the clothing. Mrs. Jackson intended to give away the stuff for the purpose of helping to bury Read, and did not give the things to defendant. She did not expect to get it back if Read was dead. The property was hers, and worth two or three dollars. The occurrence was in Fulton county, and at the time Read was alive.

Cuyler Smith, for plaintiff in error. L. W. Thomas, for the State.

PER CURIAM. Judgment reversed.

(94 Ga. 728)

DAWSON v. BRISCOE et al.

(Supreme Court of Georgia. July 16, 1894.)

NEW TRIAL—BRIEF OF EVIDENCE—DISCRETION OF COURT

1. It is no ground for dismissing a motion for a new trial that the brief of evidence contains some superfluous matter, and an error of the court in approving the brief over objection is cured by the previous written assent of the objecting counsel to the correctness of the brief. The proper motion would have been to purge the brief of all its superfluties, pointing out the same specifically.

2. On the merits, the case is within the rule that the first grant of a new trial will not be interfered with.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. Clark, Judge.

Action between Edward Dawson and Eg-

bert Briscoe and another. From the judgment rendered, Dawson brings error. Affirmed.

T. C. Battle and W. J. Albert, for plaintiff in error. Lewis & Green, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 619)

MABRY v. METROPOLITAN TRUST CO.

(Supreme Court of Georgia. July 16, 1894.)

RAILROAD MORTGAGE—RIGHTS OF MORTGAGEE AND ATTACHING CREDITOR.

1. A mortgage deed, executed and delivered in the state of Alabama to a named trustee, by a railway corporation, describing and covering all its property, real and personal, for the purpose of securing the payment of bonds issued by the mortgagor, passed to the trustee the title to the property described in the mortgage; and consequently, while the bonds to secure which the mortgage was given remained unpaid, two locomotive engines covered by the mortgage were not, as to the whole property therein, subject to attachment for a debt of the railway company, as against a claim interposed by the trustee. This is true although no default had occurred, and the mortgage provided that until default be made in the payment of the principal and interest of the bonds, or of some or any of them, the railway company should be permitted to possess, operate, manage, and enjoy the railroad, with its appurtenances, as if the mortgage had not been executed; and also that until default the railway company might sell, exchange, or otherwise dispose of such of its rolling stock as had or might become old, worn out, disused, or undesirable, substituting for the same other property of equal or greater value, which should be covered by and be subject to the mortgage,—it being further provided in the mortgage that, in case of default, the trustee might take possession of the property, and sell the same, or foreclose the mortgage.

2. Treating the law of Alabama as applicable to an attachment sued out in Georgia, the claimant's title (if valid) could not be displaced or extinguished without payment of the debt secured by the mortgage. Code Ala. 1886, § 3017. In order for section 2892 of the Alabama Code to apply, the levy would have to be restricted to such interest as the mortgagor has in the property, to wit, the equity of redemption, and the right to possession and use until the lapse of six months of continuous default by the mortgagor. No law of force in Georgia is more favorable to the attaching creditor than these provisions of the Code of Alabama.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by James F. Mabry against Western Railway Company of Alabama, whereupon the Metropolitan Trust Company intervened, claiming a right to the possession of the property levied on under attachment. There was a verdict for claimant, and, plaintiff's motion for a new trial having been overruled, he brings error. Affirmed.

The following is the official report:

Mabry sued the Western Railway of Alabama in attachment for damages from personal injuries, which he alleged he received on its railroad in Alabama. The suit was

brought in Fulton county, Ga. The attachment was levied in that county on July 22, 1889, on two passenger engines, Nos. 30 and 31. The engines were claimed by the Metropolitan Trust Company of the City of New York. Upon the trial of the claim there was a verdict for claimant, and, plaintiff's motion for new trial being overruled, he excepted. The motion was upon the grounds that the verdict was contrary to law, evidence, etc., and because the court charged the jury that under the evidence they must find the issue for the claimant and against the plaintiff.

Upon the trial the claimant assumed the burden of proof, admitting possession of the property levied on, at the time of the levy, by defendant. Claimant then put in evidence the mortgage given by defendant to it October 1, 1888, to secure the payment of mortgage bonds of defendant. The material portions of this mortgage were: It covered the railroad, including right of way, road-bed, superstructure, etc., all lands and depot grounds, etc., all engines, tenders, cars, and machinery, and all kinds of rolling stock, "whether now owned or hereafter purchased by said railway company for use on its railway hereinbefore described," etc. It provided that, until default be made in the payment of the principal and interest of the bonds, or of some or any of them, the railway company should be permitted to possess, operate, manage, and enjoy the railroad, with its appurtenances, etc., as if this deed had not been executed. In case default should be made, continuing for a certain period, the trustee (the mortgagee) was empowered to take possession of, operate, and control the property conveyed, and, in case of certain default, to take possession of the property, and sell the same, or to foreclose the mortgage. It further provided that the trustee should have power, in its discretion, upon request of the mortgagor, to convey to persons designated by the latter any property which, in the judgment of both, it was expedient to disuse for the purposes of the road, and that until default the railway company might sell, exchange, or otherwise dispose of such materials, rolling stock, or other movable property as had or might become old, worn out, disused, or undesirable, or were not needed for the purposes of the road, renewing the same, or substituting therefor other property of equal or greater value; the new materials and property thus substituted being covered by and subject to this mortgage. The mortgage was executed by the mortgagor in Alabama. Claimant then introduced a witness who testified: "I was for some years in the employment of the Atlanta & West Point Railroad, and in 1881 entered the employment of defendant, and have been in such employment ever since. I am familiar with the engines levied upon. At the date of the levy they were in posses-

sion of defendant, and were being used as part of its rolling stock. Defendant bought them, and they were in continual use by it from the time they were purchased, and ran into Atlanta on the Atlanta & West Point Railroad from Montgomery, Alabama, about three times a week. The two railroads mentioned are under the same management. One of the engines is in the shops at Montgomery, undergoing repairs, and the other is still running. The place where the engines were kept was at Montgomery, Alabama, where the roundhouse and shops were located. They were in Atlanta only when on trips from Montgomery to Atlanta and return. The Western Railway of Alabama runs from Selma, Alabama, to West Point, Georgia. From West Point to Atlanta is the Atlanta & West Point Railroad." Claimant then put in evidence section 3017 of the Code of Alabama, as follows: "When personal property mortgaged to another is levied on under execution or attachment, the mortgagee or his assignee may try the right of the property as provided in this chapter; but the plaintiff in the process may pay to the mortgagee or his assignee, the amount owing on the debt secured by the mortgage; and in such case the property shall be sold, as well for the payment of the mortgage debt as for the satisfaction of the process, the proceeds of the sale to be first applied, after payment of costs, to reimburse the plaintiff the amount so paid by him to such mortgagee or assignee." Plaintiff put in evidence section 2892 of the Code of Alabama, as follows: "Property subject to levy and sale under execution. Executions may be levied \* \* \* (2) On personal property of defendant except things in action whether he has the absolute title thereto or the right only to the possession thereof for his own life, the life of another, or any shorter period, but this does not apply to a possession acquired by a bona fide hiring of chattels. (3) On an equity of redemption in either land or personal property, when any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities."

John C. Reed, for plaintiff in error. Calhoun, King & Spalding, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 714.)

SAVANNAH, F. & W. RY. CO. v. BROOKS.

(Supreme Court of Georgia. Aug. 20, 1894.)

WAREHOUSEMEN—LIABILITY FOR DESTRUCTION OF PROPERTY.

The evidence warranted the verdict, and there was no error by the court for which a new trial should be granted.

(Syllabus by the Court.)

Error from superior court, Charlton county; J. L. Sweat, Judge.

Action by R. L. and M. M. Brooks against the Savannah, Florida & Western Railway Company to recover for goods destroyed while in defendant's warehouse. Plaintiffs had judgment, and defendant brings error. Affirmed.

The following is the official report:

The petition of R. L. and M. M. Brooks alleged that the railway company was indebted to them \$532.34, for that on or about January 8, 1892, it received as warehousemen, and accepted for storage, certain goods, setting forth the goods, of a value, including \$5.19 freight and drayage, of \$712.50, and delivered, out of the goods so stored, certain goods, setting forth what they were, of the value of \$180.16; that an agreement was made between it and petitioners, stipulating that storage should be charged on said goods; that on the 7th or 8th of January, 1892, said described goods remaining in the warehouse were destroyed, through the gross negligence of the railway company or its agents, by a fire caused by the lighting of a cigar, or a cigar which fell in a lot of hay stored in the warehouse, or by and through other gross negligence of the railway company or its agents; and that through the failure of the railway company to exercise ordinary diligence in the preservation of said goods, which became a total loss to petitioners, they were damaged in the sum of \$532.34. The jury found for plaintiffs the amount sued for, and, defendant's motion for new trial being overruled, it excepted. The motion contained the grounds that the verdict was contrary to law, evidence, etc., contrary to the charge of the court, and contrary to a specified portion of the charge. Also, because the verdict was contrary to law, in that the freight had not been prepaid on these goods, and it was charged in the bill to the plaintiffs; the rule of law in such cases being that the measure of damages is the value of the property at the point of destination, less the freight,—the jury having found the full value of the property with the freight added. Because the court refused to grant a nonsuit on the ground that plaintiffs had failed to make out their case under the evidence; they having alleged that a specific contract was made with defendant to receive and store for them the goods sued for, and that the negligence consisted in the lighting of a cigar or the letting fall of a cigar on the hay in said warehouse, or by and through other gross negligence of said railroad company or its agent. Because the court refused to give in charge the following written request: "That if the jury find from the evidence that the goods were received and receipted for by the consignee, or his agent, and were afterwards received back by the agent of defendant, to be kept, with or without hire, the defendant would not be responsible, unless special authority is shown in

the agent of the defendant to receive the goods." Because the court charged the following: "Extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property; the absence of such diligence is termed 'slight neglect.'" Movant alleges that this was confusing and misleading to the jury, and unauthorized by the pleadings and evidence. Error in charging: "Now, the defendants, in reply to all these claims and contentions upon the part of the plaintiffs, say that they are not liable; that as common carriers their duty and liability had ceased, that they had delivered the goods at the point of destination to these plaintiffs, and that they had no further control over them, and that they were placed and left in their warehouse by the plaintiffs at their own risk; and defendants deny that the fire which destroyed these goods was the result of any fault or negligence on their part, or any of their employes." Alleged to be error because misleading, in that it led the jury to suppose that defendant's liability as a common carrier was sought to be established by plaintiffs, which was not true, by allegations or proof, and that it further led the jury to believe that the burden of proof that the goods were not destroyed by any fault or negligence of it or its employes was on defendant, whereas the only negligence alleged in the declaration was acts of gross negligence.

Erwin, du Bignon & Chisholm and Hitch & Myers, for plaintiff in error. Mershon & Smith, for defendants in error.

PER CURIAM. Judgment affirmed

(94 Ga. 588)

#### NOWELL v. STATE.

(Supreme Court of Georgia. April 16, 1894.)

##### ATTEMPT TO WRECK RAILROAD TRAIN—EVIDENCE.

Under the act of 1885, making it felonious to wreck or attempt to wreck any railroad train, locomotive, or car, the actual wrecking, if accomplished by any illegal act tending to produce such a disaster, would be a crime; but, in order to constitute a criminal attempt where no wrecking ensues, an intention or purpose to wreck is essential. The evidence in the present case being wholly insufficient to establish the existence of such intent or purpose, although the act done by the accused was unlawful, meddlesome, mischievous, and grossly improper, the verdict was unwarranted under a right construction of the law, and the court erred in not granting a new trial.

(Syllabus by the Court.)

Error from superior court, Dekalb county; R. H. Clark, Judge.

William Nowell was convicted of attempting to wreck a passenger train, and brings error. Reversed.

The following is the official report:

Nowell was indicted for attempting to wreck a passenger train, and was found guilty. He moved for a new trial, and, his motion being

overruled, excepted. The evidence was quite voluminous. That for the state was to the effect: What is known as the "accommodation train" on the Georgia Railroad passed Decatur with six passenger coaches. The two rear coaches had been provided with air brakes, but the air brakes were not in working order at the time in question. These two coaches were coupled together, and to the other coaches, with what is called the "Janney Coupler," which is worked with levers. After the train passed Decatur, and while it was still in Dekalb county, and on an up grade (which made the levers more difficult to move), the two rear coaches were uncoupled by the defendant by pulling the lever of the coupling. The train in question leaves Atlanta only 20 minutes ahead of a freight train. The testimony for the defendant was to the effect that he either did not take hold of the lever at all, or did so in attempting to steady himself; that the couplers were interfered with by another or others; and that sometimes such couplers became uncoupled without using the levers.

J. W. Arnold and Geo. W. Gleaton, for plaintiff in error. J. S. Candler, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(94 Ga. 602)

#### BASS et al. v. HIGHTOWER.

(Supreme Court of Georgia. June 11, 1894.)

##### ARREST IN CIVIL ACTION—DISCHARGE WITHOUT BAIL—PROCEDURE—HABEAS CORPUS.

A defendant in an action of trover, requiring bail, cannot be discharged from legal imprisonment on the ground of his inability to produce the property sued for, or to give bond and security according to law, without pursuing the remedy pointed out in section 3420a of the Code. He cannot obtain his discharge for this cause on petition for the writ of habeas corpus; and at the hearing, on the return of such writ, evidence to show the existence of such cause is inadmissible, notwithstanding the facts relied upon may be alleged in the petition for the writ, and notwithstanding the plaintiff in the action of trover may have voluntarily appeared on the hearing of the writ, and had himself made a party to the proceeding. The hearing could be conducted only in conformity to the law applicable to proceedings by habeas corpus, whether the judge who issued and heard the writ was the judge of the court in which the action of trover was pending, or some other judicial officer empowered to issue, and entertain jurisdiction over, writs of habeas corpus.

(Syllabus by the Court.)

Error from city court of De Kalb; H. C. Jones, Judge.

In a civil action by J. H. Bass, W. P. Hightower was arrested and confined, where, upon petition for a writ of habeas corpus for discharge without bail, defendant was discharged, and plaintiff and the sheriff bring error. Reversed.

The following is the official report:

The petition of Hightower to the judge of the city court of De Kalb county alleged:

"Petitioner is illegally restrained of his liberty by being confined in the common jail of said county by virtue of a bail-trover process, copy of which is attached. He has delivered to the sheriff of the county all the cattle that were in his possession and control, and claimed under such bail-trover process. He is unable to give security or produce the property, as required by law, for which he can show good cause; and the U. S. currency claimed under said process is not in his possession, power, or control, said money being expended for the cattle, as described in said bail-trover process, as per contract between the parties." He prayed for the writ of habeas corpus, directed to Austin, sheriff and jailer of the county. The writ was issued, and, the matter coming on to be heard, defendant moved to dismiss the petition and the writ on the following grounds: "The allegations in the petition do not, in law, entitle the petitioner to the writ. If such allegations are true, the court would not be authorized, in law, to discharge the relator from the custody of the sheriff. The allegations in the petition, taken together with the sheriff's return in the bail-trover suit, make an issue that could only be tried by a jury; and, if the plaintiff is entitled to his liberty, this is not his remedy, but it is under subsection a of section 3420 of the Code."<sup>1</sup> The sheriff's return in the bail-trover suit of Bass against Hightower was: "The defendant, having this day (December 30, 1893) been served with a copy of the petition, process, and bail affidavit in said case, was arrested by me, and on failure to enter into recognizance for the forthcoming of the property sued for, and being unable to [find] any of that property myself, except four head of cattle, or to seize or take possession thereof, pursuant to the requirements of law, I commit him to jail, to be kept in custody until the property sued for is produced, or until he shall enter into bond, with good securities, for the eventual condemnation money." The motion to dis-

<sup>1</sup> Such section provides, in part, as follows: "When the defendant in any action for the recovery of personal property in which bail is required, shall by reason of his inability to give security, be held in imprisonment, it shall be lawful for him to make his petition in writing upon oath to the judge of the court in which the suit is pending, in which he shall state that he is neither able to give the security required by law, nor produce the property, and can furnish satisfactory reasons for its non-production, and traverse the facts stated in the plaintiff's affidavit for bail, of which petition he shall cause a copy to be served upon the plaintiff, whereupon it shall be the duty of such judicial officer in term time or vacation, after not less than five days' notice of the time and place of hearing has been given to both parties, to proceed in a summary way, to hear evidence upon the facts contained in said petition, and if he shall find that the petitioner can neither give the security nor produce the property, and that the reasons for its non-production are satisfactory, he shall discharge the petitioner upon his own recognizance, conditioned for his appearance to answer the suit, but otherwise he shall recommit him to custody."

miss the petition and writ was overruled. Plaintiff in the ball-trover suit was then made a party defendant to this case, and the court proceeded with the hearing. Hightower offered evidence in support of the allegations in his petition for habeas corpus, to all of which defendants objected on the grounds that the court ought not, according to law, to hear evidence in support of the allegations, and that the same is illegal, irrelevant, incompetent, and not pertinent to the issue in a case of this character. These objections were overruled. Plaintiff then introduced Hightower, who testified: "Bass and myself made a contract in February, 1893, under which he let me have two hundred dollars, which I was to use in buying cattle. I was to buy the cattle, and put them in a pasture in the southern part of De Kalb county, and keep them there until they were fat, and then sell them for him; and, if there was a profit in the transaction, it was to be equally divided between us. In the summer of 1893 I sold sixty-five dollars' worth of the cattle, and turned the money over to Bass. I had invested all the money he let me have, and twenty-nine dollars besides, in buying cattle. In December of last year he had me arrested on a warrant, and carried to Atlanta, and I was bound over to the superior court for larceny after trust, and, immediately after he had me arrested, sued out this ball-trover proceeding against me. I turned over to the sheriff four head of cattle, but no money, as all the money had been spent for cattle. The rest of the cattle had died." Defendant introduced the petition, process, and sheriff's return in the case of Bass against Hightower,—a ball-trover suit now pending in the city court of De Kalb county. The petition alleged that Hightower, of said county, was in possession of \$200, lawful money of the United States, and 12 heifers, cows, and bulls (describing them), all of the value of \$300, to which petitioner claims title, and that Hightower refuses to deliver such property, etc. The affidavit was sworn to before a justice of the peace in Fulton county, by the attorney at law for Bass, and recited the institution of the action of trover, giving the same description of the property as was in the petition, and alleged that the property is in the possession, custody, and control of Hightower, and that he (affiant) had reason to apprehend that the same would not be forthcoming to answer the judgment that might be made in the case, but would be eluded and moved away, and that he does verily and bona fide claim said property. Attached to the original affidavit was a copy thereof, sworn to at the same time by the same party, and before the same magistrate. The process was in the regular form. The return of the sheriff has been set forth above. Bass testified that, according to the contract, Hightower was to make return monthly of the stock he had purchased, etc.; that he made "returns up to May, 1893, after which time he

failed and refused to make any showing as to the amount of stock he had on hand, or what he had done with the money intrusted to him; that his May report showed he had bought 14 head of cattle, for which he had paid \$112.50; that the only return since that time was \$65, which Hightower had paid him after being pressed for a showing, but he did not say how many or what cattle he had sold to get that money; that immediately after Hightower was arrested he and Hightower met and talked the matter over, and Hightower refused to say what he had done with \$87.50 of the money that was not reported as expended, and did not claim that any of the cattle had died, although he was asked if any had died, but said that they had not. Terrel testified that he was present at the interview between Hightower and Bass, and asked Hightower how many head of cattle he had on hand at that time, and the description of the same, to all of which Hightower replied, which replies were taken down by witness in shorthand, and which descriptions were afterwards used as the basis of the petition in the trover suit. The judge below rendered judgment discharging Hightower from custody. Defendants excepted to the overruling their motion to dismiss the petition for habeas corpus, and the writ of habeas corpus; to the ruling overruling their objections to plaintiff's evidence, and allowing him to introduce testimony in support of his petition; to the ruling granting the writ and entertaining the case; to the ruling discharging Hightower from custody; and to the ruling refusing to render judgment for defendant, and remanding Hightower to custody.

Glenn & Maddox, for plaintiffs in error.  
R. M. Brown, Jr., for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 363)

#### RUSHER v. STATE.

(Supreme Court of Georgia. June 18, 1894.)

LARCENY — INDEPENDENT EVIDENCE DISCOVERED BY CONFESSIONS—COERCING CONFESSION.

1. The well-established rule that independent facts, discovered in consequence of a constrained confession made by a prisoner, are admissible in evidence against him, is of force in this state, unless it appears that criminal violence was used in procuring the confession or making the discovery. And, where such independent facts are admissible, so much of the prisoner's acts and declarations as are necessary to account for the discovery and explain the manner of it are admissible also, but solely for this purpose. They count for nothing as confessions, and, as such, are to be wholly disregarded.

2. Where counsel for the accused objected to evidence of an incriminating admission, on the ground that the same was made under coercion, and at the same time stated they wished to interrogate the state's witness to show that the accused had been whipped by the witness and others, and the state's counsel replied that the "confession" was not sought, but merely the information disclosed by it, after which there was

no further effort to examine the witness as to the alleged whipping, and no further objection to the admissibility of the evidence, failure to reject the same was not error, there being no proof by any witness that the prisoner was whipped or that any criminal violence upon him was committed.

3. The evidence as to the identity of the money stolen, and in other respects, was sufficient to warrant the verdict of guilty, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Elbert county; H. McWhorter, Judge.

James Rusher was convicted of larceny from a house, and brings error. Affirmed.

F. H. Colley and M. P. Reese, for plaintiff in error. W. M. Howard, Sol. Gen., for the State.

BLECKLEY, C. J. The indictment was for burglary, and Rusher, one of the accused, was found guilty of larceny from the house. Money was stolen from the store of J. H. Jones & Co., in Elberton. It was stolen at night, and during the same night most of it was found concealed in the grass, and somewhat buried in the ground, a few hundred yards from the store. The circumstances attending the finding were detailed by the witness J. T. Heard, a part of whose testimony, according to the brief in the record, was as follows: "Mr. Chedel, Mr. Boyd, my brother, Jim Rusher, Cas Butler, and myself were present when this money was found. The defendant, Jim Rusher, was present. He kept telling us we would find the money if we would keep looking. He said it was right there near by, and, if we would keep looking, we would find it; and we found it where he said it was. He said he would go with us where the money was found. We had him under arrest. He could not have gotten away. We carried him down there with us. \* \* \* The defendant said he would take us down there. He carried us. We did not know where to go. He was the man to show us where to go. Question. You gentlemen had used some coercion on him, hadn't you? Answer. I suppose you might call it that." The act of the accused in conducting the witness and his associates to the place where the money was found, and his declarations while the search was in progress to "keep looking for the money up by the fence. It is there somewhere,"—were objected to as incompetent evidence, on the ground that the act was done and the declarations were made under coercion. The declarations do not appear in the brief of evidence precisely as they are recited in the motion for a new trial, but this variance may be disregarded or treated as immaterial. They were not offered and received as admissions or confessions of guilt, but as information which guided the search and conduced to the discovery of the money. Nothing said by the accused either affirmed or denied guilt, or was an admission that he was the person by whom the money

was concealed. All he said was confirmed by the physical fact of the presence of the money at the place designated, and by finding it there through the search conducted as he directed.

1. The independent fact that the money was found was certainly admissible in evidence, and there can be no doubt that it has been a rule of law long and well established that not only such a fact, but acts and declarations of the accused, in so far as they explain and are necessary to account for it, whether the acts or declarations be voluntary or involuntary, may be received for this purpose. 1 Phil. Ev. 116; 2 Starkie, Ev. 37, 38; Rosc. Cr. Ev. 51; 1 Greenl. Ev. § 231; Whart. Cr. Ev. § 678; 3 Am. & Eng. Enc. Law, 481; Jones v. State, 75 Ga. 825; Daniels v. State, 78 Ga. 98. Such evidence, when admitted for this sole purpose, is not treated as proving a confession, but as being a part of the res gestae of the independent evidentiary fact. If what the accused did and said was the result of coercion, however mild, it would have been inadmissible had not the search which was made for the money resulted in its discovery. The discovery being a material and relevant fact, whatever would contribute to account for and explain it would be relevant also, not for its own sake, but for its explanatory function and value. It may be that the whole of the evidence would be inadmissible, according to the true meaning and spirit of the rule, if it appeared that criminal violence, such as whipping, was used in coercing the act or extorting the speech which led to the discovery. The fruits of physical torture, as distinguished from those of mere fear, it would seem, ought to be unavailing. The honor and decency of the law would seem to be involved in rejecting them. The law ought to hold out no encouragement to violent and lawless men to commit crime for the sake of detecting a previous crime, and bringing the offender to punishment. The law should never suffer itself to become an enemy or antagonist to its own reign. The multiplication of crimes as a remedy for crime would be a very absurd and disastrous public policy, and we think courts should not lend themselves to the advancement of any such policy unless they are compelled to do so by statute or some authority equally obligatory. The constitutional provision that "no person shall be compelled to give testimony tending in any manner to criminate himself" (Code, § 4998) does not displace or repeal the rule of law which we have been considering. It is manifest that the letter of the provision does not have that effect, for the subject-matter of the common-law rule is not the giving of testimony by the accused, but the admissibility in evidence of facts, acts, and declarations known to and detailed by other witnesses. It is contended, however, that the spirit of the constitutional provision extends to anything which a person under accusation, or afterwards accused, is coerced to do or say out of court before trial,

or in court during the trial. There certainly is some authority tending to support this position. Taken in its full breadth, we deem the contention unsound. So far as we know, there is nothing in our own Reports which goes to the extent of excluding the evidence where a substantive pre-existing physical fact bearing directly on the fruits of the crime has been discovered by means of exciting hope or fear. In *Day v. State*, 63 Ga. 667, the discovery made was that the prisoner's shoe fitted a certain track. In the present case physical facts previously existing became known. The discovery was of existing facts, all of which had been voluntarily created by the accused or some one else as a sequel to the corpus delicti. Knowledge by competent witnesses, however acquired, so that it be real and accurate, is of some evidentiary value, irrespective of the means of acquisition; and there would seem to be no injustice against any one in using it in evidence, unless it was acquired by criminal violence, or unless some rule of public policy would be violated by so using it, as in the case of confidential communications to counsel, etc. It is obvious that to compel a person while on trial to perform some act or make some prejudicial discovery in the presence of the court and jury, as was done in *Blackwell v. State*, 67 Ga. 76, is much more in the nature of compelling him to give testimony against himself than is coercing him to do or say something out of court which leads to the knowledge on the part of witnesses of some independent fact directly connected with the criminal transaction as a whole, and which has an evidentiary significance of its own, without reference to the means or method of discovery. It has been held that a person while in custody may be subjected to a personal search and examination against his will in order to discover upon him evidence of his criminality. *Woolfolk v. State*, 81 Ga. 561, 8 S. E. 724. And see *Franklin v. State*, 69 Ga. 36; *Drake v. State*, 75 Ga. 413. If this may be done, it would seem no less allowable for those having him in custody to order him to point out the place where he has concealed stolen money or property, and induce him to do so, either by operating on his hopes or his fears, provided they use no unlawful violence. It must be remembered that confessions, as such, are equally inadmissible when they are the fruits of hope as when they are the product of fear; and certainly it could not be successfully contended in this case that, if the discovery of the stolen money had been made by exciting hope of impunity, this would have been any impediment to proving the discovery, and how it was brought about, including the acts and sayings of the accused. What coercion was used we are not informed. As nothing to the contrary appears, the presumption ought to be that there was no use of personal violence or anything that would amount to criminal conduct. Our conclusion coincides with that

of the trial court. We think the evidence was admissible. In *Byrd v. State*, 68 Ga. 661, no property was found concealed, and, apart from the confession, there was no certainty either that any had been stolen, or, if any stolen, that the article produced by the accused was part of it.

2. The motion for a new trial recites that the objection to the evidence of the declarations made by the accused, as above set out, was accompanied with the announcement by counsel for the accused that they wished to interrogate the state's witnesses to show that the accused had been whipped; but there is no trace of this form of coercion in any of the evidence or of any particular form whatever. The right to interrogate the state's witnesses on this subject, though not denied, was not exercised. We may infer that, when the state's counsel declared there was no purpose to introduce confessions as such, the opposite counsel, without, perhaps, conceding the admissibility of the evidence, concluded not to resist its introduction. At all events, no further objection seems to have been made, and the theory of whipping was left wholly unsupported. It has therefore no relevancy to the merits of the objection.

3. The money found was sufficiently identified as money which disappeared from the store when the theft was committed. The sum was a little less than the amount stolen, and the identification was more by the character of the money, with reference to the material of which it was composed, than by the particular characteristics of any specific piece or pieces; but, taking all the circumstances into consideration, the jury could have had no moral doubt of the identity of the money, and there was no deficiency of the evidence in any respect. The verdict was warranted, and the refusal of a new trial was correct. Judgment affirmed.

(94 Ga. 696)

#### HINKLE v. STATE.

(Supreme Court of Georgia. June 4, 1894.)

#### COMPETENCY OF JURORS—HOMICIDE—EVIDENCE—INSTRUCTIONS.

1. A juror who, in answer to the statutory questions prescribed for testing his competency, after receiving from the presiding judge a correct definition of the word "bias" and the phrase "perfectly impartial," testifies that he is perfectly impartial between the state and the accused, is without any disqualifying prejudice if he has neither seen the crime committed, nor heard any part of the evidence delivered upon oath, and if he has no fixed opinion,—no opinion touching the guilt or innocence of the accused which will not readily yield to evidence,—although he may entertain an unfixed or floating opinion upon the subject, founded on rumor, hearsay, or newspaper reports, and may have expressed the same. In the true legal sense, he has no prejudice, and if he is unbiased he may properly answer in the negative the question, "Have you any bias or prejudice resting upon your mind for or against the accused?"

2. As to the three jurors whose alleged incompetency was discovered after verdict, the finding of the trial judge in favor of their com-

petency on the affidavits submitted to him pro and con was sufficiently supported by the evidence to render his finding on the question of fact involved conclusive upon a reviewing court. This is true whether the affidavit as to the good character of one of the movant's witnesses be considered or not. Inasmuch as the general character of the witness was not attacked, the judge was not legally bound to receive evidence in support of it.

3. Counsel for the accused having invoked the rule for excluding witnesses from the court room, and then sought to obtain an exception in favor of a son of the accused, on the ground that he was not only a material witness, but a necessary assistant in conducting the defense, by reason of his having taken a leading part in its preparation, it was discretionary with the court either to allow or to disallow the exception; and having disallowed it, and thereupon the counsel having withdrawn the son as a witness, for the sake of having his services in court during the trial, and it not appearing what fact or facts he could or would have testified to as a witness, no such abuse of discretion as will justify the supreme court in directing a new trial has been made out.

4. There was no error, upon any of the grounds of objection presented, in allowing the clerk of the court to testify that the deceased was a witness in a given case previously tried in the same court, and testified therein.

5. Even if the court erred in excluding evidence of uncommunicated threats which the accused sought to prove by one of the state's witnesses on cross-examination, the error was sufficiently neutralized by allowing the accused afterwards to recall the witness, not as his own, but as the state's, witness, and examine him fully touching such threats.

6. The charge of the court to the jury, read all together, so as to arrive at its true sense and spirit, was full, fair, impartial, and correct. There was no substantial error in the same upon any of the topics embraced in the motion for a new trial; these topics being impeached witnesses, *res gestae*, considering evidence and prisoner's statement together, malice, presumption of malice, common intent of assailants in joint assault, manslaughter, justifiable homicide, felony and felonious assault, self-defense by first assailant, self-defense by slayer generally, defense of son, and duty of the jury to free themselves from external influences in deliberating on the case.

7. Although there was much evidence tending to support the theory of the accused that he committed the homicide in defense of his son, yet as there was abundant and very powerful evidence to the contrary, and the jury being the accredited agents of the law for the determination of such questions, and they having found that the homicide was murder, and the trial judge having approved their finding, this court can discover no legal cause for reversing the judgment denying a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

John B. Hinkle was convicted of murder, and brings error. Affirmed.

Following is the official report:

J. B. and A. B. Hinkle were indicted for the murder of J. J. Worsham. The crime was alleged to have been committed on December 21, 1892. The state elected to sever, and J. B. Hinkle was put upon trial and found guilty, with a recommendation that he be imprisoned in the penitentiary for life. The trial occurred in January, 1894, the verdict being rendered February 1st. The defendant moved for a new trial, and his motion was

overruled, to which ruling he excepted. On the hearing of the motion for a new trial the movant offered in evidence two affidavits, signed by a number of persons, to the effect that they know the general character of J. B. Stewart; that his character is good, and from their knowledge of that character, they would unhesitatingly believe him upon oath upon any and all occasions. These affidavits were offered as counter affidavits in support of the affidavit of J. B. Stewart. The court refused to allow and refused to consider the same, to which ruling also movant excepted, upon the ground that it was contrary to law, and because such affidavits were material in support of the testimony of Stewart, and in contradiction of the evidence offered to disprove the affidavit of Stewart.

The motion for new trial contained the general grounds that the verdict was contrary to law, evidence, etc., and that the verdict was such as to be shocking to the moral sense, and such as to show that the benefit of reasonable doubt was not given to defendant.

Further: Because when it was ordered by the court, on defendant's motion, that all the witnesses should be put under the rule, defendant's counsel stated to the court that the preparation of the case, to a very great extent, had devolved upon defendant's son E. E. Hinkle; that he was more familiar with the witnesses and evidence than any one else, and it was material to have his services in the examination of the witnesses, and they desired to use him as a witness for defendants; and they asked that he be allowed to stay in the court room to assist in the defense. The court refused to allow this if he would be sworn as a witness. Under this ruling, defendant, to secure the attendance of E. E. Hinkle in the examination of witnesses, then withdrew him as a witness. This ruling is alleged as error, and as an abuse of the court's discretion. In a note to this ground by the court, the following is stated as what occurred: Defendant's counsel invoked the rule that the witnesses be put under the rule. The court put them under the rule, giving the witnesses instruction not to talk to the other witnesses, nor to come into the court room, etc. Defendant's counsel then asked that A. B. Hinkle, his wife, the two sons of the prisoner, and Maj. Lewis be allowed to remain in the court room, to assist in the consultation. The solicitor general objected, and asked that all be put under the rule. Defendant's counsel stated that they needed the assistance of Eugene Hinkle particularly, and of the codefendant, and these other members of the family, in the conduct of the case and the examination of witnesses, and could not safely go to trial without their presence, and that defendant's counsel understood the rule to be that it was discretionary with the court. There was then argument between counsel upon the question, mainly directed to the question of allowing the codefendant to remain in the court room; and the court then



stated that the court understood it was in its discretion to permit such witnesses to remain as the court might see proper, but the rule had been invoked by defendant, and, whether invoked by the one side or the other, the best way, when it was invoked, was to have it enforced, and, under the discretion lodged in the court, it must decline to allow these witnesses to remain in the court room. Defendant's counsel then asked if that included all of the witnesses, and the court stated that it did. Defendant's counsel then said that they wanted to ask the court that as far as Eugene Hinkle was concerned, who would not be called to testify to the facts of the homicide, having been in New York at the time of the homicide, he be allowed to remain; that they needed his presence to assist them in the examination of the witnesses; that he had had charge of that department of getting up the testimony, ascertaining the facts, and his aid was very material and indispensable; and they asked that he, if no other, be allowed to remain. The solicitor general insisted upon the rule as to this witness, and the court stated that it had ruled on the matter. After a conference between Eugene Hinkle and defendant's counsel, the latter announced that the former was so vitally indispensable that, under the ruling of the court, they would have to withdraw him as a witness, and have him remain.

Because G. W. Kinard, one of the jurors trying the case, was not a legal and competent juror, for before the term of the court at which the trial was had, he publicly said: "The homicide of Worsham was a cold-blooded murder, and that the Drs. Hinkle ought to be punished, and that the Drs. Hinkle were guilty, and ought to be hung, and that he could not sit on the jury." All these facts were unknown to movant and his counsel until after the verdict. In support of this ground of the motion, movant produced the affidavits of himself and his counsel as to their ignorance of the facts therein stated until after the trial, and that they had no reason to believe that any of the jurors had made any expressions with regard to the guilt of defendant, nor that any of the jurors were not fair and impartial. Also the affidavit of Jacob Bass: He and Kinard worked together in a laundry during 1893, until some time in the fall of 1893. Soon after the homicide of Dr. Worsham, he heard Kinard say that it was a cold-blooded murder, and the Drs. Hinkle ought to be punished. Frequently after that time he heard Kinard express himself in the same way. These and other similar expressions were so frequent that he was much surprised when he learned that Kinard had qualified himself, and been taken on the jury. Also the affidavit of Lee Aycock: He is foreman of the laundry. Soon after the homicide of Worsham he heard Kinard say, in the engine room of the laundry, that the Drs. Hinkle were guilty, and should be punished. He remarked that Kin-

ard ought not to talk that way, and Kinard replied that he had already expressed his opinion, and could not sit on the jury. Also the affidavit of J. N. Bass: He worked with Kinard in the laundry during 1893. A considerable time after the homicide,—he cannot say definitely at what time,—he heard Kinard say, in front of the engine room of the laundry, that the Drs. Hinkle were guilty, and ought to be hung. He frequently heard Kinard express himself in the same way during 1893, and upon one occasion in the summer, in the back yard of the laundry, heard him say that the Drs. Hinkle would hang, sure, and if he (Kinard) got on the jury he would hang them. Also the affidavit of J. A. Bass: On one occasion he was present in the back yard of the laundry, and heard a conversation between his brother and Kinard. He cannot recall the exact terms of the language of Kinard, but the substance of it was that the Drs. Hinkle were guilty and would hang, and that if he (Kinard) got on the jury he would hang them. The affidavits of the Bases and of Aycock were made on February 5, 1894, before George S. Cobb, N. P., except the last-mentioned affidavit of J. A. Bass, which was made February 10th, and before the same officer. By way of counter showing, the state produced the affidavit of Kinard. He denied that he made any of the statements attributed to him in the affidavits of the Bases and of Aycock, or that he made any statement of similar character. Further, that he did not remember having had any conversation with either of said parties concerning the killing, except upon the morning after the killing, when he read the newspaper account of it to Jacob Bass, but that, if he ever said anything concerning the killing, it was based upon the newspaper reports and general rumor, and not from having heard any of the evidence under oath, or from having seen the crime committed. He had no prejudice or bias either for or against the prisoner at any time, and went into the jury box perfectly impartial, with no fixed opinion in regard to the guilt or innocence of defendant, and no opinion at any time that would not have yielded readily to the testimony. He was friendly to both defendants, and at the very time of the killing was employing them as physicians for his little son, and he felt very kindly to them at the time of the trial and now, and, in agreeing to the verdict, acted entirely from the evidence. Also the affidavit of J. A. Bass: In the affidavit made by him on February 10th, before Cobb, N. P., he did not mean to swear that he had ever heard Kinard say that the Drs. Hinkle were guilty and would hang, and that if he (Kinard) got on the jury he would hang them. He does not remember what Kinard did say. Remembers hearing some conversation by Kinard with H. N. Bass in reference to the Hinkle case, but cannot remember what he said. So far as he could judge, Kinard had no feeling against the Hin-

**Men.** He did not manifest any prejudice or bias against them, nor say anything that would indicate he was unfriendly to them. The state produced similar affidavits of Jacob Bass and H. N. Bass, one asserting that he did not mean to say what was stated in the affidavit made before Cobb, and the other practically retracting what he had stated in said affidavit. Also the affidavit of many persons that they are personally acquainted with Kinard; that he is a man of good character and standing, and a truthful, stable, and upright citizen; and that, from their knowledge of his character, they would unhesitatingly believe him upon his oath. Movant, in reply, produced the affidavit of Lee Aycock, George Cobb, Eugene Hinkle, and H. V. D. Twiggs (one of defendant's counsel): They were in the office of Judge Twiggs when the several affidavits of Jacob and H. N. Bass were made before Cobb, N. P., and all of them except Aycock were present when the affidavit of J. A. Bass was made before the same officer. The affidavits were first prepared in pencil, at the dictation of each affiant, and then read over to him, so that it might be corrected, if incorrect, in accordance with the wish of each affiant. Each affidavit was then carefully transcribed in ink, and again read over and submitted to each affiant, and pronounced by each absolutely correct. The affidavits were separately prepared, because it became necessary to employ different phraseology to meet the approval of each affiant, the terms employed having been used according to the individual suggestion of each as to his personal recollection of the language of Kinard. The several affidavits were freely and voluntarily made, at the free and voluntary dictation of each, who swore positively as to the language used by Kinard, as set forth in each affidavit.

Because C. C. Alexander, who tried the case, was not a legal and competent juror, for before his qualification as a juror he said that "the Hinkles were guilty of foul murder, and that their damned necks ought to be broken, and he hoped they would live to have their damned necks stretched, and that if he was put on the jury he would hang them." All the facts stated in this ground were unknown to movant and his counsel until after the verdict. As to this ground of the motion, movant produced the affidavits of himself and his counsel that they were ignorant of the facts as to Alexander, and had no reason to suspect that he was not an impartial juror, until after the verdict. Also the affidavit of J. B. Stewart: He had a conversation with Alexander at the Alliance store at the Plains, in Sumter county, on one Saturday in June, 1893, and Alexander stated, in speaking of the Hinkle case, that the "Hinkles were guilty of foul murder, and their damned necks ought to be broken." In the same conversation Alexander stated, in substance, that if he was put on the jury he would hang them. De-

ponent is not able to say whether Alexander said that if he was put on the jury, or got on the jury, or was taken on the jury, but this is the substance of his remarks. He said to Alexander that Dr. Wise had said to him (deponent) that he did not believe Albert Hinkle would live to stand his trial, to which Alexander replied, "I hope they will live to have their damned necks stretched." Also the affidavit of J. T. Torbett that in August or September, 1893, in Marion county, he heard Alexander say that the Hinkles ought to be hung. To the best of his recollection, this is the substance or expression of what Alexander said. Deponent did not communicate this to either of the Hinkles or their counsel before or at the trial. By way of counter showing, the state produced the affidavit of Alexander, denying that he made any of the statements attributed to him by Stewart or Torbett, or any similar statement. Further, that he might have said at some time that if the reports of the killing were true, as he had heard them, the Hinkles ought to be found guilty, but he had no recollection of ever having made a statement of the kind. If he expressed any opinion, it was based upon reports, and not from any fixed or settled opinion. He had no prejudice against defendant at any time, and went into the jury box with his mind perfectly impartial. He had never heard any of the evidence, had not seen the crime committed, had never formed or expressed any opinion of the guilt or innocence of either of the defendants, and, when put upon his voir dire, had no fixed or other opinion or impression that would not have yielded readily to the evidence, and been controlled by it. He has had a conversation with Torbett, who told him that he (Torbett) did not mean to swear positively in his affidavit that Alexander had said to him the Hinkles ought to be hung, and that he would not swear positively that Alexander had made any such remark, and that whatever remark Alexander did make did not indicate to him (Torbett) that Alexander had any feeling against defendants, or was prompted from any prejudice. Deponent is informed that Stewart is related to the Hinkles. Also the affidavit of Torbett, corroborating the statements in the latter portion of the affidavit of Alexander, as to what Torbett had stated to Alexander. Also the affidavit of Seig, tending to corroborate the affidavit of Alexander in relation to the conversation between Alexander and Stewart at the Plains, deponent being manager of the Alliance store there. Also the affidavit of a number of persons that Alexander is a man of good character and standing,—a truthful, stable, and upright citizen,—and that, from their knowledge of his character, they would unhesitatingly believe him upon his oath.

Because B. H. Harris, one of the jurors who tried the case, was not a legal and competent

juror, for before the time he qualified as a juror he said that "the Hinkles were guilty of murder; that they killed J. J. Worsham because he would not swear to a lie, and that they ought to have been lynched; and that if he was taken on the jury he would convince the jury that the Hinkles were guilty and ought to be hung, and he would vote to hang Dr. Hinkle if he was on the jury,"—which was unknown to movant and his counsel until after the verdict. In support of this ground, movant produced the affidavits of himself and his counsel that they were ignorant of the matters set out in the ground, and had no reason to suspect that Harris was not an impartial juror, until after the verdict. Also the affidavit of Helen Holmes: Some time in 1893 (she was not able to specify the exact date) she was at the house of one Murphey, commonly called "Old Man Murphey," in Sumter county. There were in the room B. H. Harris, Joseph Johnson, John Suggs, and others, whose names she cannot now remember. In the hearing of these persons she heard Harris say that the Hinkles were guilty of murder; that they killed Worsham because he would not swear to a lie; that they ought to have been lynched; and that if he (Harris) was taken on the jury (and he said that he was strongly impressed that he would be on the jury) he would convince the jury that the Hinkles were guilty and ought to be hung, and he would vote to hang Dr. J. B. Hinkle if he were on the jury. The circumstances above detailed are clear to deponent's mind, and, while she has not given the exact language of Harris, she has given correctly the purport of what he said. Also the affidavits of J. N. Johnson and G. W. Murphey tending to corroborate the affidavit of Miss Holmes. Johnson did not remember the words used by Harris, but recollected that Harris expressed himself as being opposed to the Hinkles, and that he believed them guilty; and that Harris and Miss Holmes were disputing about the Hinkles. G. W. Murphey, in his affidavit, said that he heard Harris say to Miss Holmes that the Hinkles were guilty of foul murder, and ought to be hung, and that he was informed he would be on the jury, and that if he was he would stay there forever, or hang them, as he believed them to be guilty of murdering Worsham because he would not swear to a lie. By way of counter showing, the state produced the affidavit of Harris: The statements in the affidavit of Miss Holmes as to what he said are not true. He was present on the occasion referred to, at the house of old man Murphey. She was championing the case of the Hinkles, claiming that they were not guilty, and, among other things, she said that if they were to kill her own father she would know they would be justifiable, and that she could walk from old man Murphey's to Americus, a distance of 10 miles, that night, in mud knee deep, to turn them out of jail, and other things of like import. Some of those present were joking her and

teasing her. She was a spinster of high temper, and easily teased, and deponent may have spoken words to this effect: That if the reports he had heard were true they ought to be punished, but did not say they were guilty, or ought to be lynched, or if he were on the jury he would vote to hang them, unless they were proved guilty, or anything to that effect, and what he did say was more in the spirit of teasing or joking her, because others were doing the same thing, than for any other reason. When put upon his voir dire, he answered conscientiously and truthfully the questions propounded to him by the solicitor general. He had no fixed or other opinion or impression that would not have yielded readily to the evidence, and been controlled by it. He had not heard or read any of the evidence whatever. He has known Dr. J. B. Hinkle a number of years. Dr. Hinkle had been his physician, and he felt friendly towards him, and was controlled entirely by the evidence, in agreeing to the verdict that was rendered. Also the affidavits of G. W. Murphey, J. N. Johnson, and others who were present at old man Murphey's at the time in question, corroborating the affidavit of Harris as to what occurred there. G. W. Murphey also deposed that he had signed a paper, and given it to Mr. Blalock, of defendant's counsel, purporting to contain the language used by Harris on said occasion. Deponent does not know whether such affidavit contains the circumstances under which Harris made the remarks. Mr. Blalock simply asked him what Harris said against the Hinkles on the occasion, and deponent simply answered, and told Dr. Blalock what he said, without telling him under what circumstances he said it, or why he said it; but deponent did tell Mr. Blalock that Harris told him immediately after the conversation that he had nothing against the Hinkles, and was just saying it to tease Miss Helen. Deponent never read over the paper that he gave to Mr. Blalock, but told him what Harris said outside of the court house, when Mr. Blalock went into the court house and reduced it to writing, and deponent signed it without having read it. While Mr. Blalock read it over, he read it in a whisper in the court room, while court was in session, and [deponent] thus very indistinctly heard a portion of it. Johnson further deposed that what was said at Murphey's by Harris and others was in jest; that all present understood the joke, and no one thought of it as in any way prejudicing the case, and the deponent so informed Mr. Blalock when he took deponent's affidavit, and Mr. Blalock said it was unnecessary to put that fact in his affidavit. Also the affidavits of a number of persons that Harris is a man of good character and standing,—a truthful, stable, and upright citizen,—and that, from their knowledge of his character, they would unhesitatingly believe him on his oath. The state also produced the affidavits of all the jurors, except Kinard, Alexander, and Harris,

to the following effect: They have heard read the affidavits attacking the integrity, as jurors, of Kinard, Alexander, and Harris. The case extended for 11 days, and deponents were in intimate, constant association, daily and nightly, with these jurors, whose conduct was such as to be entirely above suspicion. Before the charge of the court no discussion was had, nor was there any intimation as to what was the opinion of any of the jurors. When the jury entered the jury room to consider the case, after the charge, the 12 agreed that defendant was guilty; the sole question in their minds being the amount of punishment that should be inflicted, and the only contention among them being as to whether it should be capital, or life imprisonment. Upon the first ballot upon that question, seven voted for capital punishment, and five decided, as a mere matter of grace, that defendant should be confined in the penitentiary for life. In the consultation it was finally determined to imprison him for life, instead of ordering capital punishment. Neither Alexander, Kinard, nor Harris at any time during the trial showed any disposition whatever to use harsh remedies, but were as conservative as any of the jury. As a matter of fact, Kinard did not vote for hanging. Deponents say, to the best of their knowledge and belief, from the conduct of Kinard, Alexander, and Harris, they were upright gentlemen and impartial jurors, with full understanding of their obligation, and did not violate it as jurors, but, on the contrary, went into the box, like deponents, with a clear intention to find simply, unbiased and unprejudiced, the truth of the case.

Because the court erred in allowing J. H. Allen to testify, over the [objection of] defendant's counsel, "that on the 13th day of December, 1892, as appeared by the minutes, there was a case tried in Sumter superior court between Dr. Burt, plaintiff, and J. B. Hinkle, defendant, and that Worsham testified in the case." It was not stated in this ground what objection was made to this evidence when offered. In a note as to it, the court states: The testimony of Allen was objected to solely on the ground that he had been in the court room during the trial (he being clerk of the court), and because it was immaterial and irrelevant. These objections were overruled, and Allen permitted to testify. There were no objections that the minutes were better and higher evidence as to what appeared therein.

Error in refusing to allow defendant's counsel to prove by D. F. Davenport, witness for the state, and introduced by the state, that Worsham had made threats against the Hinkles prior to the homicide, said threats being uncommunicated threats. In a note to this ground the court states: "I decline to approve the twenty-eighth ground of the amended motion, except as thus qualified: While Davenport, as state's witness, was being cross-examined, and be-

fore any evidence had been introduced by defendant, counsel for defendant proposed to examine Davenport as to certain threats alleged to have been made by Worsham, the deceased, against the Hinkles, stating at the time that they were uncommunicated threats. State's counsel objected to the witness testifying about the alleged threats, because they were never communicated to defendant, and because there was no evidence of any act on Worsham's part tending to show that at the time of the homicide he was endeavoring to carry such threats into execution, or was making any assault upon the Hinkles. The court sustained the objection, and distinctly stated that the evidence was not admissible at that time, as no overt act on Worsham's part had been shown which tended to prove that he had assaulted the Hinkles, etc. Defendant's counsel stated that he understood the court as simply ruling that the evidence was not admissible at that particular stage of the case, and the court stated that that was the extent of the ruling. Defendant's counsel, after defendant had introduced evidence, requested the court to permit defendant to recall Davenport for the purpose of cross-examining him as to said uncommunicated threats. The court permitted Davenport to be recalled by defendant, as the state's witness, and permitted the defendant to fully cross-examine him as to such threats."

Because the court erred in defining to the jurors the meaning of the statutory questions put to them when they were on their voir dire, which instructions were as follows: "The court will proceed to explain the questions which will be put to each of you on your voir dire. The first question is whether, from having seen the crime committed, or from having heard any of the evidence delivered upon oath, you have formed and expressed any opinion as to the guilt or innocence of the prisoner at the bar. Now, that is simple enough, it seems to me. You readily know whether you have or have not seen the crime committed. You readily know whether you have heard any of the evidence delivered on oath. And, of course, if you have not seen the crime committed, and if you have not heard any of the evidence delivered on oath, you are not disqualified in that question, and on that ground. The next question that will be propounded to you will be whether or not you have any bias or prejudice resting upon your mind, either for or against the prisoner at bar. I charge you that prejudice means a prejudging of the case, from any cause. It means a settled and fixed opinion, either as to the guilt of the accused, or as to his innocence. If it is a fixed and settled opinion, either as to the guilt or innocence, no matter from what cause that opinion is derived, or upon what it is based, whether from rumor, hearsay, newspaper reports, or evidence upon former trial, or from any-

thing else, if it is fixed and settled,—an opinion that will not readily yield to the testimony,—then you would be prejudiced, you would be disqualified on that ground. The question relates to the condition of your mind now, as to whether you have an opinion now, not whether you have had one at some past time. The inquiry is as to the present condition of your mind, and as to whether you have now an opinion. An opinion which is not fixed, which is not settled, an opinion that will yield readily to the testimony, even though the juror may have formed and expressed an opinion from having read a newspaper of the evidence upon a former trial, if such opinion, as I have said, was not fixed, was not settled, if it was an opinion that would give way readily, yield readily, to the testimony in the case, that of itself would not disqualify,—a juror would not be prejudiced on account of having formed and expressed such an opinion; that is, an opinion that is not fixed and settled. As to the question of bias, 'bias' means a leaning or an inclination towards or against the accused. You will be asked whether or not your mind is perfectly impartial between the state and the accused; that is, whether the juror is perfectly perpendicular between the state and the accused,—whether he is in such condition as to be swayed the one way or the other by the testimony. The last question is whether you are conscientiously opposed to capital punishment. That, I take it, needs no explanation whatever from the court. The question itself carries its meaning with it. It is plain enough."

Error in charging, on the subject of impeachment of witnesses: "When the jury believes a witness has been successfully impeached, then the testimony of such witness should be discredited, unless it be corroborated by other testimony or circumstances which the jury believe to be true."

Error in charging, as to defendant's statement: "The defendant in this case avails himself of this statute: 'In all criminal trials in this state, the prisoner shall have the right to make to the court and jury such statement in the case as he or she may deem proper in his or her defense, said statement not to be under oath, and to have such force only as the jury may think right to give it; and the jury may believe such statement in preference to the sworn testimony in the case: provided the prisoner shall not be compelled to answer any question on cross-examination should he or she think proper to decline to answer such question.'" Movant says that the court erred in incorporating in its charge to the jury the proviso given in said extract, because the same tended to prejudice the jury against the truth of the prisoner's statement, inasmuch as no cross-examination of the prisoner was had, from which the jury might or could infer that the prisoner de-

clined to permit such a cross-examination, or declined to submit to the same.

Error in charging, on the subject of *res gestae*: "Declarations accompanying the act, or so nearly connected therewith, in time, as to be free from all suspicion of device or afterthought, are admissible in evidence as part of the *res gestae*," etc., "and subject to be judged and weighed by the jury under the same rules which I have given you for weighing and considering other evidence in the case; that is, the connection of the defendant with the case, his interest in it, whether such declarations are consistent throughout, or are conflicting with themselves or other facts." Movant says that the last part of said charge is error, because, in weighing declarations which are admitted as *res gestae*, the jury were excluded from weighing such declarations by any other standard than those enumerated by the court.

Error in charging: "Now, in trying this case, you pass upon the law and facts both; that is to say, you take all the evidence and defendant's statement, and determine from that what is proven in the case,—what facts are established." Movant says that this part of the charge is misleading, and its effect is virtually to exclude the statement of the defendant, which the court had charged the jury was not under oath, and the effect of the charge was that the jury was to determine simply what was proven, and what facts were established by the evidence in the case.

Error in charging, on the ground of malice: "It means, in law, the deliberate intention to take human life under circumstances where the law would neither justify, nor in any degree excuse, the intention, if the killing should take place as intended."

Error in charging: "When the state proves a homicide by violence, and nothing more appears, the law calls that murder. It fixes the crime as murder, with malice attached to it, and it then becomes incumbent upon the person killing to show that the homicide is either manslaughter or justifiable."

Error in charging: "If two or more persons, moved and influenced by a common intent and purpose to feloniously assault another with deadly weapons and take his life, and each knows of the common felonious intent and purpose of the other to make such a felonious assault upon such person, and take his life, then the law says, under such circumstances, the act of one is the act of all the assailants; the blow of one is the blow or shot of all; they are all responsible, under such circumstances, for the acts of each other." Movant says that such charge is error, because it was inapplicable to the evidence in the case, and because the court nowhere in its charge gave the jury the alternative of the proposition of law; that is, that, although they have been jointly indicted, yet, if there was not a common intent and purpose, then he who struck the blow would be alone guilty.

**Error in charging:** "If you believe from the evidence, beyond a reasonable doubt, that the defendant J. B. Hinkle and his son A. B. Hinkle, moved and influenced by a common intent and purpose to feloniously assault J. J. Worsham with deadly weapons, and each knew of the common felonious intent and purpose of the other, did in this county, at or about the time charged in the indictment, either the defendant J. B. Hinkle or his son A. B. Hinkle, in pursuance of such known, common, felonious intent and purpose, and with the weapon and in the manner stated in the indictment, unlawfully kill J. J. Worsham, with malice aforethought, then both of them would be guilty of murder; and you would be authorized, under such circumstances, to find the defendant J. B. Hinkle guilty, although you might believe from the evidence that A. B. Hinkle fired the fatal shot." Movant says that such charge, as given, is error, because the court neither then, nor at any other place in his charge to the jury, put the alternative of the proposition, and the same was inapplicable under the evidence.

**Error in charging:** "If the evidence in this case satisfies your mind, beyond a reasonable doubt and moral certainty, that the defendant J. B. Hinkle killed J. J. Worsham, on account of and by reason of an actual assault or battery made upon him or his son, in his presence, by the deceased, or because there was an attempt by the deceased to commit a serious personal injury upon him (the defendant) or his son, in his presence, or there were other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied, as I have explained it, then the homicide would not be murder, but the defendant would be guilty of voluntary manslaughter. Unless the assault or attempted serious personal injury amounted to a felony,—that is, a crime punishable by law with death or imprisonment in the penitentiary,—and the defendant killed to prevent its commission, then he would not be justifiable under the law I will explain hereafter." Movant says that the effect of such charge, by adding the words, "I will explain hereafter," qualified that portion of it which referred to the fact that it would be justifiable to kill another to prevent a felony.

**Error in charging:** "But if, in considering the question of voluntary manslaughter, it should appear from the evidence that the defendant killed the deceased from and on account of a provocation of words, threats, menaces, and contemptuous gestures, alone, then the homicide would not be voluntary manslaughter, but would be murder. A felony is an offense against the laws of the state, which is punishable by death or confinement in the penitentiary. A felonious assault upon one's person is such an assault as, if consummated, would subject the party making it, upon conviction, to imprisonment in the penitentiary. An assault with intent

to murder by using any weapon likely to produce death would be punished by imprisonment in the penitentiary, and would consequently be a felonious assault."

**Error in charging:** "If a person attempting or endeavoring to make an assault with a deadly weapon upon the person of another was acting in self-defense,—was justifiable in making such an assault,—then the person so assaulted would not be justifiable in the killing." Such charge is misleading, inapplicable, and not the law, and tended to confuse the jury.

**Error in charging:** "It is not necessary, in order to render a homicide justifiable, where the person killed endeavored by violence to commit a felony on the person of the son of the slayer, that the felony intended or endeavored should have been any particular character or grade of felony; but if such homicide was committed by the father in the defense of the person of his son, of one who manifestly endeavored by violence to commit any offense on the person of his son, which would have subjected the person intending or endeavoring such felony to punishment by confinement in the penitentiary if such felony had been committed, then such homicide would be justifiable, provided that the killing was done by the father to prevent the commission of the felony, and that the circumstances at the time of the killing were sufficient to excite the fears of a reasonable man that such felony would be committed, and that the father really acted under the influence of those fears, and not in a spirit of revenge. If a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing that in order to save his own life the killing of the other was absolutely necessary; and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given." Movant says that the latter portion of said part of that charge was error, not applicable to the evidence in this case, nor to the character of the case as made by the evidence; that it was error, further, because, having charged the jury that a man may slay another to prevent the commission of a felony on his own person, by charging the last clause of said portion of such charge, in relation to the law of self-defense, he qualified the law of justifiable homicide, as given by the court, to prevent the commission of a felony, and established in the minds of the jury that it was necessary, before they could acquit the defendant, that the killing was done to save the life, and not to prevent the commission of a felony. The first paragraph of this charge was given upon the written request of defendant's counsel.

**Error in charging:** "In self-defense, the danger must be so urgent and pressing at the time of the killing that in order to save one's own life the killing was absolutely necessary,

or, as I have said, the slayer must honestly believe, and in good faith act upon such belief, and not in a spirit of revenge." "Now, gentlemen of the jury, take up the evidence and the defendant's statement. Go through it all, fairly, calmly, without fear, favor, affection, reward, or the hope thereof," etc.

Little, Worrill & Little, Fort & Watson, Hudson & Blalock, J. Dodson & Son, Pillsbury & Winchester, J. A. Ansley, C. W. Bass, and H. V. D. Twigg, for plaintiff in error. James M. Du Pree, Sol. Gen., E. A. Hawkins, and R. L. Berner, for the State.

PER CURIAM. Judgment affirmed.

(94 Ga. 590)

### BOSTON v. STATE.

(Supreme Court of Georgia. June 4, 1894.)

#### HOMICIDE—EXPLAINING ACTS OF DEFENDANT—ACCIDENTAL SHOOTING—INSTRUCTIONS.

1. The state having proved that the accused killed his wife by shooting her, disappeared for a few minutes, and then returned, made manifestations of grief, and said that he shot her by accident, and would not have done so for the world, it was competent for him to prove that he acted consistently with this theory by going in search of an officer, overtaking him, and surrendering himself, saying at the time of the surrender, and as explanatory thereof, that he had killed his wife by accident, the interval between the killing and the surrender not exceeding 20 or 30 minutes, according to the indications of the evidence, though the precise time did not definitely appear. His mere declaration, made subsequent to his arrest, to the effect that the killing was accidental, and that he desired to return to see the body of his wife, was inadmissible; nor was the statement of the officer to other officers on turning over the prisoner to them admissible evidence, such statement consisting of a repetition of what the accused had said on surrendering himself.

2. It is not matter of right for the accused to make a second statement to the court and jury because the state has introduced additional evidence which strengthens the case against him.

3. There was no error in the charge of the court complained of; nor was the mere failure to charge, without request so to do, any cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Mills Boston was convicted of murder, and brings error. Reversed.

Following is the official report:

Mills Boston was found guilty of the murder of his wife, Winnie Boston. His motion for new trial was overruled, and he excepted. The motion contained the grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in refusing to allow the defendant to prove by McCafferty, a police officer of the city of Macon, who had testified that at a quarter of 11 o'clock on the night of the homicide (the state's witnesses having sworn that the homicide took place at about half past 11, or a little prior to that

time), the defendant, after running up and calling said witness, said to him that he wanted to give himself up, that he had killed his wife, and that it was an accident, that the pistol had gone off accidentally, and that he would not have done it for the world. Aleck Bell, one of the witnesses for the state, testified, among other things, that, after defendant had shot his wife, defendant walked about two steps from witness' door (near which the shooting occurred) to Lee Hamlin's store door, and said, "I will give you holding up or taking up for your damn men," and went off a piece, and after awhile they commenced hollering, "Mills has killed Winnie," and he comes back and says: "Oh, Lordy! I shot my wife, but I didn't go to do it." This was 10 or 12 minutes after he came back and said that. When they said his wife was dead, he walked in, threw himself down, and says: "I shot my wife, but I didn't go to do it." For the defendant, McCafferty testified, among other things, that, at a quarter of 11 o'clock on the night of the shooting, defendant followed him down the sidewalk, and overtook him, and appeared to be crying, and witness asked what was the matter; and that defendant called him three times, and that was the way he came to stop. Defendant's mother testified, among other things, that she reckoned it was about a quarter or half an hour or between that time (after the shooting) when Mills came in and says: "Lord! I wouldn't have done it for nothing in the world, mammy. I wouldn't have done it for nothing in the world. I didn't go to do it, mammy." He just said that, and hugged her (his wife) around the neck, and looked at her and cried. She further testified that she could not say how long it was between the shooting and when Mills came, but it was before she got up from the deceased; that, after she heard the pistol, she was about 18 feet from deceased, who was standing up, and stood, witness reckoned, two or three minutes; that witness whirled to go back to her, and made to her, and went down to the floor with her, and tried to catch hold of her, and, before witness got up, Mills came in. The defendant stated, among other things, that the pistol went off uncertain to him, and it struck him so bad he stood right there, and Bell said: "Go, somebody, and get a doctor." And he (defendant) went up nearly to No. 4 engine house, and remembered that Dr. Gevinner had moved, and he (defendant) whirled and went back home, and there were all of them around there. And, when he got back, his brother-in-law walked up to him with a pistol, he being on his knees, and his brother-in-law said: "What did you shoot my sister for?" And he (defendant) said: "I didn't go to do it. God knows in heaven I didn't go to do it." And his brother-in-law said: "Tell me the truth about it. What did you shoot her for?" And he (defendant) said, "I declare to God I didn't go to do it," and a pistol snapped in his face, and he raised up and

looked up at his brother-in-law, and turned and walked out of the house, and came down Fourth street, and gave himself up, because he knew that he did not do it intentionally. If he had, he might have gone, but he did not go to do it, and it did not look like it was right for him to run away. Betsy Bell testified, among other things, that, after the shooting, defendant walked off a piece, and not very long after came back, after deceased had been moved out of the door and into the house, and fell on her, and said that he did not go to shoot her. Also, because the court erred in refusing to allow the defendant's witness Pat Murphy to testify that, after McCafferty had turned the prisoner over to him, the prisoner told him he wanted to go back out there, and see his wife again; that he had killed her by accident. A witness for the state (Butner) testified that witness was in the police station when defendant was taking on terribly over the matter, and said that, while he killed his love, he would not have done it for the world; that it was an accident; that it looked like real grief to witness; that he went on like a crazy man, said he had lost his mind, and was going on at a terrible rate, and witness had to quiet him. Error in not allowing defendant to make a statement, after the state had closed its rebuttal testimony, defendant desiring to rebut the testimony of Hattie Hunter, under the following circumstances: The state had sworn Hodnett (the coroner), Bell, and Butner, and closed. Defendant had introduced his rebutting testimony, and made his statement, when the state introduced Betsy Bell, who corroborated Bell, and Hattie Hunter, a witness who had not been on the stand before. Her version of the conversation between defendant and deceased differed somewhat from that of Bell and his wife. She claimed that she was present, standing by the side of deceased, as close as was Betsy Bell, and that deceased told defendant: "If he asked her what the gentleman said to him about stepping on her toes, she would have told him, and he told her she was a damn liar; he knew she would take up for her men. And she said if he wanted to have a fuss about it, and she didn't care if he got killed, and he told her, if she repeated that, he would shoot her, and she told him to shoot and be damned, and he shot her,"—defendant contending that this testimony varied from that of Betsy Bell. So that, when the state closed, defendant asked permission to allow the prisoner to make an additional statement, to rebut the testimony of Hattie Hunter, both as to her being present, and as to the language used, which the court refused to allow. Movant alleges that the court erred in so doing, as this was new matter brought out by his former statement, and that he was deprived of his legal right to make a statement in regard to her testimony. It appears from the brief of the testimony: That Aleck Bell testified that he heard two shots at a

frolic where there was dancing, close to his house. That witness' wife was standing on the porch, and Mills' wife was down at the "frolic house." That witness' wife called her, and she came to witness' house, and she and his wife were standing on the porch side by side when Mills' wife called him to her. That Mills said, "What are you doing here?" That she said: "I came here from the frolic where they were fussing." And she said: "What do you want to raise a fuss for? John Holloman stepped on my toes, and begged my pardon for it." And he said: "You want to hold up for your damn men." And she said: "You go ahead then, and get in the fuss, and, if you get killed, I don't care." And he said: "If you say that again, I will shoot you." She said, "Shoot and be damned;" and he shot her. He was standing not two feet from her. He threw the pistol right into her breast, and shot her right center in the face. Witness could not say who was present; there was such a crowd, and he was excited. In answer to the question who was right at his house, he said his wife was standing right by the side of Mills' wife, and, when the latter fell, he did not know but that defendant shot his (witness') wife, as they both whirled together. Defendant did not fire but once. Witness did not say, when the pistol fired, for somebody to run for the doctor; said nothing about a doctor. Betsy Bell testified that, when Mills killed his wife, she was saying something about John stepping on her feet, and defendant did not like it, and told her, if she spoke the words again, he would shoot her about this man stepping on her feet; and she spoke, "Shoot and be damned," and, when she said that, he shot her in the breast. He just laid the pistol on her breast. He was about 15 inches from her. Error in charging: "Do not misunderstand what the court means by that. That where the state shows that a killing by unauthorized violence was done, a killing by a deadly weapon, and nothing more should appear, the law presumes malice from the mere fact of an unauthorized killing with a deadly weapon,"—alleged to be error as intimating the opinion that the killing took place by the use of a deadly weapon. The evidence was that the killing was done with a pistol, and Butner testified that it was a double-acting, self-cocking pistol. Error in charging: "To point an unloaded or a loaded pistol at another is an unlawful act, and to point a loaded pistol at another, and the pistol should be fired without any intention to kill the other, and a killing should happen in pursuance of such unlawful pointing of a pistol at another, without any intention to kill, a killing under such circumstances as that would be involuntary manslaughter, in the commission of an unlawful act; and if the jury, after investigation of the case, should conclude from the evidence beyond a reasonable doubt that the killing was done by the defendant without an intention to do so, but that it was done in the commission of an un-



lawful act, why, then, you would be authorized to find the defendant guilty of involuntary manslaughter in the commission of an unlawful act. If the killing happened in pursuance of a lawful act, if the pistol was fired without any intention to kill deceased, what he did was lawful in the matter, and it was done in such a way as probably might produce death, and it was done in an unlawful way, the law would call it involuntary manslaughter, in the commission of a lawful act; but, in determining the question as to whether the defendant is guilty of involuntary manslaughter, the jury are instructed that where, if such involuntary killing—if this was an involuntary killing—happened in the commission of an unlawful act, which in its consequence naturally tends to destroy the life of the deceased, then the offense would be by law deemed and adjudged to be murder,—alleged to be error because calculated to mislead the jury, by confounding with the commission of an unlawful act the additional idea that, if death might happen, it would be murder, without sufficiently showing to the jury the difference between an act calculated to cause death and the one that did or might cause death; also, because the charge nowhere discriminated or called the attention of the jury to any rule or method of discriminating between themselves unlawful acts that do cause death or those which in their consequences naturally tend to destroy life; also, because of the use of the expression: "But, in determining the question as to whether the defendant is guilty of involuntary manslaughter, the jury are instructed that where, if such involuntary killing—if this was involuntary killing—happened in the commission of an unlawful act, which in its consequence naturally tends to destroy the life of the deceased, then the offense would be by law deemed and adjudged murder." The court did not instruct the jury that, if the act did not naturally tend to destroy the life, the defendant, if guilty of involuntary manslaughter, could not be convicted of murder. The charge is calculated to mislead the jury, because it tells them to determine the question whether he is guilty of involuntary manslaughter, thereby leaving it probable and possible that the jury could believe that, if he was guilty of involuntary manslaughter at all, it would be murder. Error in charging: "If you believe in this case that what happened—the killing of the deceased—was by misfortune or accident, and that it satisfactorily appears from the evidence in the case that there was no evil design or intention, or no culpable neglect on the part of the defendant, and what did happen in the killing of the deceased was solely due to misfortune or accident, why, he would not be guilty of anything,"—alleged to be error because it puts the onus of proof on defendant; also, because it is not true as a matter of law that there must be no culpable

neglect on the part of the defendant, because, if that was true, the least neglect would eliminate the whole element of misfortune, and, no matter how small the neglect might be, it would be murder; nor is it true, to be not guilty of murder, he must be guiltless of all evil design, for, according to the charge, if this evil design was disconnected with the killing, and in no way contributed thereto, yet the defendant would be guilty of murder. Error in charging: "If a killing occurs by the pointing of a pistol at another and firing it, whether the intention to kill or not existed at the time, that could not be said to be a killing by misfortune or accident,"—alleged to be error, because it does not limit the firing of a pistol to an intentional firing, but is so broad that it covers accidental firing, and the defendant's defense was an accidental firing of the pistol, and this charge is so framed that the jury might have believed that an intentional pointing and an unintentional firing necessarily made murder; also, because the expression "that could not be said to be a killing by mistake or accident" is an expression by the court, and took from the jury the right to determine what was an accident, and was a judicial determination of what was not an accident. Because the court erred in not calling the attention of the jury to the facts given in evidence by defendant's witnesses, to wit, his surrendering himself to the officers, his attention to his wife after the shooting, the nature of the pistol, all of which were circumstances outside of defendant's statement, on which he is entitled to have a charge. Because the court erred in not charging that if the jury, from the evidence, had a reasonable doubt as to whether the defendant was guilty of murder or of involuntary manslaughter of either grade, the defendant was entitled to the benefit of the doubt, and could not be convicted of the greater offense, but the lesser. Because the court erred, wherever in its charge it spoke of deadly weapons, by intimating the opinion that the same was a deadly weapon, without instructing the jury to inquire from the evidence if the same was such a weapon. Error in refusing to allow defendant to prove by McCafferty that, when he turned over the prisoner to Murphy, he accompanied it with a statement to Murphy that the prisoner had told him that he had killed his wife accidentally, and how sorry he was that the pistol had gone off without his intention to fire it. Error in refusing to allow defendant to prove by Murphy that, when McCafferty turned the prisoner over to him, the prisoner stated that he had voluntarily surrendered himself because he had accidentally killed his wife.

J. L. Hardeman, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment reversed.

(94 Ga. 615)

**HOME BUILDING & LOAN ASS'N v. VAN PELT.**

(Supreme Court of Georgia. June 30, 1894.)

**BUILDING AND LOAN ASSOCIATIONS—DISSOLUTION.**

On the element of law this case is controlled by the prior decision made in the same case, and reported in 13 S. E. 574, 87 Ga. 370. Upon all the essential elements of fact, the evidence was sufficient to warrant the jury in finding that the plea of the defendant involved in the last trial was true; and the court committed no error in excluding evidence, in charging the jury, or in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Home Building & Loan Association against F. M. Van Pelt. There was verdict for defendant, and, a new trial being denied, plaintiff brings error. Affirmed.

The following is the official report:

The Home Building & Loan Association sued Van Pelt for amounts alleged to be due it for an advance made to him upon certain shares of its stock held by him, interest, and fines. The jury found for plaintiff considerably less than the sum sued for, and plaintiff moved for a new trial, one of the grounds of the motion being because the court refused to strike certain pleas of the defendant. The motion was granted. Defendant brought the case to this court, which held that the pleas should have been stricken, and that the new trial was properly granted upon the grounds mentioned in the motion therefor. The pleas were pleas of usury, and that the charter of the association was void. 79 Ga. 439, 4 S. E. 501. Van Pelt then amended his pleas, and alleged that plaintiff, on — day of —, 188—, began to issue stock to subscribers therefor, under its by-laws, in a serial form, which was limited, and not to exist and run to the full extent allowed by law or its charter, but to exist and run until such stock reached, by monthly payments of its dues, interest, and fines, its ultimate value, and its members received that amount in cash. Plaintiff, on November 26, 1888, declared, by vote of its stockholders, at a regular meeting held for that purpose, that all of said stock had reached its ultimate value, and that all of the members of plaintiff, on or before said day and year, "on the stock held by each, have reached the ultimate value of their stock," by reason of which, and in pursuance of article 3, § 2, of plaintiff's constitution and by-laws, said stock was and is canceled, a copy of said section being: "When each stockholder for each share of the stock by him or her held shall have reached the sum of \$200, or his unsatisfied obligation to that amount, his or her stock shall be cancelled, provided always that any stockholder, having obtained an advance or advances in the manner prescribed under article 10, shall be debited in his account with the premium thereon." By reason of which plaintiff was dissolved, and in said dissolution closed and

wound up all the business pertaining to the series of said stock and stockholders; and, as a part of the business of plaintiff, it, on the day and year aforesaid, sold and transferred in writing said claim held against defendant, with others of like character, and on which this suit is instituted, to A. L. Waldo, H. C. Stockdell, and Joel Hurt, without recourse, for \$750, which sum, with the proceeds of the sale of other claims of like character, before the final winding up and closing out of said series of stock, was paid in the treasury of plaintiff, and by its proper officers equally distributed and paid out to each member as part of its assets. In addition to the assets thus derived, the stockholders or members all received, in money, full or ultimate value of their stock, for which plaintiff's proper officer took receipts from each, by reason of which all of said stock became and was canceled. Since November 26, 1888, and before, plaintiff has issued no other stock or series of stock, and the stock so issued and wound up was all the stock, and the last, that was issued by plaintiff, by reason of which there are now and since November 26, 1888, [have been] no stockholders or members of plaintiff, and no officers since, "nor none existing," in plaintiff. Wherefore plaintiff is dissolved, and has no legal existence, and cannot appear in court, by its agents or attorneys, in its own right, against defendant, or for the use of Waldo, Stockdell, and Hurt, in said claim. A demurrer to this plea was sustained, exceptions which defendant had filed to an auditor's report were dismissed, and a verdict was directed against defendant. He excepted. This court held (87 Ga. 370, 13 S. E. 574) that the court erred in striking the plea; that if the facts set forth were true the association was virtually dissolved pending the suit; it not only had transferred and assigned, in writing, the subject-matter of the present action, but had virtually gone out of existence; that if it had paid off and satisfied all its stockholders, and ceased to transact business, it was incapable of further prosecuting a pending action founded upon a bond which it transferred and assigned after the action was brought; that it might admit of some question,—indeed, very considerable question,—under the authorities, whether it could proceed to recover on a cause of action after parting with title, both legal and equitable, although it had not parted with its own legal existence as well; but that the court was clear that, taking the matter of these pleas as true, the association could not prosecute this action, or any other. Afterwards, plaintiff filed an amendment to its declaration, which the court below held admitted the truth of the plea, and directed a verdict for defendant. Plaintiff excepted, and this court held at its March term, 1893 (17 S. E. 771), that it was not held in 87 Ga. 370, 13 S. E. 574, that the transfer in writing of the claim sued upon be a defense to the action, but that such transfer, in connection

with the other facts pleaded, would be a defense; that the burden of supporting the plea by evidence is upon the defendant; and that the court below erred in holding as above stated, and in directing the verdict.

Afterwards, the case being tried, there was a verdict for the defendant. Plaintiff moved for a new trial, which motion being overruled, it excepted. The motion contained the general grounds that the verdict was contrary to law and evidence. Also because the court erred in excluding the evidence of Samuel Barnett, a witness for plaintiff, that at a meeting of the directors of plaintiff held on November 26, 1888, prior to the sales at the stockholders' meeting, at which action was taken looking to the disposition of pending suits, when the question was whether the suits then pending against Van Pelt and others would abate by transferring them, he, as the solicitor, was asked by the board of directors as to the legal effect of such sale, and whether the association could continue the suits, so that the purchasers who bought such suits would have nothing to do with them, except to take the funds when the suits ended, and he advised that such a course was legal. Error in charging: "If a building and loan association sells out and assigns in writing all its claims and unpaid loans, thereby realizing a fund sufficient to raise the value of its stock to a maximum fixed by the constitution or by-laws, and with this fund, in connection with other assets, pays off and satisfies all its stockholders, and entirely ceases to transact business, it is virtually dissolved, and is incapable of further prosecuting a pending action upon a bond so transferred and assigned after the action was brought." The error in said charge being: (1) It ignored the evidence of plaintiff that on November 26, 1888, its directors passed a resolution directing the sale, among other assets, of the claims it had in the suit, and directing its attorneys to announce in the stockholders' meeting, at the time of sale, that the association would continue such suits for the benefit of the purchasers of the claims thereat, under which resolution the announcement was made by the attorney as directed, and the claims were sold; the claim of Van Pelt being sold to Stockdell, who testified that he would not have bought the same if such announcement had not been made. (2) The charge assumed that the corporation had entirely ceased to transact business, when the evidence showed that on December 12, 1888, the written transfer alluded to in the plea was made; that the directors maintained their organization, and adjourned subject to the call of the president; and that the charter would not expire until 1904. (3) The charge did not fully and fairly submit the issues between the parties on the facts proved. (4) There was no evidence on which to base the charge. Error in charging: "If you find from the evidence that the facts alleged in the plea of the defendant are true, then this corporation is unable, in law, to continue this

suit; and, if these facts alleged in that plea are true (if you believe them to be true from the evidence), this corporation cannot continue this suit, whether it desires to do so or not, and neither the board of directors nor its attorneys would be authorized to continue this suit if the corporation is dissolved, as set out in the plea, and the principles of law already given you in charge." Alleged to be error: (1) Because it ignored the evidence of plaintiff that on November 26, 1888, its directors passed a resolution directing the sale, and directing its attorney to announce as above stated, which announcement was made, and the Van Pelt claim sold to Stockdell, who testified as above stated. (2) Because the charge assumed that the corporation had entirely ceased to transact business, when the evidence showed as stated in subdivision 2 of exceptions to the charge last above. (3) Because the charge did not fully and fairly submit the issues. (4) And because there was no evidence upon which to base the charge. Error in charging: "If, however, this corporation is not dissolved, and the facts alleged in the plea are not true, if you so believe from the evidence, then this corporation could continue the suit, and it would be your duty to find in favor of the plaintiff. This presents a simple and clean-cut issue for you to determine. Has the defendant sustained the facts alleged in his plea, or has he not?" The same allegations of error are made as to this charge as to the charges above stated, except that it is not alleged that there was no evidence upon which to base it.

S. Barnett and Candler & Thomson, for plaintiff in error. John A. Wimpy, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 609)

SILVEY et al. v. PHENIX INS. CO. et al.  
EVERETT-RIDLEY-RAGAN CO. et al. v.  
SAME.

(Supreme Court of Georgia. June 30, 1894.)

TITLE OF STATUTES—AMENDMENTS—JUDGMENT  
LIENS—PRIORITY.

1. The title of the act of September 19, 1891 (Acts 1890-91, p. 74), amending section 3331 of the Code, is sufficient, and the body contains no matter different from what is expressed in the title. The law to be amended, being set out in the body of the act, though with a few words omitted therefrom, is adequately described, and the new matter which the amendment introduces is clearly and correctly set forth. None of the objections urged to the constitutionality of the act are sustainable.

2. As between attachments and an ordinary suit, the latter being commenced on the same day during which the attachments were levied, there is no fraction of a day. The date of levy and the date of commencing ordinary suit being one and the same, the two events are to be regarded as contemporaneous.

3. Where an ordinary suit is commenced, not after, but concurrently with, the levy of an attachment,—that is, on the same day,—and judgment in the former is rendered before judgment in the latter, the older judgment has priority;

and this priority is unaffected by the amending act above referred to, because consistent with its provisions.

4. For an attachment creditor to take the benefit of the said amending act, as against a judgment older than the one founded on the attachment, he must make it appear that the suit in which the elder judgment was rendered was commenced after the attachment was levied. The general rule being that the relative dates of judgments control the order and rank of their liens, the party who asserts that an exception applies in a particular instance must prove it. (Syllabus by the Court.)

Error from superior court, Henry county.

Action of interpleader by the Phenix Insurance Company and others against John Silvey & Co., the Everett-Ridley-Ragan Company, and others. From the judgment rendered, John Silvey & Co. and others and the Everett-Ridley-Ragan Company and others bring separate writs of error. Reversed in part, and affirmed in part.

The following is the official report:

This case was submitted to the judge below for decision without the intervention of a jury, upon the following agreed statement of facts: The Phenix Insurance Company insured J. W. Clark to the amount of \$2,000 on his stock of goods, store fixtures, and storeroom. On September 23, 1892, a fire occurred, causing a loss of \$1,591.56, which amount the insurance company has paid into court, less expenses of \$150. On November 21, 1892, the Everett-Ridley-Ragan Company petitioned the judge of the superior court of Henry county, of which county Clark was a resident, for an attachment against the property of Clark, under section 3297 of the Code, providing for attachment against fraudulent debtors; the petition being supported by proper affidavit and bond, and proper attachment being issued thereon for \$732.08, the attachment being made returnable to the April term, 1893, of said court. On November 22, 1892, the attachment was levied upon three parcels of land in Henry county. On November 21, 1892, the Everett-Ridley-Ragan Company, desiring to garnish certain persons not residents of Henry county, requested such judge to make out and certify a copy of the petition, affidavit, bond, and attachment, which he did on that day. Said company then delivered the certified copy to the justice of the peace of the 1026th district, G. M., Fulton county, who issued summons of garnishment against the Maddox-Rucker Banking Company, of Fulton county, and the insurance company,—a foreign corporation, with an agent in that county,—requiring answer to be made at the March term, 1893, of Fulton superior court. The summons was legally served on the Maddox-Rucker Banking Company November 22, 1892, at 9:23 o'clock a. m., and on the insurance company the same day at 9:34 o'clock a. m., and the papers properly returned to Fulton superior court on December 14, 1892. On October 31, 1893, in Henry superior court, a judgment was rendered against Clark, upon the attach-

ment proceedings, for \$732.08 principal, \$57.86 interest to judgment, and all future interest at 8 per cent., and \$13.50 costs. The judgment was a general one, and also special as to the land levied upon. On November 16, 1893, execution issued, and was on the same day entered upon the general execution docket of Henry superior court. Similar proceedings were had by M. C. & J. F. Kiser & Co., respectively, at the same times, except that the summons of garnishment was served on the Maddox-Rucker Banking Company at 9:24 o'clock a. m. November 22, 1892, and on the insurance company at 9:35 o'clock a. m. November 22, 1892. The judgment in favor of Kiser & Co., was for \$1,034.82 principal, \$163.95 interest to judgment, future interest at 8 per cent. per annum, and \$13.50 costs. On November 22, 1892, Silvey & Co. brought nine suits against Clark, upon nine promissory notes, for \$90 principal, each, in the justice court for the district of Henry county, in which Clark then resided, and on December 17, 1892, obtained judgment in each of the suits for \$90 principal, 90 cents interest, and \$2.45 costs. On December 23, 1892, executions were issued upon these judgments, which were entered upon the general execution docket of Fulton county December 24, 1892, and of Henry county December 27, 1892. On November 23, 1892, Silvey & Co. sued out, based upon these suits, before a magistrate of Fulton county, affidavits and bonds to obtain garnishment, upon which summons was regularly issued to the Maddox-Rucker Banking Company and the Phenix Insurance Company, requiring answer December 5, 1892, at the justice's court for said district. These summonses were properly served November 23, 1892, and on the same day copies of the affidavits and bonds, and entries thereon of the service of the summons, were by the magistrate transmitted to the justice court in which the original suits were brought, and the originals returned to said justice court, in Fulton county. When said summonses were served upon the insurance company, it owed Clark \$1,591.56, and the banking company at the same time owed him \$63.57. On November 26, 1892, Branan Bros. sued Clark in the same justice court of Henry county in four suits, each upon a promissory note for \$99.87 principal, and on December 17, 1892, obtained judgment in one of the suits for \$99.87 principal, 66⅔ cents interest, and \$3.25 costs; in another for \$99.87 principal, 15 cents interest, and \$2.45 costs; in another for \$99.87 principal, 22 cents interest, and \$2.45 costs; and in the other for \$99.87 principal, 45 cents interest, and \$2.45 costs. On December 23, 1892, executions were issued upon these judgments, and on the same day entered upon the general execution docket of Henry superior court. Upon a suit regularly brought to the same justice court of Henry county, Shropshire & Dodd obtained

judgment against Clark, on December 17, 1892, for \$98.24 principal and \$2.45 costs, and execution issued thereon was entered upon the general execution docket of Fulton and Henry counties. On February 24, 1893, the insurance company filed its petition for interpleader against all the parties, to have it determined upon whose claim the money due by it to Clark should be paid, and further asking for an injunction, allowance for attorney's fees, and for an order allowing the balance of the fund to be paid into court. The restraining order was granted before any judgments were obtained against the garnishees in the above proceedings, and all parties are now litigating in this interpleader suit as to whose claims should receive the money. The judge below held that the fund should be paid—First, costs; second, the judgment of Shropshire & Dodd in full; third, the balance, pro rata, upon the judgments of Silvey & Co., Kiser & Co. and Everett-Ridley-Ragan Company; and, fourth, that the judgment of Branan Bros. be postponed to all others contending for the fund.

Silvey & Co. and Branan Bros. excepted, and alleged: The judgment is contrary to law, evidence, etc., and contrary to law, in this: Their judgments are of older date than those of either Kiser & Co. or Everett-Ridley-Ragan Company, and hence have a lien upon the fund superior to the lien of Kiser & Co., and Everett-Ridley-Ragan Company. The court erred in holding that the act of September 19, 1891 (amending section 3331 of the Code so as to give the lien of an attachment priority over that of an ordinary judgment obtained on a suit filed after the levy of the attachment) is a valid act, whereas said act is unconstitutional and void, because it violates section 5070 of the Code, in that it does not distinctly describe the law to be amended, as well as the alterations to be made, and because it violates section 5067 of the Code, in that it contains matter different from what it expressed in its title.

Silvey & Co. excepted, and alleged: The court erred in ruling that the levying of said attachment by serving garnishments, and the filing of the suits upon which the judgments of Silvey & Co. issued, were concurrent acts, and for that reason the funds should be prorated as above stated; Silvey & Co. contending that, even if such levies and the bringing of said suits had both happened at the same time, still said judgments would not have been obtained upon suits filed after the levy of the attachment, and hence, by the very terms of the act of September 19, 1891, said judgments are of higher dignity than the judgments of Kiser & Co. and Everett-Ridley-Ragan Company, and under the law the funds should have first been used in paying in full the judgments of J. Silvey & Co. Because the court erred in not directing the payment in full of the

Silvey judgments, it not appearing that they had been obtained upon suits filed after the levy of the attachments; said judgments being older than the judgments of Kiser & Co. and the Everett-Ridley-Ragan Company, and the burden being therefore upon the latter to show that, in spite of the fact that their judgments were younger than the Silvey judgments, nevertheless their judgments had a superior lien, because the Silvey judgments were obtained upon suits filed after the levy of their attachment,—the evidence nowhere showing that the attachments had been levied before the suits of Silvey & Co. were brought, and the court expressly finding that such suits were not brought after the levy of the attachments. Because the court erred in holding that the filing of the suits of Silvey & Co., and the levies of the attachments were concurrent, and therefore coequal in right. If the filings and levies were so equal as to time, then the older judgments of Silvey & Co. were of prior dignity, because not founded upon suits filed after the levies.

Kiser & Co. and the Everett-Ridley-Ragan Company excepted, alleging: The court erred in adjudging that the Shropshire & Dodd judgment be paid before their attachment, because the lien acquired by the levy of the attachments was prior and superior to the lien of ordinary judgment obtained by Shropshire & Dodd, and because said finding is contrary to law, evidence, etc. The court erred in adjudging that the judgments of Silvey & Co. rank equally with the attachments, as to the balance of the fund. The whole of the fund should have been awarded the attachments, because their lien, by reason of their levy, was prior and superior to the lien of the ordinary judgments of Silvey & Co.; because said judgment is contrary to law, evidence, etc.; because the attachments were levied on November 22, 1892, by serving process of garnishment on the insurance company at 9:34 a. m. and 9:35 a. m., and the garnishments of Silvey & Co. were served upon the insurance company November 23, 1892; and because the attachments of Everett-Ridley-Ragan Company were levied at a certain hour on the same day the suits of Silvey & Co. were filed, and it was incumbent on Silvey & Co. to show whether their suits were filed before or after the levy of the attachments, and, failing in this, it being peculiarly within the knowledge and power of Silvey & Co. to prove this, the law would presume that the suits were filed after the levy of said attachments.

C. T. Roan, Rosser & Carter, and Payne & Tye, for plaintiffs in error. Glenn & Slaton, and E. J. Reagan, for defendants in error.

PER CURIAM. Judgment on the main bill of exceptions reversed in part. Judgment on the cross bill affirmed.

(44 S. C. 129)

**BUIST v. FITZSIMONS** (three cases).

(Supreme Court of South Carolina. April 16, 1895.)

**DEBT DUE BUILDING ASSOCIATION — ACTION BY RECEIVER AGAINST STOCKHOLDER—PLEADINGS —ANOTHER ACTION PENDING.**

1. In an action by the receiver of a building and loan association on a bond given by a stockholder to secure the payment of an advance of stock, the monthly payments of dues and interest not aggregating a sum equal to that named in the bond, a complaint alleging that the debtor was, at the time of the appointment of the receiver, in arrears for five monthly installments, was not subject to a general demurrer.

2. Defendant's answer in an action by a receiver of a building and loan association admitted that the bond and mortgage sued on had not been fully paid, but alleged that the debt was payable in monthly installments until the business of the association should be wound up; that the association was intended to be dissolved when its assets were sufficient to make each share of stock worth \$200; and that, since sufficient funds had been paid in to produce that result, no cause of action existed on the bond. Held subject to general demurrer.

3. The fact that a suit is pending by a stockholder of an insolvent corporation against the directors for the alleged mismanagement of corporate funds is no defense to an action by the receiver of the corporation against such stockholder on a bond and mortgage given to secure a debt due the corporation.

4. Paragraphs of an answer alleging payment of the debt sued on are not subject to general demurrer.

Appeal from common pleas circuit court of Richland county; T. B. Fraser, Judge.

Three separate actions by George Lamb Buist, as receiver of the Assistance Building & Loan Association, against C. Fitzsimons. The cases were combined and heard as one in the lower court. Judgment for plaintiff, and defendant appeals. Affirmed.

The following are the pleadings in the first case:

**Complaint.**

"The plaintiff, George Lamb Buist, as receiver of Assistance Building and Loan Association, a body corporate under the laws of said state, complaining of the above-named defendant, C. Fitzsimons, alleges:

"(1) That heretofore, to wit, on or about the 9th day of September, 1892, in a certain cause depending in the court of common pleas for Charleston county, said state, entitled 'E. M. Moreland vs. Assistance Building and Loan Association,' the plaintiff, George Lamb Buist, was duly appointed receiver of the said Assistance Building and Loan Association, and by said court authorized and empowered to take charge of all and singular the assets of said corporation, and to bring all actions of any kind and description necessary for winding up the affairs of said association, and protecting the interests of the stockholders thereof; that the said George Lamb Buist duly entered upon the discharge of his duty as such receiver, having qualified as required by said order, and ever since has been, and is now, the duly-appointed receiver

of said Assistance Building and Loan Association.

"(2) That the said Assistance Building and Loan Association is a corporation organized under the laws of this state, and was at the times hereinafter mentioned such, doing business at Charleston, in said state.

"(3) That heretofore, to wit, on or about the 23d day of January, A. D. 1889, the defendant, C. Fitzsimons, duly made, executed, and delivered his bond or obligation in writing under seal, in the full and just sum of six thousand dollars, wherein and whereby it was recited that whereas, the above-bound C. Fitzsimons, having bid in an advance of stock of three thousand dollars on fifteen shares of the said association, held by the said C. Fitzsimons as a stockholder therein, and as collateral security, has assigned to the said association the said fifteen shares, and has received for such advances, in cash, the sum of two thousand two hundred and fifty dollars, and that it is contemplated that the said association shall wind up when the funds and assets of the same have so accumulated as to enable each stockholder and member thereof, upon a fair division, to be paid or receive two hundred dollars of property or assets on each and every share held by him or her; the said bond being conditioned that if the said C. Fitzsimons, his heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the above-named Assistance Building and Loan Association, the monthly sum of thirty dollars, of which the sum of fifteen dollars per month is for subscriptions to the said shares, and the sum of fifteen dollars per month is for interest on the said sum actually paid over to said C. Fitzsimons, to be paid on or before the seventh of each and every month, until the said association shall wind up and determine, and upon such winding up or determination shall transfer and surrender the said fifteen and twenty shares to the said Association, in satisfaction of the advance aforesaid, and shall stand to and abide by the constitution, rules, and regulations of said association, then the above obligation to be void and of none effect, or else to remain in full force and virtue: provided, that this contract shall not be construed in any manner to provide for more than the highest rate of interest allowed by law for the use of any sum actually obtained from said association.

"(4) That on the 23d day of January, 1889, to secure the performance of the conditions of said bond or obligation, the defendant, C. Fitzsimons, duly made, executed, and delivered to the said Assistance Building and Loan Association a written pledge of the following securities, to wit: Fifteen shares of said Assistance Building and Loan Association stock, and twenty shares Enoree Cotton Factory stock, contained in two pieces of script of five and ten shares, respectively, numbered 167 and 191, issued in the name of

C. Fitzsimons; and delivered said securities properly indorsed to the said Assistance Building and Loan Association.

"(5) That the said C. Fitzsimons has failed to pay the monthly installments due, respectively, as follows, to wit: On the 7th day of May, 1892, known as the 'one hundred and fifth installment'; the installment due on the 7th day of June, 1892, known as the 'one hundred and sixth installment'; and the installment due on the 7th day of July, 1892, known as the 'one hundred and seventh installment'; and the installment due on the 7th day of August, 1892, known as the 'one hundred and eighth installment'; and the installment due on the 7th day of September, 1892, known as the 'one hundred and ninth installment,'—and that each and all of said monthly dues or installments have been due for more than the space of three months, and that the said C. Fitzsimons has neglected and refused to pay the same, whereby the condition of said bond has been broken; and this plaintiff, suing as receiver of said Assistance Building and Loan Association, is entitled to have a sale of said securities decreed by this honorable court, and judgment and execution for any deficiency.

"Wherefore the plaintiff demands judgment: (1) That the liability of the said defendant, C. Fitzsimons, under and by virtue of the said bond or obligation, be determined by this honorable court, and the amount thereof fixed and ascertained. (2) That upon the liability of the defendant therein being so determined and ascertained, that the property therein described be sold, and the proceeds applied—First, to the payment of the costs and expenses of these proceedings; next, to the payment of any taxes which may be liens on the said property; and then to the payment of whatever sum of money may then be due upon the said bond so held by this plaintiff. (3) That the defendant, C. Fitzsimons, may be adjudged to pay any deficiency which may exist after applying all of such sales moneys as hereinbefore prayed for, and that the plaintiff have leave to enter judgment and issue execution against the said defendant, C. Fitzsimons, therefor. (4) That the plaintiff may have such other and further relief as the nature of his case may demand and to this honorable court seem meet."

#### Answer of Defendant.

"The defendant above named, answering the complaint, herein says: First. That he admits the allegations of paragraph one of the complaint. Second. That he admits so much of the second paragraph of the complaint as alleges that the Assistance Building and Loan Association is a corporation organized under the laws of this state, but denies so much of the other allegations of said paragraph as alleges that said association was doing business after the 27th day of June, 1892. Third. That he admits the allegations of paragraphs three and four of said

complaint, except as hereinafter set forth; and defendant alleges that the twenty shares of Enoree Cotton Factory stock therein mentioned were on or about the 23d of January, 1889, pledged to said association as collateral security to the loan that day received by this defendant from said association, said loan being also secured by fifteen shares in the stock of said association; and that subsequently thereto, to wit, on or about the 1st day of June, 1891, the said association duly released said twenty shares of Enoree Cotton Factory stock, and delivered the same to this defendant, at which time the said association represented to this defendant that its funds and assets had so accumulated as to be nearly, if not quite, sufficient to enable each stockholder to receive two hundred dollars for each and every share of stock held by him or her, and the delivery of said Enoree Cotton Factory stock by the association to this defendant, as aforesaid, was in recognition of the fact that the said funds and assets of said association had so accumulated as aforesaid. Fourth. With reference to the allegations of paragraph three of the complaint, this defendant admits that he has paid no installments subsequent to April 7, 1892; but he denies that he was or is liable for the payment of any installments after said date, or that he is under any legal obligation to pay the same; and, on the contrary, he alleges that said bond has been fully paid, and its condition fully performed.

"(2) Further answering said complaint, and as a second defense thereto, defendant alleges: First. That the Assistance Building and Loan Association, having been duly organized under its charter, commenced its operations on or about the 7th day of August, 1883; that the said association was organized upon a plan which contemplated that the life of said association should not exceed one hundred and two months, at the expiration of which period each share of the capital stock should be worth two hundred dollars. Second. That the defendant herein subscribed to fifteen shares of the capital stock of said association, upon the express understanding and inducement that, at the expiration of a period not exceeding one hundred and two months from the date of organization, each share of said stock would be worth the sum of two hundred dollars; and this defendant alleges that the subscription to said stock was upon this consideration. Third. That on or about the 23d day of January, 1889, the defendant made the loan and executed the bond set out in paragraph three of the complaint, assigning to said association said fifteen shares of stock therein; that, according to the terms and conditions of the bond of the defendant, he obligated himself to pay a certain sum monthly, on or before the 7th day of each and every month until the funds and assets of the association had so accumulated as to enable each stockholder to receive two hun-



dred dollars on each and every share held by him; and this defendant alleges that he has regularly and promptly paid the said monthly sum on or before the 7th day of each and every month continuously up to and including the payment of April 7, 1892; and this defendant alleges that on April 7, 1892, the said association had been in operation for one hundred and four months, and at that time the amounts which had been paid into the treasury of said association by its members and the assets of said association were sufficient to have made each share of the stock of said association of the value of two hundred dollars, and thereupon each stockholder was entitled to have received said amount upon his stock as aforesaid; and this defendant therefore alleges that thereupon the condition of his bond became fulfilled and in all respects performed, and the said bond was thereupon null and void; and defendant alleges that he is entitled to have the said bond declared fully satisfied and delivered up for cancellation.

"(3) Further answering said complaint, and as a third defense thereto, this defendant alleges: That on or about the 7th day of April, 1892, the said association, through its officers and directors, permitted and allowed the property, moneys, and assets of the said association to be almost entirely dissipated and wasted, which said loss was caused by the mismanagement, carelessness, and negligence of its officers and directors; and this defendant further alleges that a suit has been instituted and is now pending in the court of common pleas for Charleston county, in which the plaintiff herein is plaintiff and the said directors are defendants, seeking and demanding a recovery against said defendants for the amount of the loss aforesaid, occasioned by the mismanagement, carelessness, and negligence of said directors; and this defendant further alleges that a suit is pending also in the court of common pleas for Charleston county, in which the plaintiff herein is plaintiff, against the treasurer of said association and the sureties upon his official bond, in which said suit the plaintiff is seeking to recover the sum of five thousand dollars, the amount of said bond, for an alleged breach of the condition thereof; and this defendant further alleges that, if a recovery be had in favor of the plaintiff upon said suits, there will be no deficiency in the amount of the assets of the said corporation necessary to pay each member thereof the sum of two hundred dollars for each and every share held by him or her therein; and this defendant alleges that until said suits or either of them are determined it is impossible to ascertain whether or not there will be any deficiency in the assets of said association, or whether this defendant is liable in any manner to contribute to said deficiency, or in what amount; and this defendant further alleges that he is advised that the said suits are instituted in good

faith and upon sufficient grounds, and, moreover, that the said defendant directors are, as this defendant is informed, solvent, and entirely able to respond to any judgment that may be recovered against them, and that the sureties to the said bond sued on as aforesaid are good and responsible for the amount thereof.

"(4) Further answering said complaint, and as a fourth defense thereto, this defendant alleges: That the action, in which plaintiff herein was appointed receiver, to wit, the case of E. M. Moreland against the Assistance Building and Loan Association, is now pending in the court of common pleas for Charleston county, and this defendant alleges that all the rights, liabilities, and duties of this defendant and the other stockholders as stockholders in said association can be determined in said cause and are now at issue therein; and it is submitted that plaintiff cannot maintain this action while said action is pending and the issues therein undetermined; and this defendant further alleges that, until the said issues are determined, there is no liability upon his part whatever upon his bond aforesaid, nor any liability whatsoever, as a member of said association, for any losses it may have sustained.

"(5) Further answering said complaint, and as a fifth defense thereto, this defendant alleges: That great hardships and injustice will result to this defendant and other borrowing members of said association by allowing plaintiff herein to compel further payments of monthly dues upon their said bonds to said association, or to enforce the same by the sale of securities pledged therefor, and that the same cannot be lawfully done; and this defendant alleges that to require such payment is requiring from this defendant and others the payment of a usurious rate of interest upon the several amounts borrowed by him and them, and that the same is illegal and void; and this defendant claims the benefit of all laws regulating the rate of interest upon borrowed money, and prescribing penalties for usurious charges therefor.

"Wherefore the defendant prays that the complaint be dismissed, with costs."

#### Demurrer to Answer.

"The plaintiff above named demurs to the first defense set up in the answer of the defendant above named, in paragraph 1 thereof, because it appears upon its face that the same does not state facts sufficient to constitute a defense. The plaintiff above named further demurs to the second defense, set up in paragraph 2 thereof, because it appears upon its face that the same does not state facts sufficient to constitute a defense. The plaintiff above named further demurs to the third defense set up in the answer of the defendant above named, in paragraph 3 thereof, because it appears upon its face that



the same does not state facts sufficient to constitute a defense. The plaintiff above named further demurs to the fourth defense set up in answer of the defendant above named, in paragraph 4 thereof, because it appears upon its face that the same does not state facts sufficient to constitute a defense."

Judge Fraser's Decree.

"These three actions were brought originally in Charleston county, and transferred to Richland county, in which defendant resides. They involve substantially the same questions, and were heard together at the term of the court in April, 1894. They came up on demurrers to the complaint, and then on demurrers to the answers if the demurrers to the complaint should not be sustained. I will state my conclusions very briefly. In my view of the law, a receiver may be authorized to bring any action which could have been brought by the person whose estate has been put into his custody as the hand of the court. The question then is whether this corporation could have brought this action at the time the receiver was appointed.

"1. The monthly payments, according to the condition of the bond sued on, are to continue, not until the funds accumulate up to \$200 a share, as is claimed, but 'until the association shall wind up and determine.' It is alleged in the complaint that, at the time at which the alleged default occurred, the association was 'doing business in the city of Charleston, in this state.' It seems to me that, if any allegation of the sort were necessary, this is a sufficient statement that the association had not reached the point to 'wind up and determine.'

"2. The second ground of demurrer seems to be that the defendant's liability on this bond and mortgage cannot be adjudicated in an action against himself alone, but only in some proceeding in which all of the stockholders, borrowing and nonborrowing, are parties before the court. I cannot take this view of the case. The contract sued on is one made between the association and the defendant, and as to which the association occupied the position of 'trustee of an express trust,' with whom or in whose name a contract is made for the benefit of another. Code, § 184. And it is not necessary to join 'the person for whose benefit the action is prosecuted.' If the rule contended for on the part of the defendant should be adopted, and a borrowing member, who had given his bond and mortgage to secure not only interest on the sum borrowed, but monthly payment of dues on stock which by the terms of the mortgage itself is assigned as collateral to secure the loan, could require an action to be brought against all of the stockholders, borrowers and nonborrowers, before his bond could be enforced, on his default perhaps in the first year of the life of the association, these building and loan associations would become the most unwieldily, unmanageable

concerns in our whole complex business system. It may be that some investigation of the affairs of the association will become necessary, but as to them the association and the receiver sufficiently represent the stockholders for whose benefit the contract was made.

"It is therefore ordered and adjudged that demurrers to the complaint in each of these cases be, and hereby are, overruled.

"As to the demurrers to the answers:

"1. I am to construe the pleadings 'liberally, with a view to substantial justice between the parties.' Code, § 180. I am not able to connect the allegation of payment in the first defense so closely with the statement of facts made therein as to hold that the defendant will not be allowed to show payment by other than the facts stated in this defense. It does not seem to me that these facts show payment, but defendant may be able by testimony as to other facts to show payment.

"2. The fact that defendant has made payments to the company on his stock and interest to the amount of \$200, or to any amount, is no answer to this action. This would make no allowance for ordinary business losses and other ordinary expenses. The bond in this case very carefully avoids making such payments the condition on which monthly payments were to cease.

"3. In my view, it is no defense to this action that the officers and directors have wasted the funds of the association, and are liable for a large amount, to which they are able to respond.

"4. I find that this is the proper action in which to adjudicate the rights and liability of this defendant under this bond and mortgage.

"5. The bond in this case expressly provides that no interest shall be allowed higher than that allowed by law, and it would seem that no charge of usury can be made against it. A bond which on its face bears interest at 7 per cent. will be liable to this defense if it can be shown, even by parol testimony, that, in point of fact, the interest was agreed upon at 10 per cent., or at any other unlawful rate. Defendant might be able to show that instead of \$750 only \$500 were loaned to him, etc., and that the bond does not correctly state the facts. It is important that the defendant shall have the opportunity afforded by this plea to show that there is an excess of interest not to be charged against him, even if by the saving clause the association should escape the forfeitures and penalties of the acts on the subject.

"It is therefore ordered and adjudged that the demurrers to the 1st and 5th defenses in each of these cases be overruled, and that the demurrers to the 2d, 3d, and 4th defenses in each of these cases be, and are hereby, sustained."

To this order and decree the defendant

filed the following exceptions: "(1) Because the complaint herein did not state facts sufficient to constitute a cause of action, and the circuit judge erred in overruling defendant's demurrer interposed upon that ground. (2) Because his honor erred in holding that a receiver may be authorized to bring any action which could have been brought by the person whose estate has been put into his custody as the hand of the court. (3) Because his honor erred in not holding that the monthly payments required by the bond sued on were to continue only until the funds and assets of the association accumulated up to two hundred dollars per share. (4) Because his honor erred in holding that a receiver of a building and loan association, in winding up the affairs of such association, can maintain an action upon a bond of a borrowing member for further payments before any account is taken of the assets of the association. (5) Because his honor erred in holding that defendant's liability could be determined in the form of action brought. (6) Because, in overruling the demurrer to the complaint, his honor in effect ruled that a receiver of a building and loan association winding up its affairs can enforce the bonds of borrowing members for further payments, notwithstanding the fact that the association has ceased to be in operation, and no equivalent collections can be made from nonborrowing members of said association. (7) Because his honor erred in sustaining the demurrer to the second defense in the answer herein. (8) Because his honor erred in sustaining the demurrer to the third defense in the answer herein. (9) Because his honor erred in sustaining the demurrer to the fourth defense in the answer herein."

The plaintiff also appealed from so much of the order and decree as overruled his demurrer to the first defense set up in the answer of the defendant, and filed the following exceptions: "(1) Because his honor erred in holding that allegations contained in the first defense set up in the answer of the defendant state facts sufficient to constitute a defense of said action. (2) Because his honor erred in overruling plaintiff's demurrer to the first defense set up in the answer of the defendant."

Abney & Thomas, for appellant. Mordecai & Gadsden, for respondent.

GARY, J. These three actions were originally brought in Charleston county, on January 21, 1893, and by an order of the court were transferred to Richland county, where the defendant resides. They involve substantially the same questions. The pleadings in the one case only are set forth. The pleadings in the other two cases raise the same questions, the difference being that the amounts named in the several bonds, the dates thereof, and the number of shares of stock alleged to have been assigned, are not

the same. The cases came on to be heard before his honor, Judge Fraser, at the spring term, 1894, of the court of common pleas for Richland county, and the three cases were heard together. They were heard upon oral demurrers to the complaint, on the ground that they did not state facts sufficient to constitute a cause of action; and then on written demurrers to the answers, in the case the demurrer to the complaint should not be sustained. The complaint, answer, demurrer to answer, Judge Fraser's decree, exceptions of the plaintiff and defendant, will be incorporated in the report of the case.

We will first consider the defendant's exceptions, which complain of error on the part of the circuit judge in overruling the demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. This case is different from that of *Bulst v. Bryan* (lately decided by this court) 21 S. E. 537, in the important particular that in that case it appeared upon the face of the complaint that the bond and mortgage therein set forth had been paid, while no such fact appears upon the face of the complaint in this case. The complaint shows that the receiver was appointed on the 9th of September, 1892, and that at the time the receiver was appointed the defendant was in arrears for the monthly installments due, respectively, as follows, to wit, On the 7th of May, 1892; 7th June, 1892; 7th July, 1892; 7th August, 1892; and 7th September, 1892. Under the terms of the bond and mortgage set forth in the capital complaint, the said monthly installments were due and payable at the time the receiver was appointed, and this alone presents sufficient ground for refusing to sustain the demurrer. We are not content, however, to rest our decision on that ground alone. Although, ordinarily, an action could not have been brought against the defendant until the contingencies set forth in his bond and mortgage had happened, yet, when the association became insolvent, and the court undertook to wind up its affairs by placing them in the hand of a receiver, and authorized him to bring such action, the complaint is not subject to a demurrer because the original designs of the association and its contracts with the defendant have not been carried out. The presiding judge therefore properly overruled the demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

We will next consider defendant's exceptions based upon the order of his honor, the presiding judge, sustaining the demurrer to the second, third, and fourth defenses set forth in his answer. The defendant in his second defense, in substance, contends that although the monthly installments which he himself paid up to and including the 7th April, 1892, were not sufficient in amount to satisfy the bond and mortgage sued on, yet at that time the amounts which had been paid into the

treasury of the association by its members and the assets of said association were sufficient to have made each share of the stock of said association of the value of \$200, and thereupon each stockholder was entitled to have received said amount upon each share of his stock, and that thereupon the condition of his bond became fulfilled and in all respects performed; that the bond was thereupon null and void; and that he is entitled to have it declared fully satisfied, and delivered up for cancellation. We do not think the citation of authorities is necessary to show that this position is untenable, and the circuit judge was correct in sustaining the demurrer to this defense. We also are of opinion that the circuit judge was correct in sustaining the demurrer to the third and fourth defenses. The liability of the defendant under his bond and mortgage is for a fixed and definite amount, is distinct from and in no way dependent upon the liability of the other persons mentioned in the answer. All the rights of the defendant as a stockholder can be determined in the pending action mentioned in the fourth defense.

We come now to a consideration of plaintiff's exceptions, which allege that the presiding judge committed error in overruling plaintiff's demurrer to the first defense set up in the answer, and in holding that the allegations contained therein are sufficient to constitute a defense. The said defense sets up the plea of payment, and his honor, the presiding judge, would have erred in sustaining plaintiff's demurrer to it.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(44 S. C. 143)

### BUIST v. SALVO.

(Supreme Court of South Carolina. April 16, 1895.)

#### PLEADING—DEMURRER TO PART OF DEFENSE.

Where plaintiff desires to demur to certain defenses set up in the answer which are not separately stated, he may make a motion to have the pleading made more certain, and then move that the irrelevant portions be stricken out, as provided by Code, § 181, but he cannot demur to a part of a defense.

Appeal from common pleas circuit court of Charleston county; James Aldrich, Judge.

Action by George Lamb Buist, as receiver of Assistance Building & Loan Association, against Anna M. Salvo. From an order sustaining demurrer to certain paragraphs of the answer, defendant appeals. Reversed.

Fitzsimons & Moffett and H. E. Young, for appellant. Mordecai & Gadsden, for respondent.

GARY, J. The only question involved in this case which is not disposed of by the decision of this court just filed in the case

of Buist v. Fitzsimons, 21 S. E. 610, is whether or not the presiding judge erred in sustaining the demurrer to paragraphs 12 and 13 of defendant's answer. The following is the order of the circuit judge: "The complaint having been read, the defendant interposed an oral demurrer thereto, upon the ground that it did not state facts sufficient to constitute a cause of action. After hearing the argument, it is ordered that the said demurrer be, and is hereby, overruled." "This case thereafter came on to be heard upon the complaint, answer of defendant, and the demurrer of plaintiff to such answer. After hearing argument of counsel, it is ordered that the demurrer to said answer be, and is hereby, sustained in so far as same applies to the allegations contained in the twelfth and thirteenth paragraphs of said answer, and said paragraphs are hereby stricken out, the court being of the opinion that neither of said paragraphs, considered either separately or together, states facts sufficient to constitute a defense, and, so far as the demurrer to the other paragraphs of the answer is concerned, such demurrer is hereby overruled. After the presiding judge had given his decision orally, as herein set forth, counsel for the plaintiff asked leave to withdraw their demurrer to all the paragraphs of said answer, except paragraphs 12 and 13, which leave was thereupon given, and is hereby granted. March 23, 1893. James Aldrich, Presiding Judge."

Section 186 of the Code provides that a demurrer may be taken to the whole complaint or to any of the alleged causes of action stated therein; but it is nowhere provided that a demurrer may be interposed to a part of a cause of action. The same principle applies when the demurrer is to a defense. If the plaintiff desired to demur to certain defenses set up in the answer, and they were not separately stated, he should have made a motion to have the pleading made more definite and certain, and, when this was done, should have made a motion to strike such paragraphs or portions thereof as were irrelevant, as provided by section 181 of the Code, which is as follows: "If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." A demurrer cannot be sustained which is good only as to certain paragraphs of a defense.

It is the judgment of this court that the order of the circuit court be modified in accordance with these views, viz. that the order sustaining the demurrer to paragraphs 12 and 13 of the answer be reversed.

(44 S. C. 174)

**WILLIAMS v. McLENDON, Sheriff.**

(Supreme Court of South Carolina. April 15, 1895.)

**SHERIFF'S FEES—SALE OF LAND.**

Rev. St. § 2561, providing that the sheriff shall be paid "for selling land \* \* \* under decree of court, in lieu of commission and all other charges except for advertising, two dollars," applies only to cases where the sheriff merely acts as auctioneer; and, in case land is sold, and the proceeds collected by the sheriff, his fees are regulated by Rev. St. § 746.

Appeal from common pleas circuit court of Florence county; J. J. Norton, Judge.

Rule to show cause, in an action by John Kuker against W. M. Perry and others, issued on relation of George W. Williams against R. McLendon, sheriff, to compel the sheriff to execute to relator a deed to land officially sold to him. There was a judgment for relator, and the sheriff appeals. Reversed.

P. A. Willcox, for appellant. McNeill & Hursey, for respondent.

POPE, J. The title given to the appeal is misleading. There was no action between these parties. It seems that under the decree of his honor, Judge Izlar, in the action of John Kuker as plaintiff against W. M. Perry et al. as defendants, R. McLendon, as sheriff of Florence county, in this state, sold a tract of land which was purchased by George W. Williams at the price of \$500. When the said Williams applied to the said McLendon as sheriff for the execution of the title to him for such tract of land, the said McLendon declined to do so, unless he would first pay his bill of costs of \$13.25. To this payment Williams demurred, unless the sum of \$6.25 for commissions were stricken therefrom, tendering his costs, less this last-named sum. McLendon, as sheriff, stood upon his rights, demanding his entire bill of costs. Thereupon, in the action aforesaid of Kuker v. W. M. Perry et al., a rule was issued against such McLendon, as sheriff, requiring him to show cause why he refused to make the title to Williams. His return to the rule set up his rights to these commissions. After a hearing was had, Judge Norton passed an order making the rule absolute denying these commissions to the said sheriff. From this order the said McLendon, as sheriff, now appeals to this court upon the single ground that it was error of law for the circuit judge to deny these commissions to the said sheriff.

There is no question that under the repeated adjudications of this court, when one asserts his right to costs, he must, in order to establish such claim, refer to a statutory provision setting up such claim. The appellant recognizes this rule in its fullest extent, and alleges that under section 746 of our Revised Statutes he bases his claim. This section reads as follows: "All judicial sales shall be made by the sheriff, unless otherwise provided by law. In all such sales made by

him his fees shall be the same as allowed by law on sales under execution. \* \* \*

The commissions embraced in the bill of costs tendered to Williams, the purchaser, were intended to be such fees as allowed by law to the sheriff on sales under execution. The respondent, however, refers to section 2561 of our civil statute laws, which provides: Sheriff shall be paid " \* \* \* for selling land" "under decree of court, in lieu of commissions and all other charges, except for advertising, two dollars. \* \* \*

The history of this section 2561 seems to be about this: In 1870 (see 14 St. at Large, 324) the sheriff was required to make all sales of real and personal property ordered to be sold by the courts of common pleas and courts of probate, with the same fees therefor as were allowed under execution, and in 1878 (see 16 St. at Large, 629) this was so altered that for sales of land under the decree of probate court the sheriff, for selling land, was allowed two dollars in lieu of commissions and all other charges except for advertising. But in 1880 (see 17 St. at Large, 300) the word "probate" was stricken out, and sheriffs were required to accept two dollars for a sale of land under the decree of any court in lieu of all commissions and other charges except for advertising. The provisions of both the act of 1870 and that of 1880, supra, were retained in the act of legislature known as the "General Statutes," passed in 1882. In 1891 (see 20 St. at Large, 1250) the legislature provided that sheriffs of Lancaster, Georgetown, Charleston, Chester, Beaufort, and Lexington counties shall be entitled to charge and receive the same commissions on moneys received and paid out arising from sales of property under a decree of the court as are now allowed the clerks of court in similar cases. The provisions of these acts above referred to are incorporated in the Revised Statutes of 1893 at sections 746 and 2561 thereof. It is contended that there is an incompatibility between these sections, viz. that provision of section 746 which allows the sheriff the same fees for selling land under the decree of court as are provided when he sells property under the usual execution against property on the one hand, and that which restricts his fees for such sales to two dollars under section 2561. One of the principles governing courts in the construction of apparently divergent statutes seeming to relate to the same subject-matter, and of the same date, is to first seek a construction that will give them both effect if such course can be consistently taken. With this principle in view, an examination of these statutes will show that the latter act (section 2561) relates to the selling of land by the sheriff, as an auctioneer under a decree of court, and for this service his fee is restricted to two dollars. But when the sheriff, under a decree of the court, both sells the land and then receives or collects

the proceeds of such sale, this section (2561) does not provide the fees for such joint act, but section 746 is intended to supply the compensation for such services. It seems to us, therefore, that the circuit judge was in error, and the sheriff is entitled to his fees here contested. It is the judgment of this court that the judgment of the circuit court be reversed, and the cause is remanded to the circuit court, where the rule prayed for by the relator shall be discharged.

(44 S. C. 1)

## WILLIS v. TOZER.

(Supreme Court of South Carolina. April 15, 1895.)

**ACTION AGAINST ADMINISTRATOR — JUDGMENT QUANDO ACCIDERINT — EFFECT — AMENDMENT OF COMPLAINT — APPLICATION OF ASSETS OF ESTATE.**

1. Where a judgment quando acciderint was rendered against an administrator who had pleaded plene administravit, an action of debt on such judgment may be maintained against him personally for assets subsequently coming into his hands.

2. Where there is nothing in a complaint to show plaintiff's right to sue in a representative capacity, the words "as executor," in the caption, are mere surplusage, and may be stricken out by amendment at any time.

3. Where, in an action against an administrator on a judgment quando acciderint, a demurrer to the complaint was sustained, because it failed to allege that the assets subsequently received by defendant were applicable to the payment of such judgment, and that defendant had wasted and misappropriated the same, it was not error to allow plaintiff to amend.

4. Where the court failed to decide a motion to dismiss the complaint, an exception that the court erred "in refusing" to grant such motion presents nothing for review on appeal.

5. An answer of an administrator, containing a plea of plene administravit, must be accompanied by a full and particular account of his administration, with a certified copy of the inventory and appraisement.

6. A judgment is conclusive between the parties, not only as to matters actually decided, but also as to those necessarily involved in its rendition.

7. In an action against an administrator, a judgment quando acciderint is prima facie an adjudication that there are no debts known to the administrator which would take precedence of plaintiff's claim, and that assets subsequently coming into possession of the estate will be prima facie applicable to plaintiff's judgment.

8. In an action against an administrator on a judgment quando acciderint, averments in the complaint that defendant has received assets, and has failed and refused to apply them to the judgment, and has wasted and misappropriated the same, are allegations of fact, not conclusions of law.

9. An allegation in the complaint that defendant is a duly appointed and qualified administrator of intestate, is sufficient, where no exception is taken other than by oral demurrer at the trial.

10. Where a complaint has been amended, and a new answer filed, the original answer may be introduced by plaintiff as prima facie evidence of the facts admitted therein.

11. Where an administrator has pleaded plene administravit, and suffered a judgment quando acciderint in his representative capacity, he will be estopped from claiming, in his answer to an action on such judgment, that assets subsequent-

ly received by him are applicable to any other purpose.

Appeal from common pleas circuit court of Richland county; James Aldrich, Judge.

Action by Ariana I. Willis, as executrix of the estate of George L. Dial, deceased, against Mary A. Tozer, for the recovery of money. From a judgment for plaintiff, defendant appeals. Affirmed.

The order of Judge Fraser, referred to in the opinion, was as follows:

"This case came before me at the spring term of the court held in April, 1894, on an oral demurrer. If the amended complaint does not conform to the order of Judge Gary, giving leave to amend, a demurrer is not the mode by which the error may be corrected. There may, perhaps, have been a motion to set aside the amended complaint as not in conformity to the order, and it might have prevailed, whether it was or was not sufficient on demurrer. In the amended complaint we have the following allegations: (1) There was a former action against the defendant as administratrix, in which she pleaded plene administravit. (2) That on this plea there was judgment in her favor, and a judgment against her for \$633.08, as administratrix, quando acciderint. (3) That since the rendition of this judgment she has received for the estate of her intestate the sum of \$1,060.02. (4) That execution has been issued on the said judgment, and that the sheriff made a return of nulla bona thereto. (5) That the said sum of \$1,060.02 is applicable to the plaintiff's judgment and execution. (6) That the defendant has failed and refused so to apply the same, but has wasted and misappropriated the same. I do not think it important to enter into a review of the authorities on the subject. Chit. Pl. p. 361; Williams, Ex'rs, p. 1391. I am not prepared to say that there are no circumstances under which an administrator, situated as the defendant is in this case, would not be held liable to pay the plaintiff's judgment out of his own estate, because he has received an amount equal to it since the former judgment quando was rendered. Take a case in which the assets which came to the hands of the administratrix after the judgment quando are destroyed by the act of God or of the public enemy, or, again, where there was such a wholesale destruction of values by the termination of the late Civil War; and other cases might suggest themselves. These, however, would be matters to be set up in the answer. I think that the judgment in the former case is at least prima facie an adjudication that there are, or were at the rendition thereof, no debts or other obligations of which the administratrix had notice, which would take precedence of plaintiff's debt in administration of future assets. On the coming into possession of such assets, they are prima facie applicable to plaintiff's judgment, and remain so until the contrary is pleaded and shown. It is therefore ordered and adjudged

that the demurrer be overruled, and that the defendant have leave to answer within twenty days, if she has not already done so."

The defendant excepted to the order of Judge Fraser refusing to dismiss the complaint, and to the order of Judge Aldrich refusing the motion for nonsuit, and to the further rulings and the charge of his honor, Judge Aldrich, upon the following grounds:

"(1) For that his honor, Judge Fraser, erred in refusing to grant the motion of the defendant to dismiss the complaint, made on the ground that the order of Judge Gary, directing the said complaint to be amended, had not been complied with.

"(2) For that his honor, Judge Fraser, erred in holding that 'the judgment quando in the former action was prima facie an adjudication that there are, or were at the rendition thereof, no debts or other obligations of which the administratrix had notice which would take precedence of the plaintiff's debt in administration of future assets, and that on the coming into the possession of such assets they are prima facie applicable to plaintiff's judgment, and remain so until the contrary is pleaded and shown.'

"(3) For that his honor, Judge Fraser, erred in holding upon demurrer that the amended complaint stated a cause of action, whereas his honor should have dismissed the amended complaint on the ground that there were no allegations of fact to show that the assets alleged to have been received by the defendant were applicable to the plaintiff's judgment, and that the said defendant had wasted and misappropriated the said assets.

"(4) For that his honor, Judge Aldrich, erred in holding that the pleadings did not deny and put in issue the appointment of the plaintiff as executrix of the will of George L. Dial.

"(5) For that his honor, Judge Aldrich, erred in admitting in evidence the original answer of the defendant to prove assets received by the defendant, whereas his honor should have held that the complaint and answer having been amended under the order of the court, and the original answer not being verified, and no evidence being offered to show that the said answer had been brought to the attention of the defendant, the same was incompetent as evidence for the purpose indicated, and could not be used as an admission of the defendant.

"(6) For that his honor, Judge Aldrich, erred in refusing defendant's motion for a nonsuit, whereas his honor should have granted the said motion, on the grounds: (a) Because there was a total failure of evidence to show that a judgment had been obtained by the plaintiff against the defendant in her representative capacity in a prior action, wherein the defendant, by plea, confession, or default, admitted assets, or the said defendant had been found to have assets by the verdict of a jury on and against

the plea of plene administravit generally or praeter; but, if it should be held that the action could be maintained upon a judgment quando, then, (b) because there was a total failure of evidence to show that any assets had been received by the defendant which were applicable to the payment of the judgment quando in evidence; (c) because there was a total failure of evidence to show that the defendant had wasted and misappropriated the said assets; and (d) because the plaintiff having introduced the original answer of the defendant in evidence to show that certain assets had been received by the defendant, and such admission being in the same paragraph and in the same sentence qualified and avoided by the averment that the assets received had been duly administered and paid out according to law, and that the said defendant had not in her hands any assets applicable to the claim of plaintiff, such statement should be taken as a whole, and the plaintiff thereby established conclusively the defense interposed by the answer; and the defendant is, therefore, entitled to a judgment of nonsuit.

"(7) Because his honor, Judge Aldrich, erred in refusing to allow the defendant to answer the following questions, and in ruling the same to be incompetent and irrelevant: (a) In the administration of the estate of your husband, have you ever paid any debts due by the estate? (b) Mrs. Tozer, have you, in the administration of your husband's estate, paid out any funds, any assets that came into your hands, or from your own money, debts of the estate, for attorney's fees or for the administration of the estate? (c) Have you advanced any money; if so, how much? (d) Have you paid any money out of your own pocket, out of your own funds, for any debts of the estate? (e) Have you, since the decree in the former case, paid out of the money received by you on account of this legacy left to your husband by John C. Dial any of the debts incurred by you as administratrix in the administration of that estate? (f) Have you paid out any money out of that money received by you for attorney's fees incurred by you in carrying on and in protecting the estate that you are administratrix of? (g) Have you paid out of that money received by you on account of that legacy any debts due by the said estate to the state, such as taxes?

"(8) For that his honor, Judge Aldrich, erred in holding that, the defendant having pleaded plene administravit, and suffered judgment quando acciderint to be taken against her in her representative capacity in the former action, she thereby admitted that any assets received after the said judgment would be liable for its payment, and was thereby estopped from saying that such assets, when received, were applied to any other purpose than to the payment of the said judgment, and in thereby holding the said judgment to be a lien on the said assets in

priority over any and all other debts or liabilities of the estate of her said intestate, as well as in priority of her claim to be reimbursed for the necessary expenses of administration made by the said defendant individually, and in anticipation of assets.

"(9) For that his honor, Judge Aldrich, erred in refusing to allow the defendant to amend the second paragraph of her answer to the amended complaint so as to read that after the receipt of the said sum of six hundred and sixty-five and 55-100 dollars, the defendant paid out said money for attorney's fees, and in the due administration of the estate.

"(10) For that his honor, Judge Aldrich, erred in holding that the record in the case of Ariana I. Dial, as executrix of the will of George L. Dial, deceased, against Mary A. Tozer individually and as administratrix of the estate of Richard Tozer, deceased, and others, introduced by the defendant to sustain her plea of another action pending, did not sustain the said plea; and in holding that, though the parties to the suit now pending were made parties to the former suit, they were made parties on a different character, and wholly separate and distinct, and for other purposes, and that, therefore, the said plea in abatement was gone; and in holding further that, in order to sustain the said plea in abatement, the parties plaintiff must be the same, and that in these cases the parties plaintiff were not the same; whereas his honor should have held that the said record showed that the parties in the said causes were substantially the same, and that the same subject-matter was involved in both causes, and that the said plea in abatement was therefore good.

"(11) For that his honor, Judge Aldrich, erred in holding that, although due advertisement was made by the defendant, as administratrix of Richard Tozer, calling upon all and singular the creditors of the estate of the said Tozer to present and prove their claims against the said estate, and that although the said bond of Frances Arnold—upon which the judgment quando forming the basis of this action was afterwards obtained—was not presented to the defendant within the time limited by law after the said advertisement, and although this defendant had no notice thereof until on or about the 1st day of December, 1886, this defendant, having failed to set these facts up as a defense to the former action, was estopped from availing herself of them as a defense to this action.

"(12) For that his honor, Judge Aldrich, erred in charging the jury that 'the judgment of the court meant [that is to say, the judgment quando acciderint, which forms the basis of this action] that she didn't have the money then as administratrix, but that out of the assets which might afterwards come into her hands she must pay it.'

"(13) Because his honor, Judge Aldrich,

erred in charging the jury as follows: 'If you are satisfied that she [meaning the defendant] received the money to the extent asked for in the complaint, and failed to pay it on the judgment of the plaintiff, they are entitled to a judgment. In her answer she admits having received the money, and sets up the plea that she applied it to other purposes, which purposes I have had to hold were not justifiable. She had no right to pay it, and the question, therefore, is, is she indebted to the amount? Did she receive the money, and fail to apply it to the judgment? If she did, your judgment must be for the plaintiff.'

"(14) For that his honor, Judge Aldrich, erred in holding that the original answer of the defendant was evidence to show that the defendant had wasted and misappropriated the assets alleged to have been received."

Melton & Melton, for appellant. Lyles & Muller, for respondent.

GARY, J. On the 10th of January, 1887, Frances Arnold instituted an action in the court of common pleas for Richland county against the defendant as administratrix of the estate of Richard Tozer, to foreclose a mortgage on certain real estate in the city of Columbia. The defendant pleaded plene administravit, complying with rule 21 of the circuit court by filing a sworn copy of her inventory and appraisement, and by giving a statement of her administration as follows: "That no goods or chattels, rights or credits, which were of the said Richard Tozer at the time of his death, have come into her hands as administratrix to be by her administered, except certain personal property, that is to say, \* \* \* which said property, now in the possession of this defendant, was duly appraised, according to law, at the sum of \$195, and that she has paid out the sum of \$200.09 on account of the expenses of the last illness and of the funeral of her said intestate, and for fees of administration; and this defendant files herewith a copy of the inventory and appraisement of the estate of her said intestate. Wherefore this defendant prays that whatever judgment be given against her in the premises may be made subject to this, her defense, that she has fully administered all the goods and chattels, rights and credits, of her intestate, which have come into her hands as administratrix to be administered by her." That action resulted, on the 8th of May, 1888, in a judgment in favor of the plaintiff, Frances Arnold, against the defendant, as administratrix, for \$633.08. The decree in that case provided: "That if the proceeds of the sale be insufficient to pay the amount adjudged to be due to the plaintiff, with interest and costs, as aforesaid, the master shall specify the amount of such deficiency, and that the defendant, Mary A. Tozer, as administratrix as aforesaid, do pay the same to the plain-

tiff, the said Frances Arnold, with interest from the date of such report, out of any assets that may come into her hands to be administered, other than such as are specified in her answer herein, and that said plaintiff have execution therefor." The land was sold, and the master reported a deficiency of \$633.08. A judgment was thereupon entered by said Frances Arnold in conformity to said decree against the said administratrix. She subsequently received \$666.55, whereupon execution was issued upon the aforesaid judgment, which had in the meantime been assigned to the plaintiff in the present action, but, the defendant refusing to apply money to the execution, a nulla bona return was made thereon, and this action commenced on the 4th day of September, 1892.

The defendant, in her answer, admitted the receipt of the assets, but pleaded: "That at divers times during her administration of the said estate, without knowledge and notice of the indebtedness to the said Frances Arnold, as set forth in the complaint herein, and prior to the commencement of the action upon the bond and mortgage of the said Frances Arnold, the defendant, in anticipation of receiving the said legacy, advanced and paid out of her own moneys certain debts of the estate of the said Richard Tozer, and certain expenses of administration, including fees for professional services of her attorneys in and about her defense to the action pending against her as said administratrix, as hereinafter set forth, for which she asks to be reimbursed out of the assets hereinafter acknowledged to have been received by her, which said debts and expenses of administration amount in the aggregate to the sum of \$1,667.70; and the defendant further avers that at the time of the issuing of the execution set out in the sixth paragraph of the complaint she did not have, and has not now, in her hands, to be administered, any assets of the estate of her said intestate." The defendant, in her answer, also alleges that over and above the amount for which the plaintiff herein demands judgment against the defendant there are due and outstanding against the estate of the defendant's intestate, of equal rank with the judgment held by the plaintiff, claims in various sums, amounting in the aggregate to the sum of \$220. The cause came on to be tried upon the pleadings at the summer term, 1893, of the court of common pleas for Richland county, his honor, Judge Ernest Gary, presiding. Upon the reading of the complaint, the defendant interposed a motion to dismiss the complaint, by way of oral demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action (1) because it contained no allegation that a judgment had been obtained by the plaintiff against the defendant in her representative capacity in a prior action, wherein the said defendant, by plea, confession, or default, admitted assets, or the said defendant had been found to have assets by

the verdict of a jury on and against the plea of plene administravit generally or praeter; (2) if it should be held that the action would lie on a judgment quando acciderint, because the complaint contained no allegation of fact to the effect that the funds alleged to have been received by the defendant as administratrix were applicable to the payment of such judgment, and that the said defendant had wasted and misappropriated the said assets; and (3) because, while it appeared in the caption of the complaint that the plaintiff was suing in her representative capacity as executrix, there were no allegations of fact in the body of the complaint showing her right so to sue. On this motion his honor, Judge Gary, reciting the points as above set forth, made and entered the following order: "I am of the opinion that the first and third grounds are not well taken, but that the demurrer ought to be sustained on the second ground. It is therefore ordered that the demurrer be sustained on the ground specified, but that the plaintiff have leave to amend her complaint, and that the defendant have twenty days in which to answer the amended complaint to be served upon her." To this order the defendant duly filed the following exceptions:

(1) "For that his honor erred in not sustaining the motion by way of oral demurrer interposed by the defendant on the ground that the action of debt on a judgment suggesting a devastavit against an administrator individually will not lie in a case where, in the former action, there has been no admission or confession of assets, or assets found by the verdict of a jury on and against the plea of plene administravit generally or praeter, and in holding that the said ground was not well taken." The appellant contends (to use the language of her attorneys) that "It is well settled in the state that an action of debt on a judgment suggesting devastavit will not lie on a judgment quando acciderint, but only when a judgment has been obtained against an administrator in his representative capacity, in which he admits assets by plea, confession, or default, or found by the verdict of a jury on and against the plea of plene administravit generally or praeter." To support this position the appellant's attorneys rely upon the case of *Brown v. Hillegas*, 2 Hill (S. C.) \*447, in which Judge O'Neill, delivering the opinion of the court, says: "In *Jones v. Anderson*, 4 McCord, 118, Judge Colcock, who delivered the opinion, cites with approbation the remarks of the court of appeals of Virginia, which said that 'a suggestion of a devastavit may be likened to a criminal prosecution, and an executor shall not be presumed guilty of a devastavit until it is found against him by verdict.' I concur fully in this dictum. An executor or administrator is not to be made liable de bonis propriis until his devastavit is legally and firmly established. In this state this can only be done by establishing—First, his testator's



debt by matter of record (i. e. a judgment recovered de bonis testatoris against the executor or administrator); second, assets admitted by the defendant's plea, confession, or default, or found by the verdict of a jury on and against the plea of plene administravit generally or praeter; and, third, that the defendant has wasted such assets. These are facts which, although they may be proved by matter of record, must be found against the defendant by the verdict of a jury, before judgment and execution can go against him de bonis propriis." They also rely upon the case of *Ford v. Rouse*, Rice, 219, in which the court, after quoting the doctrine laid down in *Brown v. Hillegas*, says: "Under these rules it is plain to be seen that the defendant is not in any danger of a personal liability in an action of debt suggesting devastavit." Also upon the case of *Spoon v. Smith*, 38 S. C. 588, 15 S. E. 800, in which Mr. Justice Pope, as the organ of the court, says: "It is, no doubt, true, as a general proposition, that the plea of plene administravit, set up by a personal representative of a deceased debtor, in a suit by a creditor of such deceased debtor, when accepted as true, or established to be true, in such a suit, restricts such suing creditor to a judgment quando acciderint, thereby releasing the representative from all liability for assets of the deceased debtor that came into the personal representative's hands up to the date of the judgment, thereby rendering such personal representative liable for such assets of the deceased debtor as should or may come into his hands after such judgment. *Rosborough v. Mills*, 35 S. C. 578, 15 S. E. 281." An examination of the cases of *Brown v. Hillegas* and *Ford v. Rouse*, supra, will show that the principles therein stated have no application to a case like this; in fact, there is not a single circumstance in either of those cases calling forth the doctrine applicable to the present case. The case of *Spoon v. Smith*, instead of sustaining appellant's position, is authority against it, because it shows that, although the personal representative is not liable under a judgment quando acciderint for assets that come into his hands up to the date of the judgment, he is "liable for such assets of the deceased debtor as should or may come into his hands after such judgment." The practice followed by the plaintiff herein was adopted in the cases of *McDowell v. Branham*, 2 Nott & McC. 572, and *Summers v. Tildmore*, 1 McCord, 270, and no objection was made to the proceedings on the ground mentioned herein, although they were dismissed on other grounds. It is also sustained by *Williams on Executors* (volume 2, p. \*1705), where the author says: "If a judgment of assets quando acciderint has been entered against an executor or administrator, the plaintiff cannot have execution until some assets come into the hands of the defendant, when the plaintiff may bring an action of debt upon the judg-

ment," etc. A conclusive answer to the position of the appellant, it seems to us, is that when the personal representative is sued in an action of debt upon the judgment quando acciderint suggesting a devastavit, the defendant can then have the issue of fact as to a devastavit tried by a jury; and not until this is found against him, and judgment entered, is he liable de bonis propriis. Any other course than that pursued by the plaintiff herein would cause a multiplicity of suits, which the Code abhors. This exception is overruled.

(2) "For that his honor erred in not sustaining the demurrer made, upon the ground that, while it appears in the caption of the complaint that the plaintiff is suing in her representative capacity as executrix, there are no allegations of fact in the body of the complaint to show her right so to sue, and in holding that the said ground was not well taken." This exception cannot be sustained, because the words "as executrix," in the caption of the complaint, were merely surplusage, immaterial, and can be struck out by amendment at any time. *Carroll v. Tompkins*, 14 S. C. 223. See, also, *Mickle v. Construction Co. (S. C.)* 19 S. E. 725.

(3) "For that his honor erred in not sustaining the demurrer on one or both of the said grounds, and in granting the plaintiff leave to amend her complaint; whereas his honor should have sustained the demurrer on one or both of the said grounds, and dismissed the complaint." The amendment was in accordance with the liberal spirit of the Code, and was properly allowed. This exception is therefore overruled.

In pursuance of the order of Judge Gary, the plaintiff amended her complaint by inserting at the end of paragraph 8 of the original complaint the additional words: "Which said sum is applicable to the payment of the judgment above alleged, all of which amount the defendant has failed and refused to apply to said judgment, but has wasted and misappropriated." The cause came on to be tried on the amended pleadings at the spring term, 1894, of the said court, his honor, Judge Fraser, presiding. Upon the reading of the amended complaint, the defendant interposed a motion to dismiss the complaint on the ground that the order of Judge Gary had not been complied with, the amendment inserted by the plaintiff being conclusions of law, and that there were in the complaint as amended no allegations of fact to the effect that the assets alleged to have been received by the defendant, as administratrix, were applicable to the payment of the judgment forming the basis of the plaintiff's action, and no allegations of fact to the effect that the defendant had wasted and misappropriated the said assets, as required by the said order; and the defendant also interposed a motion by way of oral demurrer to the said

amended complaint, for the reason that it did not state facts sufficient to constitute a cause of action. His honor, Judge Fraser, reserving his opinion at the time, entered an order of continuance, and thereafter filed the order which will be incorporated in the report of the case.

The first exception to the order of Judge Fraser is as follows: "For that his honor, Judge Fraser, erred in refusing to grant the motion of the defendant to dismiss the complaint made on the ground that the order of Judge Gary directing the said complaint to be commenced had not been complied with." It cannot be sustained, because it does not appear that Judge Fraser made any ruling upon the question raised by this exception. In the case of *Chamblee v. Tribble*, 23 S. C. 70, Chief Justice Simpson, in speaking for the court, says: "Inasmuch as the circuit judge made no ruling for the first question,—i. e. the constitutionality of the act chartering the company,—we do not regard that question 'as before us,' as we can only review such questions of law as may be adjudged and determined below. In the absence of any ruling by the circuit judge, no question can arise in this court." This case is not like that of *Aultman v. Utsey* (S. C.) 19 S. E. 617, where the exception was based on the ground that the circuit judge had failed to decide one of the defenses set up in the answer. In the case before us the exception complains of error on the part of the presiding judge "in refusing to grant the motion to dismiss the complaint," etc., but not because he failed to decide such motion. This exception is overruled.

The second exception to the order of Judge Fraser is as follows: (2) "For that his honor, Judge Fraser, erred in holding that the judgment quando in the former action was prima facie an adjudication that there are, or were at the rendition thereof, no debts or other obligations of which the administratrix had notice which would take precedence of the plaintiff's debt in administration of future assets, and that on the coming into the possession of such assets they are prima facie applicable to plaintiff's judgment, and remain so until the contrary is pleaded and shown." Section 2046 of the Revised Statutes requires that an executor or administrator shall advertise for creditors of the estate to present their demands duly attested, and allows the executor or administratrix 12 months to ascertain the debts due from the deceased. When this defendant filed her plea of plene administravit, more than the 12 months had elapsed which were allowed for ascertaining the debts due from the deceased, and she is presumed to have ascertained this indebtedness. The defendant filed her plea of plene administravit, and, as required by law, set forth a full and particular account of her administration of the estate under oath, with a certified copy of the inventory and appraise-

ment. A part of that administration was the duty enjoined of ascertaining the indebtedness of the estate, a statement of which is properly a part of the plea of plene administravit. A plea of plene administravit without this full and particular account of the administration under oath is improper, and may be stricken out on motion. *Ford v. Rouse*, supra. The reason for this requirement of the law is thus stated in *Ford v. Rouse*: "For, if that plea had been accompanied by defendant's accounts, the plaintiff might have replied the payment of debts out of their legal order, and averred that his debt was entitled to priority of payment." A judgment is conclusive between the parties to it not only as to those matters which were actually decided, but also all such as were necessarily involved in its rendition. *Trimmler v. Thomson*, 19 S. C. 254; *Micheau v. Caldwell*, 1 Speer, 276. The question as to the indebtedness of the deceased had necessarily to be decided by the court in rendering judgment quando acciderint in so far as the defendant and the plaintiff therein were concerned. It must be remembered that this is not a contest between the plaintiff and other creditors attempting to assert their rights. The judgment quando acciderint required the defendant to pay the claim assigned to this plaintiff out of any assets that might come into her hands to be administered, other than such as were specified in her answer therein, and that the plaintiff should have execution therefor. There is no reference in the judgment quando acciderint to the claims of any other person to be paid out of after-acquired assets, and we think the circuit judge, as to these parties plaintiff and defendant, was right in the principle announced by him as stated in this exception. This exception is overruled.

The third exception to the order of Judge Fraser is as follows: "For that his honor, Judge Fraser, erred in holding upon demurrer that the amended complaint stated a cause of action, whereas his honor should have dismissed the amended complaint on the ground that there were no allegations of fact to show that the assets alleged to have been received by the defendant were applicable to the plaintiff's judgment, and that the said defendant had wasted and misappropriated the said assets." The plaintiff alleges, in paragraph 8 of the amended complaint, that the defendant, after the recovery of the judgment quando acciderint, received assets of the estate, "which said sum is applicable to the payment of the judgment above alleged, all of which amount said defendant has failed and refused to apply to the said judgment, but has wasted and misappropriated." In considering the second exception to Judge Fraser's order this court held that the assets just mentioned were prima facie applicable to plaintiff's judgment. We think that the allegations of the complaint that the defend-

ant has failed and refused to apply the said assets to the judgment quando acciderint, but has wasted and misappropriated them, are allegations of fact, and not conclusions of law. This exception is overruled.

The case next came on for trial on the said amended pleadings before his honor, Judge James Aldrich, and a jury, at the summer term, 1894, of the said court. At the close of the plaintiff's testimony the defendant moved for a nonsuit, which was refused. The grounds upon which the motion was made, together with the reason assigned by the presiding judge in refusing it, will be reported with the case. The defendant then offered testimony, at the close of which his honor charged the jury. The jury rendered a verdict for the plaintiff for \$666.55, upon which judgment was entered. The plaintiff's exception to the ruling and charge of his honor, Judge Aldrich, will be set out in the report of the case.

The first exception (No. 4 in the "case") is disposed of by the case of *Mickle v. Construction Co.*, supra, the rubric of which is as follows: An allegation in the complaint that plaintiff is a duly appointed and qualified administrator of a deceased intestate is sufficient, where no exception was made to it other than by oral demurrer at the trial. This exception is overruled.

The second exception (No. 5) is disposed of by the case of *Hall v. Woodward*, 30 S. C. 578, 9 S. E. 684, in which Chief Justice McIver says: "When he introduced in evidence the original answer, admitting these facts, which, we think, was competent evidence, just as any other written or verbal admission made by defendant, he made out a prima facie case, which threw the burden of proof upon the defendant to rebut or explain such admission, and Judge Witherspoon very properly gave the plaintiff the benefit of this view. As we have said, this original answer was competent evidence, just as a letter, or any other writing, signed by the defendant, would have been; but it was not conclusive of the fact therein stated. If it had remained as a part of the pleading, then it would have been an admission of record, and conclusive. But when it was 'sponged out' as a part of the pleading,—to use the expression found in some of the cases,—it lost its conclusive character, and stood like another written or verbal admission which the defendant may have made, open to explanation." This exception is overruled, as is also the eleventh exception (No. 14), which raises the same question.

Parts a, b, and c of the third exception (No. 6) are disposed of by the principles announced in considering the second exception to Judge Fraser's order, and cannot be sustained. Part d cannot be sustained. The answer was not a pleading in the case in which it was offered in evidence, and therefore creating a conclusive admission of the matters

therein alleged, but was introduced just as any other written or verbal admission. It was for the jury to say what parts of it they believed. If Judge Aldrich had passed upon the facts alleged in the answer, he would have invaded the province of the jury. The third exception (No. 6) is overruled.

All the other exceptions except the seventh (No. 10) will be considered together. In 7 Am. & Eng. Enc. Law, p. 386, it is said: "Under a plea of plene administravit, in answer to the proof of assets, the executor or administrator may show that he has exhausted the assets in discharging debts of a higher rank before suit commenced." Also (Id. p. 387): "The executor or administrator may plead a retainer for the expenses of the funeral or probate charges, or to reimburse himself for payments made out of his own pocket in discharge of debts superior to the plaintiff's before commencement of suit." In 2 Willams, Ex'rs, p. 1667, it is said: "Again, an executor is bound to plead a debt of a higher nature of which he has notice in bar of an action brought against him for a debt of an inferior nature, and *riens ultra*, if he has not assets for both, otherwise it will be an admission of assets to satisfy both debts." See, also, Id. pp. 1670, 1671, 1682, 1683. All such matters are part of the administration of the estate which the executor or administrator is compelled to set forth in "the full and particular account of the administration of the estate" in his plea of plene administravit. The defendant having had the opportunity, as well as it being her duty, to present the real condition of the administration of the estate in the first action, we will now consider her right to a second opportunity for such adjudication. The rule is so clearly stated in the case of *Micheau v. Caldwell*, 1 Speer, 276, that we quote somewhat at length from that case. The court says: "In the case of *Barle v. Hinton*, 2 Strange, 732, Chief Justice Eyre said: 'It is a settled rule in law that, if a defendant has a matter proper for his defense, and he neglects to plead it in bar to the action at the time he may, he shall never take advantage of it after.' And Justice Butler expressed himself in nearly the same words in the very strong case on this subject of *Erving v. Peters*, 8 Term R. 685, where the change in the consequences of a judgment which result from the statute of Anne allowing double pleas has been pointed out by Justice Grose. So universal is the rule mentioned above, that it is constantly acted on, even by the court of equity, as may be seen by the case of *Maxwell v. Connor*, 1 Hill, Eq. 22, where Chancellor J. Johnston, in reference to what he acknowledged to be a hard case, uses the following strong language: 'If a defendant has been before a competent tribunal, which has proceeded to judgment, that decision, until reversed, is conclusive upon him in every tribunal having concurrent or other jurisdiction. It is conclusive upon him as to every matter

of defense, not only presented, but which could have been presented, by him; and it is conclusive upon him although the judgment be erroneous, if he acquiesces in it, and does not proceed to reverse it. It is conclusive on him, because a party, whenever he is brought into a court, is bound to full diligence, which if he uses, he will obtain his right; if he neglects, either in putting in proper pleas, or introducing all his evidence to support them, he has no one to blame but himself; nor will his neglect in one court be allowed to give him a right to a second trial, either in that court or another. If the tribunal before which he appears commits errors in deciding, his appeal is not to a court of merely concurrent jurisdiction, but to that tribunal which is by the constitution provided exclusively and expressly for the correction of errors; and if he neglects to prosecute an appeal he must bear the consequences. \* \* \* To decide, then, whether this administratrix can now plead that she had no assets when the former recovery was had against her, it is sufficient to ask, could the want of assets have been then pleaded? and could the judgment, *de bonis*, etc., *et si non*, etc., have been rendered against her if the want of assets had been made then to appear? The plea of *plene administravit* would, in the former action, have been a good defense, and, if true, the judgment against her could at most have been only for assets *quando acciderint*. Her neglect to enter the plea was an admission of assets, which she cannot now retract, without contradicting the judgment. \* \* \* Pleading one only of two pleas necessary to a full defense, more especially of two admissible pleas; pleading that which is untrue and neglecting the other, said to be true,—is at least default *pro tanto*; and upon the universal rule before mentioned is, after judgment, an acknowledgment that what was omitted would not have availed." See, also, *Trimmer v. Thomson*, 19 S. C. 247, and the cases therein cited. To the allegation of the answer that there are other claims against the estate of equal rank with that of the plaintiff it is only necessary to refer to the case of *Huger v. Dawson*, 3 Rich. Law, 328, to show that such question cannot be considered in an action at law. In that case the court says: "The plaintiff has obtained judgment against the defendants for a bond debt of their testator, and the amount has been levied on his estate and is in the court. But the state bank comes, and alleges that it is also a bond creditor, and entitled to be paid *pari passu* with the plaintiff. Now, there is no proceeding by which the plaintiff can put in issue at law the factum of the bond to the state or the quantum of assets. The executors alone are capable of making up their issues with the bank. It follows, then, that the plaintiff is entitled to be paid out of the fund in court in exclusion of the bond debt claimed to be due by the bank, and for the same reason the bank is entitled to be paid its prior judgment in preference to the plaintiff." These exceptions are overruled.

erence to the plaintiff." These exceptions are overruled.

The seventh exception (No. 10) is overruled for the reasons therein stated by the presiding judge, which are satisfactory to this court.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(44 S. C. 145)

ASHLEY et al. v. HOLMAN et al.

HOLMAN et al. v. ASHLEY et al.

(Supreme Court of South Carolina. April 16, 1895.)

COMMITTEE OF LUNATIC — ALLOWANCE FOR EXPENSES OF SUIT—BOARD AND CARE OF LUNATIC — COMPENSATION—SET-OFF FOR SERVICES.

1. On an issue as to the right of L. to a payment of \$140 per year for the care and board of a lunatic for eight years, during which one J. was the lunatic's committee, it appeared that the father of the lunatic (the original committee) obtained a decree for a yearly allowance of that amount, and that the condition of the lunatic during the eight years for which L. claimed was the same as when such allowance was made, and that in an action brought by J., as committee, against the executors of the lunatic's father to recover for services alleged to have been rendered to the father by the lunatic, L. testified that the lunatic's labor was worth to the person having him in charge the amount of his support; but this testimony of L. was qualified by a statement that he himself made no arrangement with the committee for the lunatic's support, and at the time of giving such testimony L. was greatly under the influence of J. In this action by J. the supreme court decided that the plaintiff's estate was not liable for the services of the lunatic. *Held*, that L. was entitled to the allowance claimed for the period of eight years.

2. The committee of a lunatic, as occupying a fiduciary relation, cannot trench upon the corpus of the lunatic's estate for the bringing of a suit, unless he first obtains leave of court, or unless he shows that there was great necessity for bringing the suit, or advantage to accrue to his beneficiary from bringing it.

3. A trustee who, in a settlement out of court, allows illegal credits upon the account of his predecessor, will be liable to the cestui que trust for the amount so allowed.

Appeal from common pleas circuit court of Barnwell county; D. A. Townsend, Judge.

Action by L. A. Ashley, in his own right, and as committee of a lunatic (William Ashley, the younger), against W. A. Holman and W. A. Bailey, personally and as executors of William Ashley, and others, to recover from the estate of defendants' testator an amount due under his will for the support of the lunatic. Action by W. A. Holman and W. A. Bailey, personally and as executors, and by V. V. Holman, against L. A. Ashley, as committee of William Ashley, the younger (a lunatic), and W. Gilmore Simms, administrator, for an accounting. The two actions were heard together, and a decree for plaintiff entered in the first action, and the second action dismissed. From the decree in the first action, defendant executors and others appeal, and from the decree in the second all the plaintiffs appeal. Judgment in the first

action modified. Judgment in second action affirmed.

The decree of Townsend, J., sitting as chancellor, was as follows:

"These two cases were heard together by me at the July term of court, 1894, at Barnwell. The action first above stated (Ashley v. The Executors) was brought in the name of the lunatic, William Ashley, the younger, against the executors of the will of William Ashley, the elder, to require them to assess the real estate of the testator for the support and maintenance of the said lunatic, under the tenth clause of the said will, which is as follows: 'I consider that my afflicted son, William Ashley, is sufficiently provided for in the estate he derived from his grandfather Josiah Stallings, and therefore make no provision for him in my will; but should the estate derived from his grandfather in any way fail him, or should he, from any other cause, lack a proper support and maintenance, I direct my executors, by a fair and equal assessment upon the property given to my children and grandchildren by this will, to raise a sum sufficient for a decent support for my son William.' The defendants answer, and allege that what was known as the 'Stallings Fund' has not failed the lunatic, and they call upon L. A. Ashley, as committee of said lunatic, for an accounting as to said fund. The second of the above-stated cases (The Executors v. Ashley) was commenced after the first one against L. A. Ashley, as committee, and W. Gilmore Simms, Esq., as administrator de bonis non of Joseph Ashley, deceased, for an accounting concerning the management and disposition of the said Stallings fund, and for other relief. The above defendants answer, and say that the fund has been properly and legally expended, and the infant defendants submit their rights to the court for protection. The master took the testimony, and reported it to the court, and both cases were heard by Judge Izlar, who sustained a demurrer to the complaint in Executors v. Ashley, which, however, was finally reversed; and in Ashley v. Executors he construed the said tenth clause of said will, and expressed the opinion that the allowance for the lunatic should be increased, but declined to finally decide the case, and referred it to the master to take and note the account of L. A. Ashley, as committee of said lunatic, from the time he assumed said trust to the present time. The master took further testimony, and has reported it to this court, and now these cases are before me. Three important questions arise: First, has the Stallings fund been properly accounted for? second, what additional compensation is necessary for a decent support and maintenance of said lunatic? and, third, from what source is said allowance to be derived?

"As to the Stallings fund, Exhibit D (also v.21s.E.no.10—40

called 'Exhibit 11 and 12') contains a statement of the receipts and expenditures of said fund while in the hands of Joseph Ashley, and is brought down to the date of the death of Joseph Ashley, and includes a settlement between the administrator of Joseph Ashley (W. E. Ashley) and L. A. Ashley, who was appointed committee of said lunatic, to succeed Joseph Ashley. That statement is made from the returns of Joseph Ashley, with debits and credits for interest and commissions added, as directed by law, and shows the correct status of the Stallings fund, unless it contains items which it ought not to contain. Baker v. Lafitte, 4 Rich. Eq. 392. The executors contend that the \$300 paid as attorney's fee to J. J. Maher (who was plaintiff's attorney in an action brought by Joseph Ashley, as committee, against his father's estate, for the alleged benefit of the lunatic), \$100 paid for supreme court expenses, and \$142.25 paid to Molair for board of witnesses, all of which are contained in said statement, are not proper charges against the lunatic's estate, or the Stallings fund, but should have been paid by Joseph Ashley from his own funds or estate, or by his administrator; and their reason for this position is that the said action which Joseph Ashley, as committee, brought against the executors of William Ashley, the elder, was brought, to use their language, 'out of malice and ill will towards his father and his estate, and to promote his own selfish ends.' I have read all the testimony in said action, and all the proceedings therein in the different courts, and also the testimony given in the two cases now before me in relation to said action, and to the declarations of Joseph Ashley, and have carefully considered the same, and all the circumstances connected therewith; and I am satisfied that said suit was not only not malicious, but that there was, to any reasonable mind, probable cause therefor. It is true that Joseph Ashley, in the fullness of his feelings, said some things that would tend to lead to a different conclusion; but I have been impressed far less by what he said than by the facts proved in the case, and by all the other real circumstances connected with it. Caldwell v. Bennett, 22 S. C. 2, and cases cited; Hogg v. Pinckney, 16 S. C. 387. I conclude, therefore, that the items above mentioned as objected to by the executors are proper charges against the estate of the lunatic, and the statement, to wit, Exhibit D (also called 'Exhibit 11 and 12'), shows the correct status of the Stallings fund up to that time, and, further, that the plaintiffs in Executors v. Ashley are barred, as to said items, by the statute of limitations. Suber v. Chandler, 18 S. C. 532. That statement shows a balance of \$2,183.61 due by the estate of Joseph Ashley, deceased, to L. A. Ashley, committee; and I find that W. E. Ashley, as ad-

ministrator of Joseph Ashley, paid this last-named sum to L. A. Ashley, as committee, on the 25th April, 1887. What I have said, except as to the statute of limitations, applies to the \$724.65 paid by L. A. Ashley, as committee, from the \$2,183.61 received from the estate of Joseph Ashley, deceased. There is also another reason why L. A. Ashley should pay this amount or this claim. It was the costs in the same action by Joseph Ashley against Wm. Ashley's estate, and, as the court had not ordered Joseph Ashley to pay it, L. A. Ashley, as committee, was legally bound to pay it; and he acted discreetly in paying without waiting for an execution, and probably supplementary proceedings, and a still greater expense. *Clark v. Wright*, 26 S. C. 190, 1 S. E. 814. This item of \$724.65 appears in the annual returns of L. A. Ashley as committee. The next most important item in said returns is \$1,120 paid by L. A. Ashley, as committee, to himself, for the support and maintenance of said lunatic during eight years, in the lifetime of Joseph Ashley, and while Joseph Ashley was committee of said lunatic. This is objected to mainly on the ground that said services were rendered gratuitously, and the testimony of L. A. Ashley in said suit already mentioned is relied on to support this position. L. A. Ashley swears also in this case, and explains what he meant by what he swore on the former occasion, and swears that he always expected to get pay for said services. I find, too, that in his first annual return as committee he brought that item to the attention of the probate court, and that the court allowed it. There can be no further question, then, about the legality of that payment; but, aside from the order and authority of the probate court, I am convinced that it was a proper and legal charge against the estate of the lunatic. The balance of the Stallings fund was properly expended in the support and maintenance of the lunatic, and I find that, for three years immediately preceding the commencement of this action, L. A. Ashley supported and maintained this lunatic, in a diseased and almost helpless condition, without any funds, notwithstanding proper demands were made upon the executors therefor. I conclude, therefore, that the Stallings fund has been properly accounted for, that it was exhausted some years ago, and that the present committee is entitled to compensation for supporting and maintaining the lunatic for the last three years immediately preceding the commencement of this action, at an increased rate over what was previously ordered by the probate court, and also from the commencement of this action until the present time. The next question is, how much shall this allowance be? L. A. Ashley, in his testimony, fixes it at \$12 for his board, and \$8 for servant's

board would cost, and what would be due himself and wife for their nightly visits to his room to wash and dress him, and to render him proper services. Dr. Hunter, who, I assume, is disinterested, testified that he thought it worth from \$40 to \$50 per month, and, from all the testimony, I conclude that \$40 per month, and \$35 per annum for clothes, would be a reasonable allowance for those years immediately preceding the commencement of this action, to wit, 22d June, 1892, and the same, in proportion, from the commencement of this action to the present time,—28th August, 1894.

"It is therefore ordered, adjudged, and decreed that W. A. Holman and W. A. Bailey, as executors of the will of William Ashley, the elder, deceased, forthwith assess the lands mentioned in the tenth clause of said will a sum sufficient to pay \$1,545 for the support and maintenance of the lunatic, William Ashley, the younger, for the three years immediately preceding the 22d June, 1892 (this is to include clothing), and \$1,154.31 for the support and maintenance (including clothing) of said lunatic from the 22d day of June, 1892, to the 28th August, 1894, and that they collect the same, and pay it to L. A. Ashley or his attorney within thirty days from the filing of this decree. And if the said executors fail, in any particular, to do as hereinbefore directed, the master for Barnwell county is hereby ordered and directed to make said assessment immediately after the expiration of the thirty days, and, after legal notice, sell the lands, or so much thereof as may be necessary to raise the amounts hereinbefore directed to be raised, clear of all expenses and commissions, for cash, and, after paying all expenses and commissions, pay the same to L. A. Ashley, as committee, or his attorneys. I find that no funds or other assets of the estate of Joseph Ashley have gone into the hands of W. Gilmore Simms, as administrator de bonis non of said estate. It is further ordered that the complaint in the case of W. A. Holman and W. A. Bailey, as executors, et al., against Carrie J. Ashley et al., be dismissed, and that the plaintiffs pay the costs of said action. It is further ordered that the case of Wm. Ashley, the younger, by his committee, against W. A. Holman and W. A. Bailey, as executors, et al., be retained on the calendar, to facilitate future assessments, if such be found necessary. It is further ordered that this decree be filed forthwith, and a copy thereof be served upon W. A. Holman and W. A. Bailey without delay. It is further ordered that William Ashley, the younger, by his committee, have leave to apply at chambers for any order necessary to carry out this decree.

"D. A. Townsend, Presiding Judge.

"August 22, 1894."

The defendants W. A. Holman and W. A. Bailey (as executors of William Ashley, the elder, and in their own right), Victoria Holman, Hattie Patterson, Robert Holman, Mag-

gie Walker, Edward Holman, Henrietta K. Wood, Mamie Ashley, Irene Ashley, Ashley Bailey, Samuel J. Bailey, Jennie Miller, and Lula Williams, in the first of the above-entitled actions, gave due and legal notice of appeal from said judgment and decree to the supreme court, and asked the reversal of said judgment and decree upon the following grounds and exceptions: "(1) That his honor erred in ordering an assessment to be made by the executors of William Ashley upon the lands mentioned in the tenth clause of the will for the support of the lunatic, William Ashley, until the Stallings fund had been properly accounted for; such order being inconsistent with the decree of Judge Izlar, made in said cause on the — day of September, 1893, wherein he refused to order an assessment, upon the ground that the said L. A. Ashley had not made a proper accounting of the Stallings fund, the showing before Judge Townsend being in all respects the same as that before Judge Izlar. (2) That his honor erred in finding as matter of fact that the prosecution by Joseph Ashley of the action brought by him, as committee, against the executors of the will of Wm. Ashley, the elder, was not malicious, and that there was probable cause therefor, whereas his honor should have found from the testimony that the prosecution of said action was malicious, without probable cause, and should have concluded, as matter of law, that the costs and expenses of said action were not proper charges against the estate of the lunatic, Wm. Ashley. (3) That his honor erred in holding, as matter of law, that it was the duty of L. A. Ashley, committee, to pay the costs in said action brought by Joseph Ashley, as committee, against the executors of Wm. Ashley, out of the estate of his ward, and in holding the payment of said costs to be a proper disbursement on behalf of said estate. (4) That his honor erred in allowing L. A. Ashley the sum of \$1,120 for the support of the lunatic for the nine years previous to his appointment as committee, for during this time he had affirmed upon oath that no charge was made, and it appeared from the great preponderance of the evidence that said support was furnished the lunatic during those years partly as a gratuity, and partly for services performed. (5) That his honor erred in holding that the defendants herein were bound by the order of the probate court allowing the charge in his first annual return by the said L. A. Ashley, as committee, of \$1,120 for the support of his ward for nine years preceding his appointment as committee, whereas his honor should have held that these defendants, the child and grandchildren of Wm. Ashley, the elder, were quasi sureties for the support of the lunatic, and, not being parties to the proceedings in the probate court, could assert their rights in this action; and have the Stallings fund legally administered; to the end that they might be saved harmless. (6) That his honor erred in not finding and holding that

L. A. Ashley committed a fraud on the rights of these defendants and on the judge of probate, in asking for \$1,120 for the nine years' support of the lunatic previous to his appointment as committee, when he had, on oath, stated that he made no such charge, and that he was estopped by his conduct and declarations during said nine years to make said charge of \$1,120. (7) That his honor erred in holding that L. A. Ashley had the right, as committee, to exhaust the estate of his ward in the payment of said charge of \$1,120 for support, etc., and of the costs in the case of Jos. Ashley, Committee, v. Executors of William Ashley, without obtaining an order of court permitting him to do so. (8) That his honor erred in allowing the committee, L. A. Ashley, compensation for the support of the lunatic, Wm. Ashley, in excess of the sum of \$140 per annum, as this amount had been fixed by the probate court, at the solicitation of said committee, upon a similar state of facts. (9) That his honor erred in allowing L. A. Ashley \$480 for the maintenance of the lunatic during the years 1889 and 1890, as for these years he made returns to the probate court in which he charged his ward with \$140 per annum for his support. (10) That his honor erred in fixing the compensation to committee for care and support of the lunatic at forty dollars per month, or \$480 per year; the same being contrary to the preponderance of evidence in the case, and unreasonable. (11) That his honor erred in allowing L. A. Ashley, committee, the sum of \$1,545 for the support and maintenance of the ward previous to the commencement of this action, and previous to the demand upon the executors herein to make an assessment upon the children and grandchildren of Wm. Ashley, the elder, and in ordering an assessment to raise said amount. (12) That his honor erred in ordering, adjudging, and decreeing the sale of lands herein: (a) Because no real estate or lands are described in the pleadings; (b) because it does not appear that the personal property left William Ashley, the elder, has been exhausted; (c) because the tenth clause of the will of Wm. Ashley, the elder, does not authorize or contemplate the sale of the real estate devised in said will."

The plaintiffs in the second above-mentioned action, W. A. Holman et al. v. Carrie J. Ashley et al., also gave due and legal notice of appeal to the supreme court from said judgment and decree, and will ask the reversal thereof upon the following grounds and exceptions: "(13) That his honor erred in finding, as matter of fact, that the prosecution by Joseph Ashley of the action brought by him, as committee, against the executors of the will of William Ashley, the elder, was not malicious and that there was probable cause therefor, whereas his honor should have found from the testimony that the prosecution of said action was malicious, without probable cause, and should have concluded, as matter of law, that the costs and expenses of said ac-



tion were not proper charges against the estate of the lunatic, Wm. Ashley. (14) That his honor erred in finding and holding that Exhibit D shows a correct status of the Stallings fund up to the appointment of L. A. Ashley as committee, in that (a) said statement includes charges for counsel fees and expenses incurred by Joseph Ashley, committee, in the malicious prosecution of said action of Jos. Ashley, committee, against W. A. Holman et al., executors, etc.; (b) said statement includes a charge for commissions to Joseph Ashley, as committee, which were not made by the committee during his lifetime, nor embraced in his annual returns as such committee, the preponderance of evidence showing that it was not the intention of the committee to charge said commissions. (15) That his honor erred in holding that the plaintiffs were barred, as to contesting the validity of said statement, Exhibit D, and the items therein charged, by the statute of limitations."

The decree of Izlar, J., sitting as chancellor, rendered on the previous trial, and referred to in the opinion, was as follows:

"The above-entitled action was, by consent, heard by me, the judge of the Second circuit being disqualified on account of his relationship to some of the parties. The action is brought to have the court ascertain what would be a reasonable compensation, allowance, or charge per annum for the decent support of the lunatic, William Ashley, the younger, and to require the same for the last three years and for the future years of his life to be charged and assessed against the property of the plaintiff, L. A. Ashley, and the defendants, under the will of the testator, William Ashley, the elder, and to compel payment of the same, under the direction of the court, and through its order and process, and in such way and manner as the court may direct. The complaint alleges: That William Ashley, the younger, is now a man of mature years, was many years ago adjudged a lunatic by the probate court of Barnwell county, and that his father, William Ashley, the elder, was duly appointed his committee, and that the plaintiff, L. A. Ashley, was on the 14th day of April, 1887, duly appointed by the probate court of said county the committee of said lunatic, in the place and stead of Joseph Ashley, who had been appointed as successor to William Ashley, the elder, and that said L. A. Ashley has entered upon the duties of his office, and that said lunatic is now living with him, in a helpless condition; being incapable, from failing health, even to feed himself. That William Ashley, the elder, departed this life in the year 1887, leaving of force his last will and testament, which was duly admitted to probate; and upon which the defendants W. A. Holman and W. A. Bailey have duly qualified as executors. That the tenth clause of said will is as follows: 'I consider that my afflicted

son, William Ashley, is sufficiently provided for in the estate he derived from his grandfather Josiah Stallings, and therefore make no provision for him in my will; but, should the estate derived from his grandfather in any manner fall him, or should he, from any other cause, lack a proper support and maintenance, I direct my executors, by a fair and equal assessment upon the property given to my children and grandchildren by this will, to raise a sum sufficient for a decent support for my son William.' That the estate derived by said lunatic from his grandfather has failed him, the same having been expended and exhausted by his former committee and the plaintiff, and that he lacks a proper support and maintenance,—he being now in a very helpless condition, and without any means whatever, and only cared for by the plaintiff from his private means,—and that this state of affairs has existed for three years past. That six hundred dollars per annum would be a reasonable allowance for the maintenance and support of the said lunatic, considering his condition and station in life. That William Ashley, the elder, left a very large estate, both real and personal, which, under his will, he devised to his children and grandchildren, the plaintiff, L. A. Ashley, and the defendants, who are in possession of the same with full notice of the charge thereon under the tenth clause of the said will. That demand has been made upon the executors to make a fair and equal assessment upon the property given by said testator to his children and grandchildren by his will, to raise a sum sufficient for the decent support of said lunatic, but that said executors have failed and declined, without just excuse, to act in the premises. The adult defendants deny that the estate of said lunatic has failed, but, on the contrary, allege that, if properly accounted for by the committee of said lunatic, it will be ample for his support and maintenance; and these defendants demand that said L. A. Ashley, committee, be required to account concerning his management and disposition of the estate of said lunatic, and to apply the same to his support and maintenance. The infant defendants answer by their guardians ad litem, and submit their rights and interests to the protection of the court. After the commencement of this action, W. A. Holman and W. A. Bailey, as executors of the last will and testament of William Ashley, the elder, began an action against L. A. Ashley, as committee of William Ashley, the younger, and W. Gilmore Shims, as administrator de bonis non of the estate of Joseph Ashley, deceased, and others, praying an account concerning the management and disposition of the estate of said William Ashley, the younger, derived from his grandfather, and other relief. To this action the defendants appeared and answered, the infant defendants answering by their duly-appointed guardian



ad litem. These two actions were heard together on the pleadings and the evidence taken and submitted in the said actions, respectively. The defendants in the last-mentioned action interpose an oral demurrer to the complaint,—that it does not state facts sufficient to constitute a cause of action.

"It is contended that the executors of the will of William Ashley, the elder, cannot maintain an action against either the present committee of said lunatic, or the legal representative of the former committee, for an accounting touching and concerning the management and disposition of the estate of said lunatic received by them, respectively. I have examined carefully the complaint of the executors, and, although the allegations of fact are numerous, I confess that I fail to find in them all facts sufficient to constitute a cause of action in favor of the plaintiffs against the defendants, or any of them. The oral demurrer, in my opinion, must therefore be sustained, and the complaint dismissed.

"The main question in the present action arises out of the tenth clause of the will of William Ashley, the elder, hereinbefore mentioned and set forth. In the construction of a will, the court always endeavors to ascertain, if possible, the intention of the testator, and to carry into effect that intention. 'This intention, however,' as was said by Chief Justice Simpson in *McGee v. Hall*, 28 S. C. 182, 1 S. E. 711, 'must be reached by the application of those rules of construction which have been established as best adapted to evolve said intention, and by the principles which have been applied by the courts in analogous cases. Intention reached in any other way (as by considering what would be absolutely just to the parties, and what, in the opinion of the court, the testator ought to have done, etc.) is not allowed, because such a course would often defeat the very object intended to be accomplished, to wit, the real intention of the testator.' Now, what did William Ashley, the elder, intend by the following language, found in the tenth clause of his will? 'I consider that my afflicted son, William Ashley, is sufficiently provided for in the estate he derived from his grandfather Josiah Stallings, and therefore make no provision for him in my will; but should the estate derived from his grandfather in any manner fall him, or should he, from any other cause, lack a proper support and maintenance, I direct my executors, by a fair and equal assessment upon the property given to my children and grandchildren by this will, to raise a sum sufficient for a decent support for my son William.' It is plain that the testator knew the condition of his son, and the character and value of the estate derived by him from his grandfather. It is equally plain, also, that, taking these things (the condition of his son, and the character and value of his estate) into consideration,

the testator was satisfied that the estate of his son was ample for his proper support and maintenance. The language employed by the testator is, 'I consider that my afflicted son, William Ashley, is sufficiently provided for in the estate he derived from his grandfather Josiah Stallings, and therefore make no provision for him in this, my will.' But while the testator was satisfied, at the time he used the foregoing language, that the estate of his afflicted son derived from his grandfather was sufficient for his support and maintenance in his then condition, he was conscious of the fact that his condition might grow worse, and become such as to require larger expenditures from his estate; and he was also conscious of the fact that unforeseen losses might occur, even under the most prudent and careful management. It was to meet these contingencies that the testator adds: 'But should the estate derived from his grandfather in any manner fall him, or should he, from any other cause, lack a proper support, I direct my executors, by a fair and equal assessment upon the property given to my children and grandchildren by this will, to raise a sum sufficient for a decent support for my son William.' This, I apprehend, means nothing more than if, at any time during the life of his afflicted son, the income derived from the Stallings fund should fall to meet his necessities, the deficiency should be made up by a fair and equal assessment upon the property given by the testator to his children and grandchildren. This failure might arise from the condition of the son, or from a loss of a portion or the whole of the corpus of his estate. Age, infirmity, and disease, even if the corpus of the estate were preserved intact, might demand larger outlays for his son than the income from the Stallings fund; or if the condition of his son continued unchanged, yet, even under the most prudent and careful management, unforeseen losses might occur, so as to reduce the corpus, and thus lessen the income to a degree insufficient for the proper support and maintenance of his son. These were the contingencies which the testator anticipated, and evidently intended to provide against. The trustee should, as a prudent man, confine the maintenance of his ward within his income; and, if the necessities of his ward require him to go beyond the income, he should ask and obtain the leave of the court before doing so. *Teague v. Dendy*, 2 McCord, Eq. 207. I can never believe that the testator intended by the language used that his children and grandchildren should be required to make good the Stallings fund, in case the same was wasted or misapplied by the committee of his son, or in case same was partially or wholly lost by the careless or imprudent management of the committee. Again, I cannot believe that the testator intended to require his executors to make an assessment

upon the property given to his children and grandchildren to raise a sum sufficient for the support and maintenance of his afflicted son, William, until the committee of his said son had first, by a fair, just, and proper accounting, shown that the Stallings fund did not yield a sufficient income for that purpose, or had been legally exhausted, and not wasted and lost by careless and imprudent management. Until this is done, it is impossible for the executors to say what sum would be sufficient for the purpose. The bare statement of the committee is not enough. If the trustee has committed a breach of trust, and is indebted to the estate of his ward in consequence of a misapplication of the trust fund, or by reason of losses arising from his careless and imprudent management of the trust estate, he should make the amount of his indebtedness good before calling upon the executors to raise, by assessment against the children and grandchildren of the testator, a sum sufficient for the proper support of his ward. If he and his sureties are unable to do so, and his ward, in consequence thereof, would be lacking in proper support and maintenance, I have no doubt but that the executors would be compelled to make the assessment required by the will of the testator, and raise a sum sufficient for the support and maintenance of his afflicted son, notwithstanding the waste and management of the estate of his son by his committee. But this must first be made clearly to appear. Such, also, would be the result, in case the accounting should show no waste, no misapplication, no breach of trust, on the part of the committee, and it should be made clearly to appear that the income derived by the committee from the trust estate of his ward is insufficient for his proper support. The present action is brought in the name of the lunatic, by his committee, for the purpose of compelling the executors to raise, by assessment upon the property received by the children and grandchildren of William Ashley, the elder, under his will, a sum sufficient for the proper support and maintenance of the lunatic. The foundation of the action is that the contingency mentioned in and provided for by the will of the testator has happened. The allegation is that the estate derived by said William Ashley, the younger, from his grandfather Josiah Stallings has failed him, the same having been expended and exhausted by his former committee and this plaintiff, and that he lacks a proper support and maintenance; he being now in a helpless condition, and without any means whatever. The testimony offered in support of these allegations is not at all satisfactory. No proper account has been given by the defendants, who are deeply interested, to surcharge the accounts of the committee. Of what the estate now consists, and in what securities the same is now

invested, the defendants are without information. The defendants should be allowed this opportunity, and the committee should furnish this information. Without this, the court will have no proper data upon which to base a decree consistent with justice and equity. I am prepared to say, however, that, whatever may be the result of the accounting which I shall hereafter order, the testimony satisfies me that a larger allowance for the support and maintenance of William Ashley than that formerly ordered by this court is necessary. His condition has materially changed. Infirmary and disease have added to his mental affliction; helplessness has taken the place of strength, and suffering the place of health. Under these circumstances, more care, more medical attention, and more of the comforts of life, are not only proper, but absolutely necessary. But at this time I will not pass upon the question of compensation, and the other issues in the case not hereinbefore considered. It will be time enough to determine these matters when the report of the master, or the accounts of the committee of said lunatic, is submitted for consideration.

"It is therefore ordered and adjudged: That it be referred to the master of Barnwell county, to take and state the account of L. A. Ashley, committee of Wm. Ashley, lunatic, with his ward, from the date when he assumed said trust to the present time. That said L. A. Ashley, committee, do appear before said master on such days and at such hours as said master shall designate and appoint, and render a true, just, and fair account of all his actings and doings as such committee, and that he do show what money and other property has come into his hands as such committee; when and from whom he received the same; how and in what manner, and to whom and for what purpose, the same has been paid out, applied, and expended. And that he do also show of what the estate of said lunatic now consists, and how and in what manner the same has been and is now invested, and that he do submit for inspection and examination all vouchers and other papers relating to said estate, and showing his receipts and disbursements. It is further ordered that at said accounting the parties may be attended by their respective counsel, and that said master shall note all objections raised, and his rulings thereon, to the end that the same may be finally determined by this court at the final hearing. It is finally ordered that said master do report his action in the premises to this court with all convenient speed, and that either party may apply for a final hearing of the cause upon the coming in of the master's report hereinbefore ordered.

"Jas. F. Izlar, Circuit Judge.

"September 4, 1893."

Patterson & Holman and Bellinger, Townsend & O'Bannon, for appellants. Henderson Bros., for respondents.

POPE, J. The two foregoing actions were heard together in the circuit court, and have been presented in this court, on appeal, together. The first named is an action by a lunatic, by his committee, and by such committee in his representative character and as an individual, against the executors of the last will of William Ashley, the elder, and all the legatees and devisees under said will, and the grantors of any of the devisees under said will, for the purpose of having the executors, in the first instance, or, in the event they have settled the estate of their testator, in the second instance, to have the legatees and devisees and grantors to pay a reasonable compensation, allowance, or charge each year for the decent support of said lunatic, upon the ground that the contingency contemplated by the testator, as announced in the tenth clause of his will, requiring such payment, had occurred. The defendants, while admitting their liability, under said tenth clause of said will, to pay a reasonable compensation for the support of the lunatic in a certain contingency in said clause provided, denied such contingency had occurred. The second named is an action by the executors of the last will of William Ashley, the elder, and in their own right, and Mrs. V. V. Holman, against the committee of the lunatic, the administrator de bonis non of the estate of Joseph Ashley, deceased, and against the devisees of the lands of W. Elmore Ashley, deceased, who was the administrator of the estate of Joseph Ashley, deceased, heir at law of his estate, but is now deceased, for the purpose of upsetting an alleged pretensive settlement by and between the committee, L. A. Ashley, who succeeded Joseph Ashley as said committee of the lunatic, William Ashley, the younger, made in the year 1887. The defendants denied that such settlement was pretensive, collusive, or fraudulent, and pleaded the statutes of limitation as a bar to the action. The administrator de bonis non of Joseph Ashley, deceased, pleaded no assets in his hands, and that the estate of his intestate had been fully settled years before his appointment as administrator de bonis non. Testimony was taken in both actions before the master, and the actions came on for trial before his honor sitting as a chancellor. By his decree in the first action he recommitted it to the master for further testimony (his decree will be set out in the report of the case); and he dismissed the second action for failure to state facts sufficient to constitute a cause of action, but on appeal to this court this judgment was reversed. *Holman v. Ashley*, 40 S. C. 421, 19 S. E. 13. Further testimony was taken in both cases. These causes were then heard by Judge Townsend, sitting as chancellor; and on the 22d August, 1894, he filed his decree, wherein

he sustained the plaintiff on the first action, and dismissed the second action. His decree will be reported, together with the grounds of appeal therefrom.

While we do not deem it necessary to consider each ground of appeal separately, still we will dispose of all the questions suggested therein. We may state the first proposition thus: Was it competent for L. A. Ashley, as committee, to recover \$140 each year for eight years, beginning in February, 1879, for the board and care of the lunatic? We find that the father and first committee received \$140 (under the decree of the court of equity made in 1855) each year for these purposes, and the testimony fails to show any change in the condition of the lunatic in the period of time (eight years) here referred to, and the 24 years, reckoning from 1855, during which time William Ashley, as committee, had charge of him. Appellants suggest that this \$1,120 (eight years at \$140 per year) ought not to be allowed, because the present committee testified in the old case of *Ashley v. Holman*, 15 S. C. 97, and 25 S. C. 304, 1 S. E. 13, that the lunatic, by the labor he was able to render in the service of the person having him in charge, really earned his support. We think this was, to say the least of it, a very serious statement to make, in view of the decretal order of the court of equity made on this very subject in the year 1855, wherein the committee of the lunatic was authorized to expend from the lunatic's estate the sum of \$140 each year for his board and maintenance. It is true, the court of equity, in the year 1855, when it passed the decretal order referred to, did not take into consideration the ability of the lunatic to earn his own support by his labor, or that the committee would receive the benefit of such services. The present committee is now brought face to face with this unwise testimony of himself. Yet we are not unmindful of the facts that at the time he made such statements he did qualify them by stating that no arrangement had been made by him with Joseph Ashley, as committee of the lunatic, as to the support of the latter, and also that L. A. Ashley was at that time under an obligation to pay his uncle Joseph Ashley a large debt, of \$7,000, and seems to have been controlled by the stronger will of the said Joseph Ashley. The evidence seems to establish that when Joseph Ashley, as committee of the lunatic, brought his action against the executors of his father (William Ashley, the elder) to recover from the estate of such testator the sum of \$5,400, as the value of the alleged services of the lunatic, William Ashley, the younger, rendered to the lunatic's father for 27 years, at \$200 per year, L. A. Ashley was guilty of a wrong when he connived at this step of his uncle Joseph Ashley. However, we must not forget that this court decided that Joseph Ashley was not entitled to recover anything from the executors of his father's will, on account of the alleged services of the lunatic for 27

years; and now, if we were to hold that this sum of \$140 for each year's board and maintenance of this lunatic should not be paid to L. A. Ashley for the eight years' care of the lunatic, on the ground that the lunatic's services, voluntarily rendered by him to L. A. Ashley, were worth his board and maintenance, we would, to a certain extent, at least, be infringing upon the former decision of this court. We now say that the wisdom of the judgment of this court, as set out in 25 S. C. 394, 1 S. E. 13, has been fully vindicated by subsequent events. This is a court of equity that now considers this contention, and it is necessary that our conclusions shall accord with the demands of good conscience. We are satisfied, after a careful examination of all the facts embodied in the case, relating to the payment to L. A. Ashley, for eight years' care and maintenance of the lunatic, of the sum of \$1,120, that it must be sustained.

The next proposition may be thus stated: What responsibility attaches, under the law, to a committee or other trustee in carrying out, as plaintiff, a litigation whereby the estate of his cestui que trust may be affected, especially when the estate of such cestui que trust is imperiled, both corpus and the interest thereon, by such litigation? Now, that it may be seen that this proposition necessarily concerns the present action, let us state the facts bearing thereon: In February, 1855, the court of equity for Barnwell appointed William Ashley, the elder, the committee of his son William Ashley, the younger, who had in October, 1854, been adjudged a lunatic, and allowed the committee the sum of \$140 per annum for the care and maintenance of said lunatic; and this arrangement continued until February 22, 1879, when such committee died. The estate of the lunatic was the sum of \$2,000, derived under the will of the grandfather of said lunatic,—one Josiah Stallings. On the 5th day of April, 1879, Joseph Ashley was appointed the successor of his father, as said committee, and received the Stallings fund from the executors of his father's will on the 22d August, 1879, then amounting to \$2,070. By the tenth clause of the will of William Ashley, the elder, it is provided as follows: "I consider that my afflicted son, William Ashley, is sufficiently provided for in the estate he derived from his grandfather Josiah Stallings, and therefore make no provision for him in my will; but should the estate derived from his grandfather in any manner fail him, or should he, from any other cause, lack a proper support and maintenance, I direct my executors, by a fair and equal assessment of the property given to my children and grandchildren by this will, to raise a sum sufficient for the decent support for my son William." Under these circumstances, as, namely, with a fund already in his hands, the annual interest from which had proved fully sufficient for this support and maintenance, and with the lunatic in robust physical health, coupled with the

fact that under his father's will his whole estate, real and personal, was made liable for the support of the lunatic in case the Stallings fund failed, or in the event, from any other cause, said lunatic should lack a proper support, this new committee, Joseph Ashley, on the 13th April, 1880, in the court of equity, began the contention with his father's executors to make them pay over \$5,000 for over 24 years' work of the lunatic. Now, no sane man can say that this suit was started to procure sustenance for the lunatic. That he already had. Nor was it that his future was precarious, for, as we have already seen, that was absolutely secure. What was the probable cause of this lawsuit? The testimony of at least four witnesses—and they are uncontradicted, except as we shall hereafter specify—shows that it was spite aimed at his sister Mrs. Holman, and her children, because they were the beneficiaries under the will of William Ashley, the elder, and this Joseph Ashley was not so favored! As Mr. Joseph Ashley expressed it: "He did not know [whether he would win the case or not], but, as far as he was concerned, he did not care anything about winning it, but wanted to show Jake Holman that he could not make William Ashley's will." It seems that Mr. Jacob Holman had married the daughter of William Ashley by his second marriage, while Joseph Ashley was the son by the first marriage of his father. We stated a while ago that this testimony is uncontradicted by witnesses. That statement is correct. But plaintiffs have referred to the result of the case of Ashley v. Holman, as set out in 15 S. C. 97, and 25 S. C. 394, 1 S. E. 13, as well as to the high character of the two attorneys who were retained by Joseph Ashley to conduct this litigation,—Ex-Judge Maher and Mr. Isaac M. Hutson. But it nowhere appears in the case that either one of these gentlemen was informed of his motive in bringing such action. It is not recognized as law in this state that, if an attorney or attorneys of character advise a litigation, such fact establishes the existence of a probable cause of action. All the effect the law accords to such lawyers' opinion is that it should be considered by the jury or the judge when reaching a conclusion in the pursuance of such a question of probable cause or not. This is the rule as stated by Chief Justice McIver in Caldwell v. Bennett, 22 S. C. 9: "We think the true rule is that after the jury [this was a jury case] have been instructed as to what constitutes probable cause, as matter of law, it is for them to say, from a review of all the facts and circumstances proved to have been present in the mind of the prosecutor at the time he commenced the prosecution, *or to the plaintiff at the time he commenced his civil action* [italics ours], whether there was or not probable cause for such proceedings." The circuit judge reached the conclusion that there was probable cause in the action of Ashley v. Holman, *supra*, and then stopped. He did not

consider that phase of the question when a trustee, by trusting to his own judgment, commences an action whereby he risks the estate of his cestui que trust to the extent of, not only the interest earned, but also the corpus of such estate. We have always understood the rule to be, in this state, that a trustee—guardian or committee, for instance—could not trench upon the corpus of the trust estate, except under very exceptional conditions, and that, if the necessities of the case should demand it, he must first obtain the leave of court. *Teague v. Dendy*, 2 McCord, Eq. 207; *Haigood v. Wells*, 1 Hill, Eq. 60; *Villard v. Robert*, 2 Strob. Eq. 40; *Prince v. Logan*, 1 Speer, Eq. 29. While this is the general doctrine, that leave should be first obtained, yet such trustee, if he can, may show that the necessity was upon him to bring suit, and thereby justify his temerity. It thus appears that not only must such trustee show probable cause, but also some over-weighing necessity or advantage to his cestui que trust, in order to justify his conduct. A moment's reflection will show that the rule in such cases ought to be so strict. Otherwise it is in the power of the trustee to expend the entire trust estate in fees and expenses in a lawsuit wherein it was only hoped that the trust estate might be increased. The rule is quite different when a trust estate is attacked by third parties. Of course, in such instances, the principle of self-defense of necessity drives the trustee to court, and the expenditure of the funds of the cestui que trust. It is not a case of may, but must. In the case at bar, we fail to see that the propriety of a resort to a suit in equity by this trustee has been established, nor can we agree that this committee had the right thus to jeopardize this trust estate in his hands. We see by his returns that he paid his attorney \$400; to expenses, \$144.25; and for costs, \$724.65,—aggregating \$1,266.90,—out of an estate whose corpus was only \$2,000; thus leaving in the hands of the committee \$733.10 of that corpus,—and this last amount is to be reduced by commissions and other legitimate expenses of such committee. Can a court of equity be expected to sanction such a destruction to a solemn trust? These sums, as proper payments, cannot be allowed, but must be made good by L. A. Ashley in his accounting hereinafter ordered.

The next question may be thus stated: Upon whom will a loss be visited for allowing illegal items to enter into a settlement made by an incoming committee with the estate of his predecessor in office? It may be asked, who represented the trust estate when the settlement was made,—the administrator of the deceased committee, or was it the new committee? Certainly the new committee, and not the administrator of the deceased committee. When fiduciaries take the responsibility of making settlements out of court, they must be prepared to show, when such settlements are questioned, that the

items therein embraced are legal, and should be there. If they fail to do this, they must be held to be liable for such illegal items. L. A. Ashley must account for the sums improperly entering into the settlement by him with the administrator of Joseph Ashley, deceased.

The next question is, what shall be the form of the settlement by which the amount now in the hands of L. A. Ashley, as committee of William Ashley, shall be ascertained? We lay it down thus: L. A. Ashley shall be charged with the estate received by his predecessor, Joseph Ashley, in August, 1879, viz. \$2,070.60. Then that account must be audited, with the causes for receiving the same, together with \$140 paid for one year's board and maintenance of the lunatic, together with the other legal payments made by his predecessor. The new balances must bear interest from 22d February, 1880; be audited with \$140 paid for board, and also the legal payments. We mean by "legal payments" all those made by Joseph Ashley, except costs and fees aforesaid. The new balances will bear interest from 22d February, 1881; be audited with \$140 paid for board, and also all legal payments. The new balances must bear interest from 22d February, 1882; be audited with \$140 paid for board, and also other legal payments. The new balances will bear interest from 22d February, 1883; be audited with \$140 paid for board, and also all other legal payments,—and so on down to 1887, when L. A. Ashley is appointed committee. In his account he is entitled to commissions for receiving, and is entitled to credit for board, at \$140 per year, until the date of his action, on 22d June, 1892. After that date such committee is allowed credit each year for \$515, for the care and maintenance of his cestui que trust, and as soon as his ward's estate is exhausted, under the accounting herein provided for, he is allowed to demand that the executors of the last will of William Ashley, deceased, shall, during each year, assess, collect, and pay over to him, as committee for the said William Ashley, the younger, the said sum of \$515; and, in case any one of the legatees and devisees under the will of William Ashley, the elder, shall fail to pay the amount assessed against him or her by the said executors, the said legacies and devises may be sold, under the process of the court, by the master for Barnwell county, to raise their respective assessments for the support of such lunatic aforesaid. So much of the decree as dismisses the second action is sustained, because the statute of limitation is a perfect protection to the estate of Joseph Ashley, deceased, so far as the plaintiffs to the second action are concerned. It follows, therefore, that the decree must be modified as herein required. It is the judgment of this court that the judgment of the circuit court, as to the first action, be modified as herein required, and the action is remanded to the circuit court for the for-

mulation of a decree after the accounts are recast as required herein by the master for Barnwell county. It is the further judgment of this court that the judgment of the circuit court in the second action is affirmed.

(44 S. C. 177)

**ARMSTRONG et al. v. BRANT.**

(Supreme Court of South Carolina. April 19, 1895.)

**SERVICE OF SUMMONS—NONRESIDENT DEFENDANT  
—LEAVING COPY AT RESIDENCE.**

1. Code Civ. Proc. § 156 (2 Rev. St. 1893, p. 67), making personal service of a summons out of the state equivalent to publication of the summons, and mailing a copy thereof to a non-resident defendant, is not sufficiently complied with by levying an attachment on land within the state belonging to a nonresident defendant, and leaving a copy at his place of residence, out of the state, in his absence, without publishing the summons.

2. Code Civ. Proc. § 155, subd. 4 (2 Rev. St. 1893, p. 67), providing that the summons may be served by delivering a copy thereof to any person of discretion residing at the residence of defendant, applies only to service on a person within the state.

Appeal from common pleas circuit court of Hampton county; J. D. Witherspoon, Judge.

Action by Armstrong, Cator & Co. against M. O. Brant for goods sold and delivered. From an order refusing to set aside a judgment in favor of plaintiffs, defendant appeals. Reversed.

Julius P. Youmans and A. M. Boozer, for appellant. W. S. Tillinghast, for respondents.

McIVER, C. J. This is an appeal from an order made by his honor, Judge Witherspoon, refusing a motion to set aside a judgment heretofore recovered by the plaintiffs against the defendant. This motion was based upon several grounds, among which was that the defendant had never been legally served with process, and hence the court which rendered the judgment now sought to be set aside never acquired jurisdiction over the defendant in the case. It is needless, and would perhaps be improper, to consider any of the other grounds upon which the motion was based, under the view which the court takes of the jurisdictional question, and therefore these other grounds need not be stated. The facts out of which the question of jurisdiction arises are not disputed, and may be stated as follows: The plaintiffs are residents of the city of Baltimore, in the state of Maryland, and the defendant is a resident of the city of Augusta, in the state of Georgia, and the action in which the judgment in question was recovered by default, defendant not appearing, was brought by the plaintiffs against the defendant on an open account for goods sold and delivered in the court of common pleas for Hampton county, in the state of South Carolina. At the time the action was commenced, the plaintiffs sued out a warrant of attachment, which was levied upon a tract

of land situate in this state, belonging to the defendant. The plaintiffs also obtained an order for the publication of the summons, but no publication thereof was ever made. The plaintiffs, however, undertook to serve the defendant with a copy of the summons by leaving the same at the residence of the defendant in the said city of Augusta, with the mother of the defendant, she being a person of suitable age and discretion, residing at the time with the defendant at her place of residence in the city of Augusta, but the defendant never was personally served, either within or without the limits of this state. So that the vital question which we encounter at the threshold of this case is whether the court ever acquired jurisdiction to render the judgment now sought to be set aside. If it did not, then the judgment is void, and the defendant is entitled to have it so declared by her motion in the same case. This question turns upon the inquiry whether the defendant was ever made a party to that case in any of the modes prescribed by law for that purpose, and such inquiry is narrowed down to the question whether the defendant was ever legally served with the summons before the judgment in question was rendered; and that depends upon the question whether a nonresident can be made a party to an action, even after a writ of attachment has been regularly issued and levied upon real property of the defendant situate in this state, without publication and mailing a copy of the summons to defendant, and without personal service of the summons outside of the state, after the order of publication has been made. Inasmuch as it appears that no publication was ever made, though an order to that effect was made, the precise question here presented is whether service by leaving a copy of the summons at the residence of defendant, outside of the state, with a person of suitable age and discretion, will be sufficient, or whether personal service is not necessary. It seems to us that this question is conclusively determined by the express terms of section 156 of the Code of Civil Procedure, as found in 2 Rev. St. 1893, pp. 67, 68, where, after providing a mode by which absent defendants may be made parties to an action, to wit, by publication, in the cases specified, one of which is "(3) where he is not resident of this state but has property therein, and the court has jurisdiction of the action,"—precisely this case,—the section further provides as follows: "Where publication is ordered, personal service of the summons out of the state, is equivalent to publication and deposit in the post office." It is clear, therefore, by this express statutory provision, that the only way in which a nonresident defendant can be made a party to an action in the courts of this state is either by publication actually made for the time prescribed, and deposit in the post office, or by personal service of the summons on the defendant outside of this state, after an order for publication has been obtained. It follows,

therefore, that, as it is admitted in this case that no publication was ever made, and that the summons was not personally served upon the defendant, the defendant never was legally made a party to the action in which the judgment in question was rendered, and hence such judgment should be set aside. It is said, however, that so much of the section of the Code above cited as requires personal service on a nonresident when made outside the limits of the state has been repealed by the act of 1892 (21 St. at Large, p. 104), but it will be seen by the reference to that act that it does not purport to alter or repeal any part of section 156 of the Code, from which we have quoted, but its operation is in express terms confined to another section (155), for the language of the act is: "That subdivision 4 of section 155 of the Code of Civil Procedure of this state be, and the same is hereby amended so as to read as follows: \* \* \* (4) In all other cases to the defendant personally or to any person of discretion residing at the residence, or employed at the place of business of said defendant." To allow the act of 1892 to operate as an amendment to section 156, to which it makes no reference whatever, when, by its express terms, its operation is confined to another section, relating, as we think, to a different state of things, does not seem to us to be permissible. It seems to us clear that the purpose of section 155 was to provide how service may be made upon a person within the state, and then the Code proceeds, in the very next section (156), to provide how service may be made upon persons outside of the state, for the section opens with these words: "When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the state," going on to provide how service may be made in such a case, showing very clearly that the legislature, after providing how service may be made upon a certain class of persons, to wit, those who may be found within the state, by the terms of section 155, intended to provide a different mode of service upon persons of a different class, to wit, those outside of the state. We do not think, therefore, that it is legitimate to apply an amendment, expressly declared to be designed to alter the law as to the mode of serving one class of persons, to a different section, prescribing the mode by which service upon another class of persons may be made. To this construction of the effect of the act of 1892, which we have adopted, the legislature seems to have given its approval, for in the Revised Statutes of 1893, in which the amendment of 1892 is incorporated in subdivision 4 of section 155, the terms of section 156 remain unaltered. Now, while it is quite true that the Revised Statutes cannot be regarded as having the force of law, by reason of the fact that they were never passed in the mode prescribed by the constitution, yet it is equally true that, since the passage of the act of 1892, the legislature, by an act approved 4th January, 1894

(21 St. at Large, p. 502), declared that the Revised Statutes be "approved as a revision, digest and arrangement of the statute law, civil and criminal, of the state of South Carolina, as it stood" on the 28th of November, 1893, and has promulgated the same as such in the form which appears in the volume which we have cited. The circuit judge seems to have based his decision entirely upon the case of Gibson v. Everett (S. C.) 19 S. E. 286. But an examination of that case will show that it differs widely from this case, for in that case it appeared, not only that an order of publication had been obtained, but that such publication had been actually made, which would have been sufficient to give the court jurisdiction after the real property of the defendant within this state had been attached; but there was also, in that case, actual service made on the defendant in the state of North Carolina, while in the present case there was no publication made, and no personal service on the defendant in the state of Georgia. That case, therefore, is clearly inapplicable. We avail ourselves of this opportunity of saying that it does not seem to us that there is the slightest foundation for the criticism which seems to have been made of that case (Gibson v. Everett). We do not think that any point there decided is in conflict with any former decision of this court.

We have not deemed it necessary to consider any question as to the attachment, for assuming, for the purposes of this discussion, that the attachment was free from all objections, yet we do not see how that can affect the question of the jurisdiction, to which alone we have confined our attention. It is contended, and properly conceded, that an action cannot now, as was formerly the case, be commenced by attachment, but that an attachment is merely a personal remedy in an action; and while it is undoubtedly true that an attachment may be obtained, upon a proper showing for that purpose, before the summons has been served, provided the action has been commenced by lodging the summons with the sheriff for service, or is commenced at the time of the obtaining of the warrant of attachment, yet, unless the action is prosecuted to judgment, the attachment will be fruitless of results. Hence we are unable to see how the obtaining and levy of the attachment can affect the question of jurisdiction, upon which alone we pass any conclusion. It seems to us that the order appealed from should be reversed, and it is so adjudged.

(44 S. C. 133)

PORTER et al. v. STRICKER et al.  
(Supreme Court of South Carolina. April 19, 1895.)

MORTGAGE BY INSOLVENT—VALIDITY—PREFERENTIAL ASSIGNMENT.

1. A mortgage, given by an insolvent debtor to a creditor, which is intended as security for



his debt and not as a transfer of the property as a preference, is not invalid under Rev. St. 1893, § 2146, providing that an assignment by an insolvent debtor of his property, as a preference to any other creditor than the public, shall be void.

2. The question whether a mortgage given by an insolvent to a creditor was intended as a security or as a preferential transfer of the property is a question of fact.

Appeal from common pleas circuit court of Chester county; R. C. Watts, Judge.

Action by Benjamin B. Porter and others against Robert W. Stricker and others to have a mortgage of defendants declared void as in fraud of creditors. From a judgment for plaintiff, defendants appeal. Reversed.

The following was the report of the referee:

"This is a supplementary proceeding on the part of judgment creditors of R. W. Stricker, and was commenced on the 14th day of February, 1893, by service of summons and complaint, and has for its object setting aside a mortgage executed by R. W. Stricker to Mary J. Coleman on the 1st day of January, 1892, upon the ground that same was given with the intent to defeat his commercial creditors and prefer Mary J. Coleman, and charging and alleging that the debt to Mary J. Coleman was not bona fide, and, further, that the mortgage was indeed an assignment made and executed in violation of the laws of the state, and is void. All of the defendants made answer denying the material allegations of the complaint. The total amount of the judgment (judgments bearing date April 1, 1892) debts established before me amount, in round numbers, to twenty-four hundred dollars, and in two of the cases the executions have been returned to the clerk's office marked 'Nulla bona.' I have taken the testimony as ordered, which is now on file in this court, and from the testimony I find the following facts:

"Robert W. Stricker had for a number of years been carrying on a mercantile and manufacturing business in the town of Chester, and for the transaction of such business occupied and used the shops, storerooms, etc., belonging to the defendant Mary J. Coleman (whose agent John K. Coleman was then and now is). That the rental value of said shops, storerooms, etc., was the sum of four hundred dollars per annum, and that Robt. W. Stricker paid the rents at the above-mentioned price, up to and including the year 1887. That, for the years 1888, 1889, 1890, and 1891, Stricker failed to pay the rents except in part, but executed and delivered to Mary J. Coleman his notes for the rent of 1888, 1889, 1890,—the rent for 1891 being included in the mortgage in controversy, no note having been given for this year,—the notes for rent to bear interest from the end of each rental year. That one of said notes has been lost or misplaced by Stricker since he took up the same by the mortgage. That on 1st January, 1892, Stricker was due and owing Mrs. M. J. Coleman the sum of sixteen hundred dollars, on account of rent, and also the sum of two

hundred dollars which she had loaned him, making Stricker's total indebtedness to her eighteen hundred dollars. That at this time, to wit, January 1, 1892, Stricker was indebted to sundry creditors in the aggregate about four thousand dollars over and above the amount he owed Mrs. Coleman, and had, in the way of assets, between two and three thousand dollars in way of notes, mortgages, and accounts in addition to the stock on hand. Stricker was at this time insolvent,—he says so himself, in effect,—and Coleman knew that he had been hard pressed for money, and while he may not have been absolutely certain of his insolvency, yet, from all the circumstances, and considering the intimate relationship which existed between J. K. Coleman and Stricker, Coleman knew that Stricker could not meet his obligations if his creditors pressed him, which for the purposes of this case amounts to the same thing as insolvency. Coleman was indulgent to Stricker, and up to this time had frequently loaned him money, as much as two, three, and four hundred dollars at a time. On the 1st day of January, 1892, under these circumstances, Stricker executed and delivered to Mrs. M. J. Coleman (through her agent, J. K. Coleman) the note and mortgage now in controversy, payable at one day, covering the articles as set out in the complaint in this action, and, from the testimony of Stricker himself, covered everything he had except a few buckles in the harness shop, and the said mortgage was placed upon record in office of register of mesne conveyances of Chester county, on the 3d day of February, 1892. That the mortgage was given for bona fide debt, a large portion of which was long since past due, and was then all due and unpaid, and that Stricker gave her the mortgage to secure her and prefer her; and the testimony fails to show that there was any collusion between Stricker and Coleman, or that there was any fraud in the transaction. This mortgage was held by Mrs. Coleman until the 21st day of April, 1892, at which time a sale of the mortgaged goods was made thereunder, after legal advertisement; and on this day notice was served upon Mrs. M. J. Coleman and J. K. Coleman, her agent, by Messrs. Glenn and Gage, attorneys representing sundry creditors of R. W. Stricker, protesting against the sale of the goods and chattels of R. W. Stricker, stating in said notice that the mortgage was void, and that the creditors would look to them for said goods and the value thereof. The sale, however, was made, under the direction and supervision of J. K. Coleman, and all articles enumerated in the mortgage were sold except some silverware, which was erroneously included therein, and was the property of Stricker's son. From the sale bill in evidence, the property sold brought \$1,193.55, and at the sale J. K. Coleman purchased for himself (not as agent for his wife) goods amounting to \$1,093.25, and the mortgage of Mrs. Coleman has a credit indorsed thereon



of date 25th April, 1892, eleven hundred dollars and fifty cents. That the sale was an open and fair sale. That the vehicles and coffins failed to bring their cost value, the deficiency being one hundred and fifty to one hundred and seventy-five dollars; the notes, mortgages, and accounts only bringing the sum of forty dollars. That Stricker, in order to reduce rent expenses, on 1st January, 1892, moved part of the goods upon which the mortgage of Coleman was placed to Odd Fellows' Hall, giving up a room of Mrs. Coleman's, in which the goods had previously been, and these goods were sold in Odd Fellows' Hall. That John K. Coleman left the goods bought by him at the sale in charge of Stricker to sell for him, and that Stricker turned over to Coleman the moneys received by him on account of such sales. Some of the vehicles are yet unsold, and Stricker has collected for Coleman on the outstanding notes and accounts purchased by Coleman at the sale from one to two hundred dollars. That Stricker turned over to other creditors two vehicles, in March, 1892, upon which Coleman held a mortgage. This was before Coleman seized the goods, and Stricker replaced the vehicles by substituting others made by him. That Coleman never listed the notes, mortgages, and accounts purchased by him. They call for a value of about one thousand dollars, but he has collected only about seventy-five dollars upon them, and he has collected, all told, from sale of vehicles, notes, mortgages, and accounts, about nine hundred dollars, and has several jobs still on hand. That Stricker is now conducting business as agent for his wife, Sarah J. Stricker, having borrowed five hundred dollars from the Building & Loan Association for that purpose.

"Now, from the facts of this case as above stated, is the mortgage in controversy an assignment in fact, though a mortgage in name? The debt was bona fide. Part of it had been past due for three years, and with each year, under our law, Mrs. Coleman had a preferred lien upon the merchandise in her houses to secure the payment of her rents, but she was indulgent to Stricker, and manifested a desire to help him along in his business, not only by not closing down upon him for her yearly rents, which she had a perfect right to do, but in addition loaned him as much as two hundred dollars in money to assist him to prosecute his business. The counsel for plaintiff, in the argument before me at the reference, called my special attention to the cases of Meinhard v. Strickland, 29 S. C. 491, 7 S. E. 838, and of Archer v. Long, 32 S. C. 171, 11 S. E. 86. I have examined these cases carefully, and fail to find any analogy between them and the one now before the court, the facts being entirely different. In this case the mortgage was given for a bona fide debt past due, and no attempt to foreclose the same until about 90 days after its execution, and even then evidently in self-defense, while, in the case of Meinhard

v. Strickland, the mortgage was given payable on demand, and had incorporated in it debts not maturing for one and two years, and the same almost instantly foreclosed. In the case of Archer v. Long, the facts there brought out evidently showed collusion between parties in interest; that the mortgaged property, after sale, remained in the possession of the mortgagor, and the moving cause of the execution of the deed and mortgage from Means to Beaty was that Beaty should assign the same to Means' children. We have no such facts here. There was no collusion between Stricker and Coleman, and Stricker neither was to receive nor has received any benefit, direct or indirect, from Coleman on account of executing the mortgage, and the only object he had in view was to secure her, and that he had a legal right to do, even if it can or could be assailed from a moral standpoint. The counsel for defendants, in argument before me at the reference, called my special attention to the cases of Verner v. McGhee, 26 S. C. 248, 2 S. E. 113; Magovern v. Richard, 27 S. C. 285, 3 S. E. 340; and Lamar v. Pool, 26 S. C. 441, 2 S. E. 322; and upon these I rest this case. All the cases to which my attention has been called by the attorneys representing both plaintiffs and defendants have been carefully read and considered by me, and through each of them, without exception, is the underlying principle that a debtor may prefer a creditor by mortgage to secure a bona fide debt, where it is without intent to defeat, hinder, or defraud other creditors; and this intent, in my judgment, not appearing in the case before me, I conclude that the mortgage is valid, that the same should be sustained, and the complaint dismissed."

The following was the decree:

"This is an action brought by certain judgment creditors of the defendant Robert W. Stricker to have declared null and void a certain mortgage made by Stricker to M. J. Coleman, dated the 1st day of January, 1892, upon the ground that said mortgage was, under section 2014 of the General Statutes, an assignment by Stricker in preference to Coleman. This cause was referred to John C. McFadden, Esq., referee, and he has filed his report on the testimony, to which exceptions were filed by the plaintiffs, and the cause was heard by me upon these exceptions. After hearing the testimony, exceptions, the argument of counsel for plaintiffs and defendants, I hold and adjudge that said mortgage was an assignment by Robert W. Stricker made to the defendant M. J. Coleman with intent to prefer her over Stricker's other creditors, and was in violation of section 2014 of the General Statutes of this state, and is null and void. Before the sale of the mortgaged property, had on the 21st day of April, 1892, the plaintiffs gave notice to John K. Coleman, agent for Mrs. M. J. Coleman, that they protested against the sale of the property on the

ground that the mortgage was void. At the said sale, with notice of this claim, John K. Coleman bought in very near all the property covered by the mortgage, and has sold much of it. Again, he has also collected some of the accounts due to Stricker, but how much the referee does not exactly report. It is further adjudged that all rights acquired under said mortgage and the sale thereunder be vacated and annulled, and that the property seized and sold under the mortgage for the value thereof be forthwith delivered and paid over to the receiver hereinafter named, to hold and disburse the same according to the provisions of law; that the defendants M. J. and J. K. Coleman account before the referee herein for all the property received by them, or either of them, and all the moneys collected by them, or either of them, under said mortgage; that this cause be recommitted to John C. McFadden, Esq., as special referee, to take the account, and ascertain what property and moneys and choses in action the defendants M. J. Coleman and John K. Coleman have, or ought to have, arising out of said mortgage; that the referee advertise in the Chester Reporter, for three successive issues, the creditors of Robert W. Stricker to render in and establish their claims before him; that the referee return the testimony to this court, with his report of this property, money, and choses received and due by the said M. J. and J. K. Coleman, and report further as to what creditors of Robert W. Stricker shall be entitled to share the same; that, to carry out this decree, J. C. James, Esq., be, and he is hereby, appointed a receiver, upon his entering into the usual bond in the sum of fifteen hundred dollars, to be approved by the clerk of the court for Chester county, to take and receipt for and hold all the property, money, and choses, accounts, etc., or the proceeds thereof, covered by said mortgage, and to hold the same subject to the further order of this court; that said receiver is hereby empowered to collect by suit or otherwise any debts due to Robert W. Stricker, and embraced in said mortgage, and to sell any of the property covered by the same. It is further ordered and adjudged that the defendants pay the costs of this action. It is further ordered and adjudged that plaintiffs may apply at the foot of this decree for any further order to carry out the same, as may be necessary."

S. P. Hamilton, for appellants. J. L. Glenn and G. W. Gage, for appellees.

McIVER, C. J.. The facts of this case are so fully stated in the report of the referee as to render any restatement of them here unnecessary, inasmuch as such report, together with the decree of the circuit judge, will be incorporated in the report of this case. The object of the action was to set aside a chattel mortgage given by the defendant Stricker to

his codefendant M. J. Coleman. While the mortgage was assailed in the complaint upon two grounds; (1) That it was void under the statute of Elizabeth; (2) that it was void under the assignment law,—yet, as the attack on the first ground utterly failed, the only question for consideration now is whether the mortgage is void under the assignment law. See section 2146, Rev. St. In order to sustain this ground, it is necessary to show that the transaction in question, though taking the form of a mortgage, was, in fact, intended as an assignment with preferences, and thus, while not in form a violation of the letter, was really in violation of the spirit and true intent, of the act. This has been the uniform construction which this court has placed upon that feature of the assignment law (section 2014 of the General Statutes of 1882, now section 2146 of the Revised Statutes of 1893),<sup>1</sup> from the case of Wilks v. Walker, 22 S. C. 108, the first case in which this subject was considered, down to the case of Mitchell v. Mitchell (S. C.) 20 S. E. 405, the last utterance of the court upon the subject. In the case of Wilks v. Walker the question was considered as arising on a demurrer to the answer, in which it was alleged that the transactions there assailed were entered into in pursuance of an intent to assign all of the insolvent debtor's property to certain of his creditors in preference to, and exclusion of, all his other creditors, and, this allegation being admitted by the demurrer, the transactions there assailed were obnoxious to the assignment law, for there the intent was admitted. In Austin v. Morris, 23 S. C. 393, the circuit judge found as a fact that the mortgages there assailed were in fact intended as an attempt to evade the provisions of the assignment law, and, this finding of fact being accepted and approved by this court, the legal conclusion followed that the mortgages were in fact, though not in form, an assignment, and therefore void, under the provisions of the assignment law. In Lamar v. Pool, 26 S. C., at page 446, 2 S. E. 322, the late Chief Justice Simpson, in delivering the opinion of this court, after laying down the universally conceded doctrine that even an insolvent debtor may, by a bona fide mortgage which is intended merely as a security, prefer one creditor, uses the following language: "So that in all of these cases, where the instrument assailed as contrary to section 2014 [now section 2146] does not, in its form, violate that section, having earmarks that cannot be mistaken, the question must hinge upon the intent of the parties. Is the paper a bona fide mortgage, intended as a security, which the law allows? or was it intended as an assignment, in which the particular creditor is preferred, the form of the paper having been adopted to evade the act? This question, in such a case, becomes a question

<sup>1</sup> Rev. St. 1893, § 2146, provides that an assignment by an insolvent debtor of his property, as a preference to any other creditor than the public, is void.

of fact, and such is the case now before the court." The court then goes on to consider this question of fact, and, agreeing with the circuit judge that there was no such intent, sustains the mortgage. In *Meinhard v. Strickland*, 29 S. C., at page 496, 7 S. E. 838, the court, in considering a case like the present, used the following language: "It is plain, then, that in cases of this kind the question is mainly one of fact as to the intention of the parties. If the instruments employed were bona fide intended merely as security, and not as a means of evading the provisions of the assignment act, then they do not fall within the purview of that act. But if, on the contrary, the instruments resorted to, whatever may be their form, were intended, not merely as security, but as a means of transferring the debtor's property to the favored creditor to the exclusion of others, with a view to evade the provisions of the assignment act, then they must be regarded as null and void, under the provisions of that act." And the court goes on to notice the cases of *Verner v. McGhee*, 26 S. C. 248, 2 S. E. 113, *Lamar v. Pool*, supra, and *Magovern v. Richard*, 27 S. C. 272, 3 S. E. 340, where the attack upon the transactions there assailed failed because of the failure to show any such intent in either of those cases. As it is well expressed in *Verner v. McGhee*, supra: "The assignment act has no application, unless there is either an actual assignment, or a state of facts, fully proved or admitted, which, in conscience and equity, are tantamount to an assignment with unlawful preferences." In *Putney v. Friesleben*, 32 S. C. 492, 11 S. E. 337, the same doctrine was fully recognized and acted upon. To the same effect see *McIntyre v. Legon*, 38 S. C., where, at page 463, 17 S. E. 253, in delivering the opinion of the court, Mr. Justice McGowan lays down the rule in the following language, quoted with approval from the separate opinion in *Austin v. Morris*, supra: "I do not doubt that an insolvent debtor may, by a bona fide mortgage, which is intended merely as a security, prefer one creditor; yet if the mortgage is designed, not as a security, but as a means of transferring his property to one or more of his creditors in preference of others, it seems to me that it is, in effect, though not in form, an assignment, and comes within the mischief intended to be suppressed by section 2014 of the General Statutes." After thus laying down the rule, the learned justice proceeds as follows: "Taking this as our guide, let us apply the rule to this case. The question is really one of fact. The referee found 'that the mortgages were not intended by Legon to operate as an assignment of his property, but were honestly executed for the purpose of protecting Catherine Legon, as a bona fide creditor.' The circuit judge concurred in this finding, and, under the well-known rule of this court, it will not be disturbed," etc.; and the mortgages were sustained. To same effect see *Monaghan Bay Co. v. Dickson*, 39 S. C. 146, 17 S. E. 696.

The case of *Mann v. Poole*, 18 S. E. 145, 389, reported also in 40 S. C. 1, comes next in order. That case seems to be relied on by counsel for respondents as shaking, or at least qualifying, the doctrine uniformly recognized in the series of cases above cited, by laying down as the true test, in all such cases as the present, the result of an inquiry whether it was the intention of the insolvent debtor, in giving the mortgage assailed, honestly to secure one or more of his creditors, or was it his purpose thereby to give one or more of his creditors a preference over other creditors. This view is based upon a partial quotation from the opinion of Mr. Justice Pope in that case, but when the whole passage is read, and especially when the real nature of that case is considered, together with the subsequent remarks of the learned justice, it will at once be seen that such view is based upon an entire misconception, and that the decision in that case in no wise conflicts with or qualifies any of our former decisions. The entire passage in the opinion reads as follows: "It is no longer profitable, in the light of the repeated adjudications of this court on the subject, to consider the right of an insolvent debtor to give a mortgage to one or more of his creditors, when it is intended that such a mortgage or mortgages shall operate as mere securities to secure such creditor or creditors bona fide. In the light of our decisions, whenever it becomes necessary to canvass the transactions of insolvent debtors with their creditors, who are preferred by receiving a lien upon such insolvent debtor's property to the exclusion of all other creditors, so as to determine whether such preferences are obnoxious to the provisions of chapter 72 of our General Statutes, the crucial test is this: Was it the intention of the insolvent debtor to honestly secure the debt of one or more of his creditors, by giving a judgment, or a mortgage, or an assignment of certain choses in action, or was it his purpose thereby to give one or more of his creditors a preference over other creditors? Thus the intention of the insolvent debtor must be ascertained, and this presents a question of fact." Now, when it is remembered that whenever an insolvent debtor gives to one of his creditors a mortgage upon the whole, or even a part, of his property, he necessarily gives such creditor a preference over his unsecured creditors, and as a man is always presumed to intend the necessary consequences of any act which he may do, it is very obvious that the question of fact mentioned in the foregoing quotation never could arise, if the language there found should be construed as counsel for respondents claim it should be, for, as soon as it appeared that the insolvent debtor had made a mortgage to one of his creditors, it would at the same time appear that he had preferred one of his creditors, and hence the question of fact, whether he had made the mortgage with intent to prefer a given creditor, never could arise. It is ob-

vions, therefore, that the true meaning of the passage quoted is that in all such cases the question is just what it is stated to be in the foregoing cases, there manifestly referred to, though not named: Was it the intention of the insolvent honestly to secure one of his creditors, or was it his purpose thereby to prefer one of his creditors, in violation of the assignment law, by resorting to a mortgage instead of a formal assignment, and thus to evade the provisions of that law? This, it seems to us, is shown by the language in the quotation which we have italicized, as well as by the express recognition of the preceding cases; for otherwise we would be compelled to infer that the intention was to overrule such cases, and this certainly could not be said with the least show of propriety. Our view of the true meaning of that decision is still further confirmed by the fact that Mr. Justice Pope, after laying down the law as above quoted, proceeds to inquire whether the mortgages then in question, made just about 91 days before the execution of the deed of assignment by Dr. Poole, the insolvent debtor, were not parts of the same scheme, culminating in the deed of assignment, whereby Dr. Poole attempted to prefer his wife and grandchildren at the expense of his other creditors, and, showing clearly that such was the fact, announces his conclusion in the following emphatic terms: "To expect any man to believe that Dr. Poole did not systematically contrive this result is asking too much of human credulity." Now, if it was intended by that decision to declare the law to be that the only question in such a case would be whether the mortgages were given with intent to prefer one or more creditors,—a question which, as we have seen, is no question at all,—then where would be the necessity, or even the propriety, of entering upon the inquiry to which we have just referred? It is clear that the case of *Mann v. Poole* does not in any way conflict with any of the previous decisions, and was not designed to controvert or even qualify any of the principles established by such decisions.

The last case upon the subject is *Mitchell v. Mitchell* (S. C.) 20 S. E. 405. In that case a mortgage was attacked upon two grounds: (1) That it was given with intent to hinder, delay, and defeat other creditors, in violation of the statute of Elizabeth; (2) that it was intended to be a transfer of the whole, practically, of the insolvent debtor's estate to the mortgagee, who was the wife of the debtor, and therefore void under the assignment law. The facts necessary to sustain both of these grounds were found both by the circuit judge and by this court, and therefore the mortgage was held void upon both grounds. It is obvious, therefore, that *Mitchell's Case*, in which the opinion was delivered by the same justice who prepared the opinion in *Mann v. Poole*, supra, is in line with all the previous

cases hereinbefore cited; for in that case one of the points upon which the question turned, as to whether the mortgage was invalid under the assignment law, was whether the mortgage was given to secure an honest debt, or whether it was intended as a means of transferring the whole, or practically the whole, of the debtor's property to the mortgagee, to the exclusion of other creditors.

From this review of the cases upon the subject in this state, the following propositions, applicable to the case under consideration, are clearly deducible: (1) That an insolvent debtor may by a bona fide mortgage, which is intended merely as a security for a just debt, prefer one of his creditors; (2) that if the mortgage is really designed to operate, not as a security merely, but as a means of transferring the debtor's property to the favored creditor, in preference of the other creditors, then it is void, under the assignment law; (3) that the question as to what was the intention is a question of fact. Applying these propositions to the case under consideration, it seems to us clear that the conclusion reached by the circuit judge cannot be sustained. There is no finding of fact, and no testimony upon which such a finding could be based, that the mortgage was intended to operate as a means of transferring the debtor's property to the mortgagee. On the contrary, the referee finds the other way, and his conclusion is abundantly sustained by the testimony. This finding of fact by the referee is not overruled by the circuit judge, though he does differ with the referee as to his conclusion of law. All that he says upon the subject is: "I hold and adjudge that said mortgage was an assignment by Robert W. Stricker made to the defendant M. J. Coleman with intent to prefer her over Stricker's other creditors, and was in violation of section 2014 of the General Statutes of this state, and is null and void." But his honor did not find as a fact that the mortgage was intended to operate as a transfer of the debtor's property, and we do not see any testimony which would warrant any such finding. On the contrary, it seems to us that the whole testimony points clearly to the conclusion that the sole object of giving the mortgage was to secure an honest debt due to a very indulgent creditor, for a part of which she held a superior lien, and another part of which was for money then loaned to the debtor to carry on his business. The subsequent conduct of the parties negatives the idea that there was any intention that the mortgage should operate as a transfer of the property, for the conceded fact is that the debtor was permitted to retain the possession and use of the mortgaged property for more than three months after the maturity of the mortgage debt. The judgment of this court is that the judgment of the circuit court be reversed, and the complaint dismissed.

(44 S. C. 118)

## CITY COUNCIL OF GREENVILLE v. ORMOND et al. (No. 3,574.)

(Supreme Court of South Carolina. April 15, 1895.)

## JURY TRIAL—EQUITABLE ISSUES.

In a suit on a bond, where the allegations in the answer involve fraud and mistake in an account, it is not error to deny a motion to have the cause submitted to a jury, the issues being purely equitable.

Appeal from common pleas circuit court of York county; R. C. Watts, Judge.

Action on a bond by the city council of Greenville against G. C. Ormond, surviving partner of Ormond & Goforth; Thomas F. Dunlap, as administrator of the estate of R. J. Dunlap, deceased; L. R. Williams; L. K. Armstrong; and John Nichols. Defendants moved to have the cause transferred to the jury calendar, and from an order denying their motion they appeal. Affirmed.

Hart & Hart, Finley & Brice, and C. E. Spencer, for appellants. J. A. McCullough and Wilson & Wilson, for respondent.

POPE, J. The appellants allege error in the order of his honor, Judge Watts, in refusing, at the April, 1894, term of the court of common pleas for York county, in this state, to grant an order transferring this action from calendar 2 to calendar 1, so that all the issues involved in the action might be tried by a jury. The grounds of appeal from this order refusing the said motion are two in number, but they are intended to raise the question that the pleadings, when properly construed, show that such issues were, under section 274 of our Code of Civil Procedure, triable by a jury, as a matter of right of the defendants. It seems to us that the circuit judge was right in keeping this action on calendar 2, because the issues, as made by the pleadings, were purely of an equitable character, and we will now briefly indicate the basis of this conclusion.

It seems: That in March, 1892, the city council of Greenville determined to lay down within the city of Greenville a sewerage system, and on the 19th of that month entered into a contract with Ormond & Goforth to excavate and fill trenches for sewers within the limits of that city. This contract, and the specifications of the city engineer therefor, are made a part of the complaint. On the same day, Ormond & Goforth, with R. J. Dunlap, L. K. Armstrong, L. R. Williams, and John Nichols as their sureties, executed to the city of Greenville their bond, in the penal sum of \$10,000, conditioned "that the said Ormond & Goforth should well and truly keep and perform all the terms and conditions on their part to be performed, and should indemnify and save harmless the said city of Greenville, as therein stipulated." That subsequently, on the 7th day of May, 1892, the said sureties, under their hands and seals, agreed that the city of Greenville

might increase the compensation to their principals without impairing their bond of 19th March, 1892. That W. L. Goforth, of the firm of Ormond & Goforth, having died, the sureties, on the 12th of August, 1892, agreed as follows: "Know all men by these presents, that we, R. J. Dunlap, R. L. Williams, L. K. Armstrong, and John Nichols, sureties \* \* \*, agree that said bond [19th March, 1892] shall cover, in addition to the matters therein stated, any amount that Ormond & Goforth, or G. C. Ormond, survivor, may be due the city of Greenville, upon final settlement with the same, for moneys advanced in the purchase of tools and dynamite used or to be used in the work named in the original contract; also any loss sustained by the said city of Greenville, or liability incurred by reason of the use of the credit of said city of Greenville, by Ormond & Goforth, or G. C. Ormond, survivor, in the purchase of tools and dynamite." That thereafter, between the 1st September, 1892, and 13th day of December, 1892, the said city of Greenville, relying upon said agreement, advanced the sum of \$2,158.02, which was paid by them for the purchase of tools and dynamite by said G. C. Ormond, survivor. That R. J. Dunlap thereafter departed this life, and the defendant Thomas F. Dunlap is his administrator. That the city of Greenville, through its city council, demands a judgment against the defendants for said \$2,158.02. That the defendants, after admitting the execution of the foregoing papers, insist that they ought not to pay said sum, because the city engineer, in making up his estimates of the work done by said Ormond & Goforth, and G. C. Ormond, as survivor, which estimates, under the original contract, were to be binding upon all the parties, as to said work, either by fraud or palpable mistake, neglected and refused to allow the contractors \$14,529.42 in addition to the sums he did allow, and further charged the contractors with the sum of \$850 improperly paid by the city of Greenville to some of its property owners for alleged injuries to their property, respectively, growing out of the labor of said contractors in carrying out their contract. That the defendants, who were sureties, were made to assume liability improperly. That if the accounts between the city of Greenville and Ormond & Goforth, and G. C. Ormond, as survivor, were properly adjusted, there would be nothing due by the defendants to the plaintiff, but on the contrary the plaintiff would be due the defendant G. C. Ormond, as survivor, the sum of \$13,221.40.

Now, it must be apparent that the defendants confess and avoid, and that the matters in avoidance involve the connection of fraud and palpable mistake in an involved account, which, on the law side of the court, their bond executed on 19th March, 1892, would preclude them from claiming, but, under familiar principles of equitable jurisprudence, in a court of equity, could be fully considered.

Such being the case, we see no error in the order of Judge Watts now complained of. It is the judgment of this court that the order appealed from be affirmed, and the cause is remitted to the circuit court to be there heard as a cause in equity.

(44 S. C. 112)

**CITY COUNCIL OF GREENVILLE v. ORMOND et al. (No. 3,575.)**

(Supreme Court of South Carolina. April 15, 1895.)

**LEGAL AND EQUITABLE ISSUES—RIGHT TO JURY TRIAL.**

Where the issues raised by pleadings are partly legal, and partly equitable, it is not error to deny a motion to have all the issues tried by jury, though the right exists to have purely legal questions so tried.

Appeal from common pleas circuit court of York county; R. C. Watts, Judge.

Action by city council of Greenville against G. C. Ormond, surviving partner of the firm of Ormond & Goforth, and others, on two notes. Defendants appeal from an order denying their motion to have the cause placed on the jury calendar. Appeal dismissed.

Hart & Hart, Finley & Brice, and C. E. Spencer, for appellants. J. A. McCullough and Wilson & Wilson, for respondent.

**POPE, J.** This action was commenced in the court of common pleas for York county, in this state, on the 15th day of August, 1893, by the plaintiff against the defendant, as above named, on two notes for \$2,000 each. It was placed on calendar No. 2. After the defendants had all answered, they caused a notice to be served upon the attorneys for the plaintiff that they would on the 14th day of April, 1894, or as soon thereafter as counsel could be heard, move before his honor, Judge Watts, for an order striking said cause from calendar 2, and placing same upon calendar 1, for trial by jury. This motion came on for hearing before such presiding judge, in open court; and on the 18th day of April, 1894, Judge Watts, in a short order, refused such motion. Thereafter the defendants appealed from said order on two grounds, to wit: (1) The complaint having presented a purely legal cause of action, and each of the answers having presented defenses which were purely legal, the determination of which for defendants would warrant a final judgment in their favor; (2) and the complaint being legal, even if there are any distinct, independent, equitable issues raised by either of the answers, such issues might be reserved for trial by the court without depriving the defendants of their right to trial by jury.

It is to be regretted that the circuit judge, in formulating his order wherein he refused to grant the defendants' motion, failed to indicate his ground therefor. Strictly speaking, this is the duty of any court. In the case at

bar the pleadings are extended, and raise some interesting issues. We do not know a better instance than the present in which to point out the danger to a party to an action pending in court in associating good grounds with bad grounds, as the basis for a motion to change such action from one calendar to another. Here we are satisfied that there are at least two grounds on which the defendants have a right to have certain issues of fact tried by a jury; and, on the other hand, there are certain questions of fact entering into certain other issues that are equitable in their nature, and for which the right of trial by jury does not exist. But the defendants having moved generally to have the whole action transferred to the calendar (No. 1) appropriate to trials by jury, thereby seeking the trial of all the issues in the action by a jury, and the circuit judge having refused the defendants' motion, we cannot say that it was error in the circuit judge. We will have to dismiss the appeal from the order of Judge Watts, but, in doing so, feel that our right to protect the defendants by providing that this order, here made, shall not prejudice their right to move for an order to transfer the action to calendar 1, if they feel so advised, so that the issues properly triable by the jury may be then tried. It is ordered that the appeal be dismissed, with the foregoing reservations, and the action is remanded to the circuit court.

(43 S. C. 439)

**SULLIVAN v. WILLIAMS et al.**

(Supreme Court of South Carolina. April 16, 1895.)

**ATTACHMENT—FORTHCOMING BOND—VALIDITY—DELIVERY—FORGED SIGNATURES—ESTOPPEL.**

1. In an action on a bond alleged to have been executed by defendants under an agreement with plaintiff to procure the discharge of an attachment, facts occurring at the execution of the bond showing it was a voluntary, and not a statutory, obligation are admissible in evidence.

2. Where the statute provides for the releasing of attachment by giving of bond under order of court, and a release by bond at common law was also allowed, and it appears in an action on the bond that it was executed in pursuance of an agreement for the release of an attachment on property, a nonsuit cannot be granted on the ground that the release was made without an order of court.

3. In an action on a bond, it appeared that the sureties agreed with A., an obligor, to become such with the understanding that his two partners should become obligors thereon, but no notice of this condition was given to the obligees, but the partners' names appeared in the body of the bond as obligors. After A. had signed the bond the two sureties signed, without waiting for any other signatures, and delivered it to A. to have it completed before delivery. The bond was subsequently delivered, with all the signatures required, including the names of the two partners. There was nothing on the face of the bond to show that it was not regular. *Held*, that evidence that the names of the two partners were forged is not admissible. *McIver, C. J.*, dissenting.

4. Where a bond, when delivered to the obligee, has signatures of obligors different from those that appear in the body of the bond, the

sureties will be released, unless proof is made that they waived the defect.

Appeal from common pleas circuit court of Greenville county; I. D. Witherspoon, Judge.

Action by W. E. Sullivan against James T. Williams and Alexander Stuart, as sureties on a bond given for the release of an attachment. From a judgment for plaintiff, defendants appeal. Affirmed.

The following is a copy of the bond on which this action is brought:

"The State of South Carolina, County of Aiken. In the Common Pleas. Bond for Discharge of Attachment. Know all men by these presents, that we, George W. Susong, W. A. Susong, A. E. Susong, James H. Rumbough, and D. L. Boyd, known as Susong & Co., nonresidents in South Carolina, and Alexander Stuart, residing in Greenville city, state of South Carolina, and a freeholder in said state, and James T. Williams, residing in Greenville city, state of South Carolina, and a freeholder in said state, are held and firmly bound unto W. E. Sullivan, of said state, a creditor suing the said Susong & Co., who has prosecuted attachment proceedings against the said Susong & Co., on the ground of their nonresidence in said state, in the sum of twenty-one thousand and fifty dollars, to be paid unto the said W. E. Sullivan, his certain attorneys, executors, administrators, and assigns, to which payment, well and truly to be made and done, we bind our heirs, executors, and administrators jointly and severally by these presents. Sealed with our seals, and dated this twenty-seventh day of July, A. D. 1887, and in the one hundred and twelfth year of the American Independence. Whereas, a warrant of attachment has been issued on the application of the said W. E. Sullivan against said Susong & Co., as nonresident debtors, directed to the sheriffs of the counties of Aiken, Edgefield, Abbeville, Laurens, and Greenville, said state, commanding them to attach and safely keep all the property of the said Susong & Co. within their respective counties, consisting especially of the roadbed, right of way, and franchises of the Atlantic, Greenville, and Western Railway Company within the counties above named; also of about twenty thousand dollars of township bonds, deposited in the Greenville National Bank, of Greenville, said state; also real estate of said George W. Susong in the town and county of Greenville, said state; also real estate of said D. L. Boyd in the town and county of Greenville said state,—and all other property, both real and personal, in the hands, possession of, control of said Susong & Co., or any of them, or their agents or servants, in the several counties above named, or so much thereof as may be sufficient to satisfy the demands of the said W. E. Sullivan, the creditor plaintiff, amount to ten thousand five hundred and eighteen and  $\frac{20}{100}$  dollars, with interest,

together with all the cost and expenses: Now, the condition of this obligation is such that the above-bounden, Susong & Co., Alexander Stuart, and James T. Williams, shall and will, on demand, pay to the plaintiff creditor, to the aforesaid W. E. Sullivan, the amount of judgment that may be recovered against the said Susong & Co., defendant debtors in the action brought by said W. E. Sullivan against the said Susong & Co. in the court of common pleas for Aiken county, for ten thousand five hundred and eighteen and  $\frac{20}{100}$  dollars, then this undertaking shall be void and of none effect; otherwise to remain in full force and virtue. G. W. Susong. [L. S.] Alex. Stuart. [L. S.] Jas. T. Williams. [L. S.] D. L. Boyd. [L. S.] Jas. H. Rumbough. [L. S.] W. A. Susong. [L. S.] A. E. Susong. [L. S.] Signed, sealed, and delivered in the presence of W. C. Benet, M. F. Ansel, as to G. W. Susong, Boyd and Rumbough; G. G. Wells, as to Alex. Stuart and Jas. T. Williams; R. J. Stokley, as to the two last.

"State of South Carolina, County of Greenville.—We, the above-named Alexander Stuart and James T. Williams, do hereby swear that we are together worth the amount of the above bond, over and above all liabilities and homestead exemption. Alex. Stuart. Jas. T. Williams.

"Sworn to before me this July 27, 1887, A. J. Mosely, C. C. P. and G. S. [Seal.]

"We approve the within bond this August 1st, 1887. A. J. Mosely, C. C. P. M. F. Ansel."

Haynsworth & Parker, for appellants. Henderson Bros. and Cothran, Wells, Ansel & Cothran, for respondent.

POPE, J. W. E. Sullivan, as plaintiff, on the 2d day of August, 1892, instituted an action against James T. Williams and Alexander Stuart, as defendants, in the court of common pleas for Greenville county, in this state, to recover judgment against said defendants for the sum of \$11,447.12, with interest from 14th day of July, 1890, on \$10,882.21, and for costs. The action came on for trial before his honor, Judge Witherspoon, and a jury, in such court, on the 29th day of March, 1894, and resulted in a verdict for the plaintiff for \$14,274.07. After entry of judgment thereon, the defendants appealed to this court.

The plaintiff, in his complaint, as his cause of action, substantially alleges that Susong & Co., composed of George W. Susong, W. A. Susong, A. E. Susong, James H. Rumbough, and D. L. Boyd, were indebted to him in the year 1887 in the sum of \$10,518.26, and that immediately thereafter he brought his action against such firm, for the collection of his said debt, in the court of common pleas for Aiken county, in this state; that inasmuch as said defendants, Susong & Co., and every partner thereof, were nonresidents of this state, but as the firm and two partners thereof had real and personal estate within



the counties of Aiken, Edgefield, Abbeville, Laurens, and Greenville, in this state, such plaintiff procured to be issued in his said action, by the clerk of the court of common pleas for Aiken county, a warrant of attachment against the property of said firm of Susong & Co., and of the two defendants George W. Susong and David L. Boyd, as members of said firm of Susong & Co., within said counties, and that thereunder the sheriffs of Aiken, Edgefield, Abbeville, Laurens, and Greenville counties, respectively, did attach such property of Susong & Co. and such property of George W. Susong and David Boyd within their respective counties; that, when this was done, thereupon an agreement was entered into between W. E. Sullivan and Susong & Co. whereby, in consideration of a bond being made by the members of the firm of Susong & Co., with James T. Williams and Alexander Stuart as sureties, in the penal sum of \$21,050, conditioned that they would, jointly or severally, pay whatever judgment might be recovered by the said W. E. Sullivan in his action against Susong & Co., such attachment of the property of Susong & Co. and of the said George W. Susong and David Boyd were released; that W. E. Sullivan, in his said action against Susong & Co., recovered a judgment on circuit, which was affirmed on appeal to the supreme court (15 S. E. 377), for \$11,375.62, with interest from July 14, 1890, or \$10,882.21, and also \$61.50 as costs of appeal, which said sums, and every part thereof, the said Susong & Co., and the partners thereof, have not paid; and that, upon demand therefor upon the said James T. Williams and Alexander Stuart, they, each, have refused payment. The defendants James T. Williams and Alexander Stuart, in their answer, admit that George W. Susong, W. A. Susong, A. E. Susong, James H. Rumbough, and D. L. Boyd, copartners in business as Susong & Co., were nonresidents of this state in 1887, when the action of Sullivan against them was begun; that Susong & Co. being indebted to plaintiff, Sullivan, as stated by him, said Sullivan, on 17th June, 1887, made applications for writs of attachment against the real and personal estates of George W. Susong, W. A. Susong, A. E. Susong, James H. Rumbough, D. L. Boyd, and Susong & Co., as nonresident debtors, and that such application for attachments was regular in all respects; that such attachments were issued by W. M. Jordan, Esq., as clerk of the court of common pleas for Aiken county, in this state, as hereinbefore stated; that W. E. Sullivan, as plaintiff, in his said action against the said George W. Susong, W. A. Susong, A. E. Susong, James H. Rumbough, and D. L. Boyd, composing the firm of Susong & Co., as defendants, obtained his judgment against said defendants in the court of common pleas for Aiken county, S. C., on 14th July, 1890, for the sum of \$11,375.62, as hereinbefore stated; and that James T. Williams and Alexander Stuart are residents of this state.

But these defendants denied that the sheriffs of Aiken, Edgefield, Laurens, Abbeville, and Greenville counties, respectively, did attach certain property of Susong & Co. within their respective counties; that on the 27th day of July, 1887, in order to discharge the attachments in given time, the said W. E. Sullivan and Susong did come to an agreement whereby, upon the execution of a bond in favor of W. E. Sullivan, under the hands and seals of the several partners comprising the firm of Susong & Co., dated 27th July, 1887, and delivered on August 1, 1887, to the proper officers, such attachments were released; that upon the delivery of said bond the said attachments were duly discharged, the attached property mentioned in the bond released, and the said bond then delivered by the said officers to the plaintiff; and that by the bond given by these defendants they obligated themselves, jointly and severally, in the penal sum of \$21,050, for the payment to the plaintiff of such judgments as plaintiff might recover in his action against Susong & Co. These defendants, Williams and Stuart, in their answers, allege, substantially, as a second defense, that in the body of the bond referred to in the complaint (the bond given in attachment proceedings) the names of George W. Susong, W. A. Susong, A. E. Susong, James H. Rumbough, and D. L. Boyd are set out as principals, while the names of James T. Williams and Alexander Stuart only appear as sureties; that, when presented to them (Williams and Stuart), George W. Susong was the only one of said principals who had then signed said bond; that these defendants signed said bond upon the distinct understanding that it should be executed by all the persons named in its body before it should be delivered or filed to be used as a basis of an application to discharge the attached property, and that such execution should be evidenced and proved in due form of law; that after signing said bond these defendants did not see it again until a few weeks before the commencement of this action; that they are informed and believe that the names of W. A. Susong and A. E. Susong, which appear as signers thereof, were not written either by themselves, or by any other person duly authorized so to do, and that such W. A. and A. E. Susong now dispute their liability upon said bond, and refuse to be bound thereby; that the other persons named as principals on said bond are insolvent, but that W. A. and A. E. Susong then were, and now are, men of considerable wealth; that these defendants knew of their means at the time they signed the said bond, before it should become effective, was what induced these defendants to sign the same; that the execution of said bond on the part of the persons named as principals was not proved or acknowledged as required by law, nor was said bond approved by the clerk of the court for Aiken county, when these defendants had a right to and did expect that these



formalities should be complied with before the bond should become effective, and that they did not and would not have waived the same, and that, if the plaintiff accepted said bond without a compliance with the law in said respects, all damages resulting therefrom are attributable to his own negligence, and not to these defendants; that these defendants signed the said bond with the understanding that when it should be executed by all persons named therein as obligors, and after all persons named as defendants in Sullivan against Susong & Co. had appeared in such action it should be used in an application on the part of the principals, to the officer who had issued the attachment, or the court, for an order discharging the property from such attachment, and was for such purpose alone that these defendants signed the said bond; that no such application was made, either to the officer who issued the attachment, or to the court, for an order discharging the attached property, and no such order has been passed; that, if the attached property has ever been discharged from said attachment, it was by the voluntary act of the plaintiff, and not in the manner provided by law, and contemplated by these defendants. And these defendants deny that they ever consented to be bound by said bond, except upon the conditions set forth above, of all of which the plaintiff was fully advised by the recitals of the said bond and the provisions of law, and was otherwise informed by these defendants. They allege that all these provisions were important, and material to their protection, on their relation as the sureties upon said bond. They deny that they authorized delivery of said bond in its present condition, and they allege that said bond is void and of no effect.

When the cause was being tried, certain testimony was offered by the plaintiff, which, on objection, was ruled incompetent by the trial judge; and testimony was offered by the defendants which, upon objection, was ruled incompetent by the trial judge. Exceptions to such ruling were duly noted, and these exceptions form a part of defendants' grounds of appeal. The defendants moved for a nonsuit, which motion was overruled. This furnishes an additional basis for an appeal. Lastly, the defendants presented sundry requests to charge, and whenever these were declined by the circuit judge an appeal was based upon such refusal.

The following are the grounds of appeal: "(1) Because his honor, the presiding judge, erred in not granting the nonsuit requested by the defendants, for the following reasons: (a) Because we respectfully submit that under the evidence the bond sued upon in this action, so far as it affects these defendants, must be deemed a statutory obligation, given, in pursuance of statute, for the purpose of effecting a discharge of the attachment referred to in the complaint, and

the said bond had not been used in the manner contemplated by statute, or by the defendants herein, at the time of the execution thereof, in that the bond was never delivered to the clerk of court of Aiken county, as contemplated by the statute and by the defendants, and was never received, accepted, or filed by said clerk. (b) Because the signatures of the makers of said bond, and more particularly of W. A. Susong and A. E. Susong, were never probated or acknowledged in like manner as deed of real estate, as required by the rules of the circuit court in this state, and such bond would never, therefore, have been lawfully received, accepted, or filed by said clerk. (c) Because, even if said bond, as contended by plaintiff, had, by agreement between the plaintiff and the principals therein, been diverted from the statutory course, and had, by such agreement, been delivered to the plaintiff, instead of said clerk, and if the requirements of law as to the manner of execution and the filing and accepting by the clerk had been waived by the said principals, such agreement and waiver would not affect the defendants, unless they themselves had notice thereof before delivery of said bond, or unless the defendants waived said requirements, and assented to the use of said bond in a manner not contemplated by statute; it being submitted that as to these defendants the said bond must be presumed the statutory obligation, in the absence of testimony that these defendants had knowledge of a use not contemplated by statute, and assented thereto, and of this there is no evidence. (d) Because there was no evidence tending to show that the bond was executed by W. A. Susong or A. E. Susong, or by any one by them authorized. (2) Because his honor erred in allowing the introduction of the telegram of W. C. Benet to Henderson Bros., and of their reply to the same; also in admitting the testimony of M. F. Ansel as to transactions between W. C. Benet and himself,—it being submitted that all this testimony was irrelevant and incompetent, as tending to convert the said bond from a statutory obligation, which these defendants had a right to presume it was, into a voluntary obligation, there being no testimony showing that this was brought home to defendants. (3) Because his honor erred in excluding the testimony of Mrs. A. E. Susong, when first offered, to the effect that the signature of A. E. Susong to the said bond was forgery. (4) Because his honor erred in holding that there was nothing in the face of said bond to give sufficient notice to the plaintiff herein, as to Ansel and Mosely, his agent, that the defendants herein had signed said bond upon condition that W. A. and A. E. Susong would also sign the same, and in excluding, therefore, the evidence of A. E. Susong to the effect that he had never signed the said bond, but that his signature thereto was a forgery. (5)

That his honor erred in holding that the defendants could not avail themselves of the forgery, or of all the facts concerning it, and he therefore erred in excluding the testimony of Mrs. A. E. Susong as to said forgery. (6) Because his honor erred in holding that no testimony, and more particularly the testimony of Mrs. A. E. Susong, could be introduced to prove the signature of A. E. Susong to said bond, notwithstanding the fact that the rule requiring the probate or acknowledgment of the signature to said bond had not been complied with, and therefore the palming off of a forged signature to said bond rendered probable, or at least more possible, in consequence of the neglect of plaintiff or his agents in accepting said bond uncompleted according to law. (7) Because his honor erred in holding that the testimony of the defendant James T. Williams did not disclose any condition between himself and Geo. W. Susong, D. L. Boyd, and James Rumbough to the effect that the bond was not to be delivered until signed by W. A. and A. E. Susong, and that, the names of said W. A. and A. E. Susong appearing in the face of the bond as co-makers thereof, he erred in excluding the testimony of Mrs. A. E. Susong, and other testimony offered by these defendants, to the effect that the said A. E. Susong never signed the bond, and that his signature thereto was a forgery. (8) Because his honor erred in holding that the condition made with Boyd, Rumbough, and G. W. Susong by Jas. T. Williams, prior to his signing said bond, to the effect that he would only sign on condition that W. A. and A. E. Susong also signed said bond, was not brought home to the plaintiff by the testimony of Jas. T. Williams, and therefore in excluding the testimony of A. E. Susong when offered the second time, whereas he should have submitted that question to the jury. (9) Because his honor erred in excluding testimony offered by these defendants to the effect that the signature of A. E. Susong, as it appears on the said bond, bore on its face evidence of forgery which should have excited the inquiry of plaintiff or his agents before they accepted said bond. (10) Because his honor charged the jury: 'If you conclude from the evidence that there was any agreement between Susong and these two parties here, that cannot bind or prejudice the right of the plaintiff [Sullivan], unless it was made to appear that it was brought home to Sullivan, or unless this defendant signed it with the condition that it was signed by W. A. and A. E. Susong, and these and this condition was brought home to the plaintiff.' (11) Because his honor erred in refusing to charge, as requested by the defendant, 'that, if a surety is called upon to sign a bond given for the purpose of effecting a discharge of attachment, his contract is presumed to be the statutory bond for that purpose, unless there appears

on the face of the bond something to warn the surety that the bond is not to be used for that purpose, and in a manner not contemplated by statute.' (12) Because his honor erred in refusing to charge, as requested by these defendants, 'that the bond sued upon in this action has nothing on its face to warn a surety that it is not the bond contemplated by statute to procure a discharge of an attachment. And in that case, unless the jury believe from the evidence that the sureties, the defendants in this action, at or before the signing of said bond, had information of the proposed use of such bond in a manner and for a purpose not contemplated by statute, the defendants in this action are presumed by law to have obligated themselves only in the manner evidenced by their bond, when construed with the laws of this state and the rules of this court having reference to such bonds.' (13) That his honor erred in refusing to charge these defendants' fourth request to charge, and in holding that, whilst such stated correct principles of law, they had no application to this case, such request being as follows: 'That section 263 of the Code—the section having reference to the giving of bonds for the purpose of discharging attachments—contemplated that such a bond shall be used as an application to the court or officer who issued the attachment, for a discharge of the same. It contemplates delivery to and approval by the court or such officer.' (14) That his honor erred in refusing the defendants' fifth request, and in holding that, while such a request stated correct principles of law, it had no application to this case; such request being as follows: 'That the attachment in the present case was issued by the clerk of the court of Alken county; so that, if the provisions of the act had been followed, the bond would have been delivered to and approved by him or the court.' (15) That his honor erred in refusing to charge these defendants' sixth request to charge, and in holding that, whilst such request stated a correct proposition, it would not affect this case, or, in other words, it would not discharge the liabilities of these defendants on this bond; that request being as follows: 'That rule of the circuit court provides: "All bonds and undertakings shall be duly proved by a subscribing witness or acknowledged in like manner as deeds of real estate before the same shall be received or filed."' (16) Because his honor erred in refusing to charge these defendants' seventh request to charge, and in holding that, whilst such request stated correct principles of law, it had no application to this case; such request being as follows: 'Under this sale, it would have been necessary, before this bond could be lawfully received by the officer issuing the warrant of attachment, or the court, that its execution should be proved by the oath of a subscribing witness, or acknowledged in like manner as deeds of

real estate. It would have been the duty of the officer or the court, before receiving the bond, to see that this requisite had been complied with, and to have declined to receive it unless such proof of its execution had been furnished.' (17) Because his honor erred in refusing defendants' eighth request to charge, to wit: 'That the provision of law contained in such rule is intended for the protection of all persons interested in the due execution of the bonds or undertakings made in the course of judicial proceedings. That it is for the protection of the obligee of the bond, but also for the protection of the sureties therein, tending to preserve to those signing such bonds their right of contribution from an exoneration by those whom they have a right to expect will sign such bonds with themselves, and serving to protect the sureties signing from frauds, by preventing or making less probable the forging the names of others, whom they, in law, had the right to expect would sign such bond before it would be binding on themselves.' (18) That his honor erred in refusing these defendants' ninth request to charge, to wit: 'That if the jury believe from the evidence that the defendants had no knowledge or information that this bond was to be used for the purpose and in the manner not contemplated by statute, and did not assent to such use, their liabilities thereunder will be determined only as though this bond were a statutory bond given for the purpose of discharging an attachment. In such case, if the bond was not delivered to the clerk of the court of Aiken county, or to the court, and was not proved by the oath of a subscribing witness, or acknowledged in like manner as deeds of real estate, and was not filed with the clerk of the court for Aiken county,—if none of these things were done,—these provisions of law have not been complied with, and the bond is void, as to these defendants, unless the jury find from the evidence that they waived the requirements of compliance with these conditions.' (19) Because his honor erred in refusing to charge these defendants' nineteenth request to charge, and, whilst admitting the effect of the proof referred to in such request, saying, 'I hold it not necessary to have such on this bond.' Said request as follows: 'In determining this question of negligence, in case you conclude that the bond was so intrusted by these defendants, you must consider all the circumstances surrounding the case; and, in this connection, I charge you that the provisions of law requiring all such bonds to be proved by the oath of the subscribing witness before they should be received is calculated to prevent the palming off of a false signature, and the defendants had the right to expect that such proof should be made before the bond was received.'"

We will discuss these exceptions in the following order: First, the admission by

the trial judge of testimony in behalf of plaintiff excepted to by the defendants; second, the denial of defendants' motion for a nonsuit; third, the refusal by the trial judge to admit certain testimony offered by the defendants; fourth, the refusal by the trial judge to charge certain requests presented by the defendants.

First. The plaintiff offered to show the circumstances attending the execution of the bond which procured the release of the property attached. To this the defendants objected. The bond was approved by Mr. Ansel, a member of the Greenville bar. It was in the handwriting of Mr. Benet, an attorney at that time practicing at the Greenville bar, and as such the attorney of Susong & Co. The testimony was intended to explain these matters. Such testimony in no wise infringed upon the terms or provisions of the bond itself. We cannot see that it was incompetent. Hence the second ground of appeal is dismissed.

Second. At the close of plaintiff's testimony, defendants moved for a nonsuit which was refused. Was this error? The proposition that the circuit judge should not grant a nonsuit, if there is any testimony—legal testimony—to support plaintiff's cause of action is admitted on all hands here. But the question presented by defendants is that attachment proceedings are purely the creature of statute; that such attachment proceedings, under the statutes of this state, may be released by the giving of a bond or undertaking in double the amount sued for, with two sureties, who shall justify before the clerk of the court in the county where the action is pending, or by a judge in such county. And, further, that rule 66 provides that before such bond can be filed the same should be approved by the clerk who issued the attachment, and also shall be probated as is required of deeds to real estate before being recorded, to wit, by the affidavit of one of the subscribing witnesses; that defendants, being only sureties, had the right to insist, as a condition precedent to any liability thereunder, that this bond should be subjected to the requirements of the statute in the particulars before recited, and especially that the release of the property attached should have been made by the clerk at Aiken, or a judge; and that, as the testimony of the plaintiff failed to show affirmatively such a compliance with such statutory requirements, the defendants were entitled to a nonsuit. We think this position is untenable in the case at bar. There is no doubt but that the law in existence at the time of the creation of a contract, and pertaining thereto, enters into the obligation, as a part thereof; but appellants overlook the fact that at the time of the execution by them of this bond the law in this state allowed such proceedings in an attachment to be released, so far as property attached was concerned, by a bond at the common law. Plaintiff, in his proof, did not show that such release was under any order of court. On the

contrary, he showed that the attachment was released by Mr. Ansel, as the agent of the plaintiff. The first ground must be dismissed.

Third. Defendants sought to introduce testimony to show that the bond in question was signed by the defendants upon the express condition that A. E. Susong and W. A. Susong also should sign the same, but the trial judge ruled such testimony incompetent unless the signing by the defendants on condition that W. A. and A. E. Susong each should sign the same was brought home to the plaintiff himself, or some one representing him. Was this error on the part of the judge? It is always better to have the circumstances of the case before us when we are called upon to pass upon a question of law which is to govern the solution of such a contest. In the case at bar, George W. Susong and D. L. Boyd were in the city of Greenville, as was also Rumbough, but the other two members of the firm of Susong & Co. lived in East Tennessee. All the property attached was in this state, and the proceedings in attachment, under which the firm assets, as well as the property of the two partners, George W. Susong and D. L. Boyd, were located in this state, and the action in which the attachment was procured, being in a state court, was limited to the state's territory. Under the circumstances, George W. Susong sought out James T. Williams and Alexander Stuart, and represented to them that he would have to execute a bond to secure the release of such firm assets, as well as the property of two of the firm, from this attachment. No one else was present when application to Williams and Stuart to become sureties was made. Both Williams and Stuart contend that they agreed to become sureties for the firm upon a distinct understanding that A. E. and W. A. Susong would become obligors thereon. Confessedly, no notice of this condition was imparted to Sullivan or any agent of his. We do not hesitate to say that, if this was all in the case, we would say the judge was right; but this is not all, for the bond itself said that W. A. and A. E. Susong were each a member of the firm of Susong & Co., and each one was therein secured as an obligor. From this view of the case, it was immaterial that Williams and Stuart acquainted Sullivan or his agents with the condition upon which they signed, and thus we are met with the

Fourth subdivision: Was it competent for Williams and Stuart to prove that the names of W. A. Susong or A. E. Susong were forged to such bond? That this is a joint and several bond, in our judgment, is immaterial, for the effect of its being joint or several would only relate to the remedy, namely, the ability of Sullivan, as obligee, to bring his action against the obligors, jointly or severally, upon the happening of the condition to the bond. It would not extend so as to fasten a liability upon each obligor named in and signed to the bond, whether such signatures were forged or not. We mean this: that whether the liability

of the obligors to this bond be joint or several does not reach the question which has to be decided in order to hold these sureties liable. It is a far different and more serious question, and one which has caused very deep concern to courts, in their effort to settle the law governing such matters in a manner that will protect sureties, and at the same time preserve the rights of obligees. It is not to be wondered at that there has existed a contrariety of opinion among courts on this subject, but nevertheless it is to be deplored, as adding to the criticism that the law is uncertain.

We begin the discussion by admitting that sureties are favored in the law. But this is true only to the extent that such sureties are entitled to all the protection flowing from the negligence, fraud, or misconduct of the obligee, and to stand on their contract, *strictissimi juris*, and not that they are not to be treated as original promisors, along with their principals, being debtors from the beginning. "He must see that the debt is paid, and he is held ordinarily to know of any default of his principal. \* \* \*" Baylies, Sur., at page 5. Of course, the rights and duties are held different, in the law, as to negotiable and nonnegotiable instruments. In the former his liabilities are to be determined under the law merchant; in the latter, mainly under equitable principles. Under such nonnegotiable instruments as bonds and other specialties, the pivotal point is the delivery of the instrument; for around this, as a center, revolve conditions that will be respected,—notice of conditions in the instrument itself, and such like defenses. In the case at bar, the sureties, seeing on the body of the bond the names of George W. Susong, D. L. Boyd, J. H. Rumbough, A. E. Susong, and W. A. Susong, as obligors, along with their own (Williams and Stuart), were clothed by law with the right to insist that the names of all these should appear as signers of the bond before any liability on their part attached. Not that they could insist, in a private agreement with any of their co-obligors, that any other names than those named in the bond should sign, to make the obligations binding upon them, for it made no difference what private agreement they had with their co-obligors to limit or fix their liability under the bond, unless such private agreements should be communicated to the obligee or his agents. But the obligee and his agents were bound, at their peril, to see that the names of every person set out in the bond should be signed to the same before such bond clothed the obligee with an enforceable contract against the surety. This, however, being admitted, does not settle the equities between the sureties under the bond here. It seems that after George W. Susong signed the bond in question, and without waiting for any other signatures, the two sureties signed the same, and justified that they were worth the penalty of the

bond,—\$21,050. Of course, it will not for a moment be contended that such a premature act on their part made them liable. It is fixed law that it did not. However, when it is remembered that this bond could not operate until its delivery, and that these two sureties placed said bonds in the hands of George W. Susong and others, to have the same completed before its delivery, and the sureties thereby, in law, made such co-obligors their agents—not the agents of the obligee—to procure such signatures, and when, as they contend, such signatures of A. E. and W. A. Susong were forged to such bond, and in that condition the bond was delivered to Sullivan, the obligee, or his agent, does there not arise an equity in Sullivan, whereby he can say: "Grant that the bond, which, when presented to me, or my agent, Mr. Ansel, for acceptance, although entirely regular on its face, as having been executed by A. E. and W. A. Susong, yet in fact their names were forged thereon and thereto. This will not avail you as a defense, and you are estopped from proving such forgery, because, 'when one of two innocent persons must suffer, the loss must fall upon him who put it in the power of a third person to cause such loss, as well as upon the principle that, when an agent is clothed with apparent authority to do an act, he may bind his principal, within the limits of that authority, whatever may have been his private instructions.'" *Fowler v. Allen*, 32 S. C. 236, 10 S. E. 947. It is true that Chief Justice McIver was discussing a negotiable instrument in the case last cited, yet when he used this language he preceded it with this remark: That "the proposition does not rest alone upon the peculiar character of negotiable papers, but upon the well-settled principle," as above quoted. It would seem, therefore, that Williams and Stuart, the defendants, having made George W. Susong and the other co-obligors their agents to procure the signatures of W. A. Susong and A. E. Susong, and their names being forged, as signers of the bond, while it was in the hand of their agents, before its delivery to the payee or his agent, that the principle above quoted—when one of two innocent parties must suffer, the loss must fall upon him who put it in the power of the third person to cause such loss—will make them liable, and forbid their offering proof that the names of W. A. Susong and A. E. Susong, or either of them, were forged, as signers of the bond. Before fortifying the foregoing declaration of the law by quoting from adjudged cases and respectable authors, it may be as well to point out the hardship to the plaintiff of any other construction of the law applicable to this case. Here the plaintiff has secured the payment of his debt by seizing the property of this firm and two of its members, within the jurisdiction of the courts of this state, and, by his honest reliance upon the bond delivered to him, has surrendered his lien

upon all the attached property,—not only that of the firm of Susong & Co., but also of that attached of George W. Susong and D. L. Boyd, as individual partners in said firm. The plaintiff has complied with his duty under the bond, and has pursued this firm, and every member of such firm, until he has a valid judgment against them for the amount originally sued for, and this after one of the most fiercely and closely contested litigations that has occurred in our courts. See 30 S. C. 395, 9 S. E. 156; 36 S. C. 397, 15 S. E. 377; 18 S. E. 268. And now, after having complied with his duty in every respect, the fruit of his victory is to be wrested from him by the assertion by the sureties of a fact that their principals are interdicted from setting up themselves in their own behalf, and with no allegation in the pleadings, or any proof tendered at the trial to show, that the plaintiff was guilty of any negligence or misconduct or laches, or notice or knowledge of any irregularity or fraud. Let us briefly refer to the law, as settled by decisions and approved authors.

First. A bond operates from its delivery. "There is a distinction to be observed between the effect of the delivery of negotiable and nonnegotiable paper. The one is governed by the law merchant, and the other by the law governing other contracts. But delivery is essential to the validity of a bond or other nonnegotiable paper." *Baylies*, Sur. 98; *Wild Cat Branch v. Ball*, 45 Ind. 213; *McPherson v. Meek*, 30 Mo. 345; *Ayres v. Milroy*, 58 Mo. 516; *State v. Young*, 23 Minn. 551; *Hall v. Parker*, 37 Mich. 590. And this doctrine is impliedly recognized in the case of *Gourdin v. Read*, 8 Rich. Law, 232; *Mills v. Williams*, 16 S. C. 593.

Second. A bond to which there are several obligors, some of whom, as between themselves, are principals, and others sureties, and, when delivered to the obligee, has signatures of obligors different from those that appear in the body of the bond, is notice to the obligee whereby the surety to such bond may be released from any liability thereunder, unless proof is made that such surety waived such defect before delivery. Mr. Baylies, in his work on *Sureties and Guarantors*, at pages 212, 213, says: "So, if the bond bears upon its face evidence that it is an incomplete instrument, or there is something in the attendant circumstances showing knowledge, or its equivalent, on the part of the recipient that the instrument was not to be delivered until other signatures were obtained, or other acts done, of equal importance, the delivery of the instrument will cause no liability, as against one who executed it on the express condition that it should not be delivered to the obligee until the instrument was complete, or the other signatures obtained, or other stipulated acts done." The case of *Pawling v. U. S.*, 4 Cranch, 219, is an apt illustration of this doctrine, for, in the case quoted, Todd, a surety,

wrote the names of those persons with whom he was willing to become sureties on Ballinger's bond, and called on those who witnessed his signature to remember this fact. Signatures of others than those named in the bond itself were added afterwards, without Todd's knowledge or acquiescence. The court, per Marshall, C. J., sustained Todd's right to prove those facts in his execution as an obligor of the bond. In *U. S. v. Leffler*, 11 Pet. 36, the foregoing case was recognized. *Bank v. Evans*, 15 N. J. Law, 156, was a case where one named in the body of the bond did not sign the same, and the court held that the surety incurred no liability thereunder.

Third. A bond which purports to be made by several persons, who are named in the body of the bond as obligors, and which, after being executed by the sureties therein named, and left with the principal to be completed and then delivered to the obligee, is presented to and delivered to the obligee fairly executed, with nothing to warn such obligee, either by word, act, or in the instrument itself, that any one or more of the names of the obligors named therein, and who had to sign the same after such sureties had already subscribed the same, were forged, but which forgery occurred while the instrument was in the hands of a co-obligor, and before delivery to the obligee, is a valid obligation of such surety, and he is estopped, in an action thereon against him, to allege and prove that the name of one or more of his co-obligors was forged to such instrument. Mr. Baylies, in his work on *Sureties and Guarantors*, at page 211, says: "The current of the later decisions is to the effect that where a surety places an instrument, perfect on its face, in the hands of the proper person, to pass it to the obligee, the law justly holds that the apparent authority with which the surety has clothed him shall be regarded as the real authority, and, as the condition was unknown to the obligee, therefore the benefit of such condition shall not avail the surety." *Russell v. Freer*, 56 N. Y. 67; *State v. Potter*, 63 Me. 212; *Nash v. Fugate*, 24 Grat. 202; *Dair v. U. S.*, 16 Wall. 1; *Butler v. U. S.*, 21 Wall. 272; *Smith v. Peoria Co.*, 59 Ill. 412; *State v. Peck*, 53 Me. 284; *McCormick v. Bay City*, 23 Mich. 457; *Cutler v. Roberts*, 7 Neb. 4. In this connection it may be well to distinguish the principles really entering in to make up the decisions by our own court of *Gourdin v. Read*, 8 Rich. Law, 232; *Mills v. Williams*, *supra*. In the first case cited a surety, Read, had signed a bond, leaving the payee's or obligee's name in blank, and intrusted such unfinished instrument to his principal, one Commander, to negotiate a loan. When Commander approached Gourdin to negotiate a loan of money from him on this bond, this blank was unfilled, and after Gourdin consented to make the loan the principal, Commander, in his presence, filled out the blank space with Gourdin's name. When action was brought by Gourdin against Read on this

bond, he defended on this ground, and the additional ground that he had revoked the verbal form he had intrusted Commander with to fill in the payee's name. Under these circumstances, it is very evident that Gourdin was put upon notice to inquire by what authority Commander placed his name upon said bond as the obligee thereof. This was good law then, and it is good law now. It falls under the head of those cases where the instrument itself furnishes notice so that inquiry can be made as to the power of the principal obligor to act for his surety. So it is in the second case just cited (*Mills v. Williams*, *supra*). In the sealed note then in contention, it was in evidence that the note, on its body, stated the value received to be a mule, and the payee's name was left unfilled. One of the obligors gave the note, for a horse, to a different person than that from whom the mule was to be purchased. This court held that both the obligor and her sureties, other than that one who negotiated for the purchase of the horse, were released. This decision was correct, for here the instrument itself, being nonnegotiable, in two particulars, served notice upon the obligee that he was taking the risk himself in such transaction, for the consideration expressed in the note was the purchase of a mule, and the name of the payee was left blank. So, too, the case from Massachusetts of *Russell v. Annable*, 109 Mass. 72, is perfectly consistent with these principles, and was properly decided, as we shall now show. In a case when an attachment had been sued out upon the partnership property, a bond was prepared, in which each partner was stated as an obligor, and one Annable signed as a surety thereto, but the principal obligors were parties only by one partner signing the firm name opposite the seal. No ratification of the firm name by the other partners was contended for, and in fact it was not true. Here, therefore, there was expressed notice to the obligee that under the loan—and every one is presumed to know the law—such a bond was a nullity; and the surety, when sued, claimed the benefit of this patent defect on the face of the bond, giving notice to the obligee thereof, and of course the court decided that he was released from all liability thereunder. If it is desired, this doctrine will be found to be fully sustained in *Kling Co. v. Ferry* (Wash.) 32 Pac. 528; *Helms v. Agricultural Co.*, 73 Ind. 325; *State v. Baker*, 27 Am. Rep. 214; *Stern v. People*, 102 Ill. 541; *Lombard v. Mayberry*, 24 Neb. 674, 40 N. W. 271; *Bank v. Stevens*, 39 Me. 532; *State v. Hewitt*, 72 Mo. 603; *Mathis v. Morgan*, 53 Am. Rep. 847; *Wood v. Ogden*, 16 N. J. Law, 453.

Fourth. A bond signed by one or more of several obligors, but signed by the surety before all the obligors have signed, but not delivered to the obligee until after all have signed, is esteemed, in law, to be intrusted by the surety to his obligors as agents to procure the completion of the bond. "In these cases

of conditional agreement, it is the surety who puts trust and confidence in the principal, and not the obligee; and, if any one is to be the loser, it should be the surety, for he puts it in the power of the principal to create the mischief complained of. The bond having been accepted and acted upon, the surety is estopped from setting up an unperformed and undisclosed condition. The cases before cited all proceed upon the ground that there is nothing upon the face of the bond, as disclosed by the attending circumstances, to apprise the obligee or accepting officer of a state of facts which should prevent its acceptance." *State v. McGonigle* (Mo. Sup.) 13 S. W. 758. "The law makes the principal the agent of the surety for the delivery of the bond." *Jordan v. Jordan* (Tenn.) 43 Am. Rep. 299, and cases there cited; *Carroll Co. v. Ruggles*, 58 Am. Rep. 226. The principle is recognized in our own case of *Fowler v. Allen*, supra. The judgment should be affirmed. It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, J. (concurring). The case of *Dunn v. Garrett* (Tenn.; decided October 2, 1894, and reported in 27 S. W. 1011) sustains the conclusion announced by Mr. Justice POPE in the leading opinion in the case. The facts of that case are thus stated by Mr. Justice Beard, as the organ of the court: "A bond, unofficial in character, was executed by one Garrett, as principal, and by the defendants, as his sureties, payable to complainant, as obligee. This bond, regular in its form and perfect in its face, was delivered by the principal obligor, and was accepted by the latter in good faith, as complete instrument, without any facts or circumstances attending its delivery, on the obligee's part, as to the mode of its execution. On these facts, the question here presented for determination is this: After loss covered by the terms of this bond has occurred to the obligee by the default of the principal obligor, can a surety avoid recovery for this loss upon the ground that he had made a private agreement with his principal at the time of signing, and leaving it in the latter's hands, that the principal obligor should not deliver it to the obligee until another party has signed it as surety, when, in violation of this agreement, and without the knowledge or consent of the surety, the bond was subsequently delivered?" After quoting with approval the following language from the case of *Jordan v. Jordan*, 10 Lea, 124, to wit: "The law makes the principal the agent of the sureties for the special purpose of delivering the instrument. \* \* \* It is a case for the application of the ordinary principle of agency,—that, when the agent is clothed with apparent authority to do the act, he may bind the principal, within the limits of that authority, whatever may have been his private instructions,"—the court proceeds as follows: "In other words, the surety has innocently, but negligently, placed it in the

power of his agent to inflict a loss upon another, who is equally innocent, and in no respect guilty of negligence. In such a case the effect of the holding of *Jordan v. Jordan*, supra, was, whenever a loss occurred as the result of such negligence, to apply the rule announced in *Lickbarrow v. Mason*, 2 Term R. 63,—that, 'whenever one of two innocent persons must suffer by the acts of a third, he who has enabled the third person to occasion the loss must sustain it.' \* \* \* In *State v. Potter*, 63 Mo. 212, the court says: 'Here the surety who defends this action had invested the principal with apparent authority to deliver the bond, and there was nothing on the face of the bond, or in any of the attending circumstances, to apprise the official who accepted it that there was any secret agreement which forbade its acceptance. The surety is alone at fault in the matter, as, but for his unwarranted trust in Turley, the latter would never have had it in his power to occasion the loss which the beneficiaries of this bond must suffer, if the defense made by the surety is successful.' \* \* \* Surely, then, a more opportune application of the language of Lord Holt in *Hern v. Nichols*, 1 Salk. 289, could not occur than to the case before us,—that, 'seeing somebody must be the loser by the deceit, it is more reasonable that he that employs and puts trust and confidence in the deceiver should be loser, than a stranger' \* \* \*." The court then concludes as follows: "We are satisfied to adopt the rule as found in *Dair v. U. S.* (16 Wall. 1), and other similar cases already referred to, as resting on sound principle, and sustained by the weight of authority. We agree with the court, in *Nash v. Fugate*, when it says: 'It is impossible to foresee the mischief of adopting a different rule,' for, 'an obligee having in his possession an instrument signed by responsible parties, to all appearances complete and valid, may, at any distance of time, be confronted and defeated by a secret parol agreement between the principal obligor and some of the sureties, of the existence of which he had not even a suspicion. How is it possible to provide against these secret agreements? How are they to be met and disproved? In the nature of things, the obligee can offer no evidence besides the bond, as the knowledge of the condition is generally confined to the principal obligor and his sureties.' It is proper to add that in all such cases, to give the holder the benefit of the rule here announced, it must affirmatively appear, as it does in the case, that he took the instrument in question without notice of its conditional delivery." In the case of *Fowler v. Allen*, 32 S. C. 229, 10 S. E. 947, there were two questions raised by the appeal, the second of which was whether there was error in instructing the jury that even if the defendant did sign the notes upon the condition stated, which, it is conceded, was not complied with, she would nevertheless be liable thereon, unless the plaintiff had notice



that she signed upon such conditions. In delivering the opinion of the court, Chief Justice McIver said: "As to the second question, while it is not to be denied that there is some conflict in the cases elsewhere, we think the decided weight of authority, as well as argument, is in favor of the proposition that where one signs a negotiable note, perfect on its face, as surety for another, upon the condition (known only to the principal) that it is not to be delivered to the payee until something else is done, the surety will be liable, even if such condition be not complied with, unless notice is brought home to the payee of such condition. This proposition does not rest alone upon the peculiar character of negotiable paper, but upon the well-settled principle that where one of two innocent persons must suffer the loss should fall upon him who put it in the power of a third person to cause such a loss, as well as upon the principle that, where an agent is clothed with apparent authority to do an act, he may bind his principal, within the limits of that authority, whatever may have been his private instructions. Here the principal debtor, after signing the notes, takes them to the defendant for the purpose of procuring her signature as his surety, in accordance with the agreement made by him with the plaintiffs, and when he delivers them, properly signed, surely the payees cannot be affected by any private instructions which the surety may have given to her principal, unless the same were communicated to the payees. The surety, by signing the notes, complete in form, and placing them in the hands of her principal to be delivered to the payees, even though upon a condition, has placed it in the power of her principal to deceive the payees; and, if loss ensued, it must fall upon the one who contributed to that loss, rather than upon the innocent payees, who were left in ignorance of the conditions upon which the notes were signed. The principal debtor was the agent of the surety, and not of the creditor; and if he has done an act for the doing of which he was clothed with apparent authority, even though it may have been done in violation of her private instructions, the person who invested him with such apparent authority must take the consequences.

\* \* \* Some of the cases (notably, *Dair v. U. S.*, 16 Wall. 1, followed by *Butler v. U. S.*, 21 Wall. 272) have extended the principle above laid down to nonnegotiable as well as negotiable instruments." It was no part of the duty of the plaintiff herein to supervise the execution of the bond, and, when it was delivered to him, he had the right to presume that the signatures were genuine, unless he had notice of the forgery, or there were facts apparent upon the face of the bond sufficient to put him on inquiry. It was not contended that the plaintiff had actual notice of the forgery at the time the bond was delivered, but that the bond, upon its face, disclosed facts sufficient to arouse suspicion and

put the plaintiff on inquiry. There is no doubt that such facts would defeat a recovery upon the bond. The testimony offered by the defendant to show that the signatures of W. A. Susong and A. E. Susong were not genuine, but were forgeries, was, under our view of the law governing this case, only competent in case the bond showed upon its face such facts as were calculated to excite suspicion and put the obligee on inquiry. Whether the bond, upon its face, disclosed such facts, was a preliminary question to be decided in the first instance by the presiding judge. *Wicker v. Pope*, 12 Rich. Law, 391; *Greenl. Ev.* (2d Ed.) § 504, note 8. In ruling upon this question, the presiding judge said, "There is nothing about the bond, as delivered, which is sufficient, within itself, on the evidence here, to put the obligee of the bond on notice." In the case of *Sims v. Jones* (S. C.) 20 S. E. 905, this court says: "Where the rulings of the circuit judge are brought in review before this court, two things must appear: (1) That the ruling to which exception was taken is erroneous; (2) that the appellant has suffered prejudice by such erroneous ruling." There is nothing in the case showing that the appellant has suffered prejudice by the rulings of the presiding judge alleged to be erroneous. A copy of the bond is set forth, but it does not show upon its face that there were facts sufficient to put him on inquiry.

The appellants contend that it appears that the bond was not probated by a subscribing witness, as required by rule 66 of the circuit court, and that this was a fact sufficient to put the plaintiff on inquiry. This requirement of the rule was held to be a nullity in the case of *Grollman v. Lipsitz* (lately decided by this court) 21 S. E. 272. It would be very unjust to the plaintiff that a new trial should be granted on the ground that the bond disclosed facts sufficient to excite inquiry, and it should appear upon the second trial that the circuit judge was right in holding that no such facts existed. There being nothing before this court showing that the appellant has suffered prejudice by the rulings of the circuit judge, the exceptions relating to this question cannot be sustained. I concur in the opinion delivered by POPE, J.

McIVER, C. J. (dissenting). This is an action on a bond, a copy of which appears in the case, which should be set out in the report of the case. The main defense relied upon was that said bond was intended to be, and was in fact, a statutory bond, given for the purpose of discharging certain writs of attachment issued by the clerk of the court of common pleas for Aiken, in an action then commenced by the present plaintiff, W. E. Sullivan, against George W. Susong, W. A. Susong, A. E. Susong, James H. Rumbough, and D. L. Boyd, copartners in business under the name of Susong & Co., which attachments had been levied upon certain property of said Susong & Co., and of some of the individuals composing



the firm, in the counties of Greenville, Aiken, Edgefield, Abbeville, and Laurens; and the defendants contend that said bond was void, as a statutory obligation, for want of compliance with certain statutory requirements. The plaintiff, on the other hand, insists that said bond was a mere common-law obligation, and never intended to be such an undertaking as was contemplated by the statute. So that our first inquiry is whether the bond upon which the action is based was a statutory undertaking, or a mere common-law obligation.

When Susong & Co., the defendants in the action commenced by attachment, appeared in such action, the statute provides that they could apply to the officer who issued the attachment (the clerk of Aiken county), or to the court (meaning, of course, the court of common pleas for Aiken county), for an order to discharge the same, and, upon such application, Susong & Co. should "deliver to the court or officer an undertaking \* \* \* approved by such court or officer to the effect that such sureties will pay to the plaintiff the amount of judgment that may be recovered," etc. Code, §§ 262, 263. Now, it does not appear that Susong & Co. ever took any step whatever towards obtaining a discharge of the attachments by an order of any officer or any court; but, on the contrary, it does appear that they sought such discharge by an agreement with the plaintiff. This most abundantly appears from the telegraphic correspondence which passed between Mr. Benet, acting as attorney for Susong & Co., and Messrs. Henderson Bros., attorneys for Sullivan, the plaintiff, on the 27th of July, 1887; in which Mr. Benet, being in Greenville, propounds the following inquiry to Messrs. Henderson Bros., who were in Aiken, "Will you authorize Ansel [a gentleman of the bar of Greenville] to release Sullivan attachment on filing the bond satisfactory to Greenville clerk court?" To which Henderson Bros. sent from Aiken the following reply: "Will authorize Ansel to release attachments upon the bond for double amount claimed, approved by Ansel and clerk of Greenville." When this correspondence was offered in evidence, appellants objected, it seems, upon the ground that it was *res inter alios acta*, inasmuch as it did not appear that appellants either knew of, or had any connection with, such correspondence. The objection was overruled, and appellants excepted; and the competency of this evidence is one of the points presented by this appeal. One of the allegations in the complaint was that "the defendants, on or about the 27th day of July, 1887, in order to discharge the said attachment, in pursuance of an agreement had between said W. E. Sullivan and said Susong & Co., did execute in favor of this plaintiff their certain bond," etc.; and this allegation was denied in the answers of these appellants. It seems to us that the evidence in question was directly responsive to the

issue thus presented, and was therefore competent,—not as binding appellants to the terms of the agreement evidenced by the correspondence, but simply to show that the bond in question was given in pursuance of an agreement had between said W. E. Sullivan and said Susong & Co., to which the appellants might or might not afterwards become parties, as they saw fit. Having reached the conclusion that the bond in question must be regarded as an ordinary common-law obligation, and not as a statutory undertaking contemplated by the provisions of the attachment act, it becomes unnecessary to inquire whether it lacks any of the essential requirements of such an undertaking, or, if so, whether the want of such compliance renders the bond void, as against these appellants; and we are therefore not to be understood as passing upon any of these questions. But it is insisted by appellants that, if the bond be regarded as a common-law obligation, no recovery can be had upon it in this action, because there is no allegation in the complaint which shows that it is a paper of that character; and the case of *Booker v. Smith*, 38 S. C. 236, 16 S. E. 774, is cited to sustain that proposition. While we do not propose to question the authority of that case for the point there decided, we do not think the case is applicable here. In the first place, the bond there sued upon was a bond to procure a warrant of attachment, while here the action is upon a bond given to obtain a release of the levy of an attachment. But this, which may possibly be regarded as an immaterial difference between the two cases, is not the only difference. There the bond or undertaking, upon its face, showed that the intention was to give the undertaking prescribed by the statute, and there was no hint or suggestion that the undertaking was intended to be a common-law obligation; while here the bond not only does not purport to be a statutory undertaking, but, on the contrary, purports, on its face, to be an obligation given without reference to the provisions of the statute, and in the complaint it is expressly alleged that it was given "in pursuance of an agreement" between Sullivan and Susong & Co., which negatives the idea that it was an obligation given in pursuance of the statute. We do not think, therefore, that this position of appellants can be sustained.

Regarding, then, the bond constituting the basis of this action as a common-law obligation, the appellants contend that they are not bound thereby, for the reason that the bond shows on its face that they were to be bound merely as sureties of Susong & Co., and that, until each one of the members of that firm (the bond being an instrument under seal) signed the same, they (the appellants) assumed no liability; and they offered evidence tending to show that one of the members of that firm, to wit, A. E. Susong,—the one who was understood to be worth the amount of the bond,—never did in fact sign

the bond, but his apparent signature there-to was forged, and that the signature showed on its face that it was not genuine. To understand properly the ruling of the court as to the offer of the testimony, it will be necessary to state substantially what occurred before and at the time the bond was signed by the appellants. According to the testimony of the appellant Williams,—which was not objected to, except as hereinafter stated,—on the day the bond was signed, and before it was signed by appellants, G. W. Susong and Boyd, two of the members of the firm of Susong & Co., went to the store of Williams, and requested him to sign the bond as surety for Susong & Co. "Mr. Susong stated that his two brothers belong to the company, and would sign the bond, of course; and I told him that I knew that there was no risk, if W. A. and A. E. Susong signed it, and stated that they belonged to the company, and, of course, would sign it." To this testimony plaintiff's counsel objected, unless notice is brought home to the plaintiff; and, defendants' counsel stating that they would prove notice, no ruling of the court was then made. The witness Williams further stated that he knew the financial condition of W. A. and A. E. Susong. "They were considered among the wealthiest and most substantial men in East Tennessee." The witness also stated that he consented to sign the bond on condition that W. A. and A. E. Susong would sign it. On the same day, and soon after this conversation, the witness was sent for to go to the clerk's office, and said: "I went into the clerk's office, and Mr. Mosely showed me the bond; and I read it, and glanced at it to see if W. A. and A. E. Susong were members of the company, and I saw their names set forth in it, and I signed the bond." It also appears that when Williams went into the clerk's office the only name signed to the bond was that of G. W. Susong, and soon after Stewart and Williams signed, in the order stated. At this time the following persons appear to have been present: Mr. Ansel, who, it will be remembered, was representing the attorneys for the plaintiff; Mr. Benet, who was acting as attorney for Susong & Co.; and Mr. Mosely, who, with Mr. Ansel, was to approve the security,—besides Boyd and Rumbough, two of the members of the firm of Susong & Co., and probably G. W. Susong. The witness Williams further stated that Boyd, Benet, and Ansel were discussing the completion of the bond by the other parties,—W. A. and A. E. Susong, who were not present. The witness was then asked this question: "State whether it was understood by Mr. Ansel and Mr. Benet and the other parties who were interested in this matter that W. A. Susong and A. E. Susong should sign that bond before it should become effective?" To this question plaintiff objected, and the objection was sustained, to which defendants' counsel excepted. The

witness was then asked, "What was the substance of what passed?" to which the witness replied: "The substance of it was that the bond was to be signed by W. A. and A. E. Susong, and the conversation was between Boyd, Benet, and Ansel; and whether the others joined in, I do not know. I do not know that I said anything on the subject." The witness further testified that he did not know, and had no information as to the fact, that A. E. Susong had not signed the bond before it went into the possession of the plaintiff, and never learned the fact until May, or the summer of 1892, shortly before this action was commenced,—2d August, 1892. On the cross-examination this witness said that he did not remember to have said anything in the clerk's office, when he signed the bond, about the conversation between himself and Boyd and W. G. Susong at his store, wherein he agreed to sign the bond on condition that it was signed by W. A. and A. E. Susong. When this witness was recalled, he was asked: "What was the understanding,—what was expressed by these parties,—before you signed the bond, as to who would sign it?" to which he replied as follows: "As I stated in my direct or cross-examination, that I did not remember saying anything to them about the condition of my signing it; but Mr. Boyd and Mr. Ansel and Mr. Benet were the perfecting of the bond and the completion of it, and it was the understanding that that bond was not to be delivered until W. A. and A. E. Susong signed it." When asked if that was his understanding, he replied: "That is my presumption,—that that was the understanding; that was the understanding." In the cross-examination the witness again said that he did not state, or say anything about, his agreement, at the store, with Boyd and G. W. Susong, while in the clerk's office, but he added: "It was stated by one of the men—Benet, Boyd, or Ansel—that that bond was not to be delivered until it was completed by the signature of W. A. and A. E. Susong. That was so stated by some of them; and, if it had not been stated, I would not have signed it,"—though the witness again repeated that he himself said nothing of the kind while in the clerk's office. The defendants' counsel then proposed to offer evidence tending to show that the name of A. E. Susong was forged, which, upon objection, was ruled out, the court holding as follows: "It seems to the court that the testimony of Mr. Williams is not sufficient to show any agreement between himself and Ansel and Mosely with reference to the execution of this bond, nor does it appear that there was any condition between the parties at that time with reference to his signing the bond, and upon that ground I will have to exclude all evidence going to show forgery." To this ruling defendants' counsel excepted, and then proposed to offer evidence tending to show that the signature

on the bond does resemble that of A. E. Susong, and that it shows on its face that it is not genuine, all of which was ruled out, and defendants excepted.

For the purpose of determining the legal question presented, it is proper to assume that appellants, if permitted to do so, could have shown, not only that the signature of A. E. Susong was forged, but also that it showed upon its face that it was not genuine, or at least that the testimony offered would have tended to show both of those facts; and this would, at least, have raised issues of facts to be passed upon by the jury, for the ruling of the circuit judge is necessarily based upon the theory that even if the forgery were proved, and even if the signature of A. E. Susong showed upon its face that it was not genuine, those facts would not relieve the appellant from liability unless it also appeared that plaintiff had notice that the appellants signed the bond under an agreement that it was not to be delivered until it was signed by A. E. and W. A. Susong, or that appellants signed upon the condition that they were not to be liable until A. E. and W. A. Susong had also signed. Now, conceding, for the present, the correctness of the legal proposition upon which the ruling of the circuit judge was manifestly based, and disregarding the parol evidence of what occurred at the time of the signing of the bond, it seems to us clear that the bond bore upon its face notice that the condition upon which the appellants signed was that the members of the firm of Susong & Co. should sign before the appellants incurred any liability. It is manifest that the appellants were mere sureties of Susong & Co., and had no further connection with the matter, except as such sureties. Now, what were the sureties for? The terms of the bond show that they were sureties for the performance of an obligation to be entered into by Susong & Co., which could only be done by the execution of the bond by each one of the members of that firm, whose names are mentioned in the bond as principal obligors. The contract of the appellants was to secure the performance of the obligation of Susong & Co., not the obligation of any one or more of the members of that firm, but the obligation of all the members of that firm. The first step to be taken towards fixing the liability of the sureties, therefore, is to show that Susong & Co. have entered into the obligation, the performance of which the sureties have undertaken to guaranty. Until this is done the appellants have incurred no liability, for, as sureties, they have the right to stand upon the strict terms of their contract. It may be said, however, that this is a joint and several obligation, and only the appellants are sued in this action, and may be held liable as several obligors. But, in the first place, it is not so clear from the terms of the bond that the obligors are bound jointly and severally, for

the terms are, "we bind our heirs, executors, and administrators, jointly and severally"—not "ourselves, our heirs," etc.; but, as the word "ourselves" may have been accidentally omitted by the printer, we will not rest our conclusion upon this, and, on the contrary, will assume that the bond is, in form, joint and several. But, assuming that this question still remains, what is the contract of appellants, treated as several obligors? Why, nothing more than a guaranty that an obligation to be entered into by Susong & Co. shall be performed by them. It is unlike an ordinary joint and several note, where each signer promises to pay a special sum of money, either jointly with his co-signers, or severally.

The question which we have been considering has been the subject of much conflict of opinion in the courts of other states, as is apparent from the numerous cases with which we have been furnished by counsel on the one side and on the other of this case. Without undertaking to go over these numerous cases, we may refer to the case of *State v. Potter*, 63 Mo. 212, as furnishing quite an elaborate review of the cases up to that time,—1876; and we are therefore relieved of the necessity of considering any of the cases prior to that decision, except to say that in *Dair v. U. S.*, 16 Wall. 1, therein referred to, it was expressly stated by Davis, J., in delivering the opinion of the court, that if the name of Cloud had appeared as a cosurety in the body of the bond the decision would have been otherwise, for that would have been notice to the agent of the government, and then adds these words: "In any case, if the bond is so written that it appears that several were expected to sign it, the obligee takes it with the notice that the obligors who do sign it can set up in defense the want of execution by the others, if they agreed to become bound only on condition that the other cosureties joined in the execution." And that case was subsequently recognized in the case of *Butler v. U. S.*, 21 Wall. 272. It may also be noted that the case of *Russell v. Annable*, 109 Mass. 72, seems to have escaped attention in the review of cases in *State v. Potter*, supra, possibly for the reason that the cases under review were cases in which one surety was seeking to escape liability upon the condition that others were to sign as cosureties, whereas in *Russell v. Annable* the question was to the effect of the failure of the principal obligor to sign, upon the liability of the surety. We will recur to this case hereafter. It may be said that this review of the authorities in *State v. Potter* shows that the weight of authority was in favor of the view stated above in the extract from *Dair v. U. S.* We shall not undertake a review of the cases decided since 1876, but will content ourselves with referring to some of the cases which seem more immediately applicable to

the case in hand; for it seems that in many, if not in most, of the cases, the question has been as to the effect of the failure of a cosurety to sign, which, it seems to us, may be different from the failure of the principal obligor to execute the bond in question, though we are not to be understood as definitely deciding that there is any real difference. In *Russell v. Annable*, supra, the action, as in this case, was upon a bond given for the purpose of dissolving an attachment of partnership property. Both of the partners were named as principals, but the bond was executed by only one of them, in the name of the firm. It was held that the surety would not be liable without proof of the assent of the other partner to the execution of the bond. In that case the opinion of the court contains the following language: "The bond purports to be the joint and several contract of certain persons named therein as principals, and the defendant and George M. Stevens as sureties. The defendant's undertaking is only that the principal obligors shall fulfill the obligation which, by the terms of the bond, they have assumed. But, if the bond was not binding upon both Dennett and Pottle (as it was not, for want of due and proper execution of the instrument on their part), they assumed no obligation, and it was not binding upon the sureties. It was essential to the bond that the principals should be parties to it. It is recited that they are so, and the instrument is incomplete and void without their signature. \* \* \* The instrument is incomplete without the signature of each partner, or proof that the signature affixed had the assent and sanction of each of them. The sureties on a bond are not holden, if the instrument is not executed by the person whose name is stated as the principal therein. It should be executed by all intended parties"; citing *Bean v. Parker*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. 24. It may be said that, inasmuch as the bond in that case showed on its face that it was signed in the partnership name by one of the partners, this was notice to the obligee that the execution of the bond was incomplete, as all persons are presumed to know the law,—that the signing of the partnership name to a bond by one of the partners does not bind his copartners unless their assent or subsequent ratification is shown. Admitting this to be so, would not the fact—which the defendants offered to show, and were not allowed to do—that the signature of A. E. Susong showed on its face that it was forged, operate as notice, and much stronger notice, to the plaintiff in this case? In *Johnston v. Kimball*, 39 Mich. 187, decided in 1878, the action was upon the official bond of the township treasurer, "which was drawn up in the usual form, setting forth himself as principal, and plaintiffs in error as sureties, by name, and bound them all to the performance of his duties." The principal

never signed the bond, and the court held that in such case the sureties were not liable, unless there was positive evidence that the sureties intended to be bound without requiring the signature of the principal. The court used this language: "The obligation of a surety cannot fairly be extended beyond the scope of his written contract, \* \* \* and we think that, presumptively at least, where the contract which he signs calls for the signature of other parties, the instrument is to be deemed inchoate and imperfect until they also sign it"; citing the case of *Hall v. Parker*, 37 Mich. 590, decided in 1877, which rested on the same principle. *Bunn v. Jetmore*, 70 Mo. 228, is a direct authority to the same effect, and the court there said it was "the received doctrine" that sureties may show, in discharge of their liability, that their principal never was bound. On the other hand, the case of *Trustees v. Sheik*, 119 Ill. 579, 8 N. E. 189, has been cited to show that the surety is not discharged by reason of the failure of the principal to sign the bond. But the reasoning of that case is far from satisfactory, as it treats the failure of the principal to sign as a mere technicality, while we think it is more than a technicality, and in fact goes to the very root of the matter. But even that case concedes that if the obligee has notice of the fact that the bond was signed by the surety upon condition that the principal should also sign, or notice of such facts as would put a prudent person upon inquiry, then the surety would be discharged. This admission is, as it seems to us, fatal to the validity of that decision, for there, as here, the name of the principal appeared in the bond, as intended to be one of the obligors, and that fact, as has been held in many cases, and with good reason, is notice to the obligee that the intention of the parties was that the signature of the principal obligee was necessary to the completion of the bond. We prefer, therefore, to follow the cases previously cited, rather than the Illinois case.

Many, if not most, of the other cases cited, are cases in which a surety has claimed a discharge upon the ground that he signed the bond upon the understanding that others were to sign as cosureties before the delivery of the bond, which they did not do; and, where the names of such cosureties appear in the bond, there is much conflict of authority as to the effect of that fact as notice to the obligee. We do not propose to go into a consideration of these cases, for the reason, as already indicated, that such cases may, perhaps, be regarded as standing upon a different footing from cases like the present, where the defense is that the persons named as principal obligors in the bond have failed to sign the same. We will, however, notice one of them (*Mathis v. Morgan*, 72 Ga. 517), for two reasons: (1) Because it is claimed that that case has been approved by the supreme

court of the United States in *Beach v. Rice*, 131 U. S. 293, 9 Sup. Ct. 730; and (2) because the case seems to be much relied upon by counsel for respondent. In the first place, the case of *Veach v. Rice* arose in the state of Georgia, and involved the liability of a surety on an administration bond taken by the ordinary, which must be determined by the law of Georgia, and the case of *Mathis v. Morgan* was merely cited to show what had been decided to be the law of Georgia, and cannot, therefore, be properly relied upon to show that the supreme court indorsed the proposition of law announced in that case. But the case of *Mathis v. Morgan* differs from the present case in the fact that there the surety claimed relief upon the ground that one of the cosureties failed to sign the bond, while the claim for relief herein, based upon the ground that the principal failed to sign the bond, presents other material points of difference, as may be seen by a brief statement of the facts of that case. In that case the complaining surety signed the bond before another surety, whose name precedes his in the body of the bond, whose signature was subsequently forged, and the complaining surety intrusted the bond to the president of the bank, the principal obligor (one Samuel), as escrow, not to be delivered to the obligee until the other sureties executed the bond, but Samuel delivered the bond to the obligee, with all the signatures, apparently genuine, thereon; and it was held that the complaining surety was liable. It will be observed that in that case the surety, after executing the bond, intrusted it to Samuel, who should be regarded as practically the principal obligor, and thereby made him his agent to procure the signatures of the other sureties before delivering the bond, while here there is not only no evidence that the appellant intrusted the bond to any one, but on the contrary the undisputed evidence is that the appellants, after signing the bond, simply left it in the possession of the persons who were superintending the signing of the bond, two of whom, Ansel and Mosely, were the agents of plaintiff, the obligee. Again, in the Georgia case, the bond was delivered to the obligee "with all the signatures apparently thereon," while here the appellants were not allowed to show that the signature of one of the principals, A. E. Susong, showed on its face that it was forged. The opinion of the court in that case was based upon the ground that as the surety, by intrusting the bond to Samuel to procure the signatures of the cosureties, put it in his power to commit the fraud, which was afterwards committed by some one, he must suffer, upon the familiar principle that, where one of two innocent persons must suffer by the wrongdoing of a third person, the one who put it in the power of such third person to do wrong must suffer the loss occasioned by such wrong. But, for the operation of this principle in this case, it is necessary that the fact should appear that

the appellants put it in the power of the wrongdoer to do the wrong which has occasioned the loss, and that fact did not appear in this case, as it did in *Mathis v. Morgan*. We do not think, therefore, that the case from Georgia applies to this case.

It is urged, however, that the bond, when delivered to Ansel, bore upon its face the names of all the members of the firm of Susong & Co., and therefore the plaintiff, who had accepted it as genuine, should not be affected by the fact that one of the signatures was forged. Ordinarily, a person, when he accepts an obligation purporting to be executed by another, takes it with the risk of being able to show that the signature thereto is genuine when he finds it necessary to enforce such obligation by an action at law. But, in addition to this, if the appellants had been permitted to show, as they offered to do, that the name of A. E. Susong, apparently signed to the bond, showed on its face that it was a forgery, then, clearly, the plaintiff could not claim to have been deceived.

It only remains to consider the two cases cited from our own state. In *Martin v. Stribling*, 1 Speer, 23, the action was against a surety upon a joint and several note; and the defense was that defendant signed the note as surety for McCullough, with the understanding that one Rogers should sign as cosurety, and that McCullough should place in the hands of Rogers books and papers to be collected by him, and applied to the payment of the note. The court held that, while there was no doubt that defendant signed the note with the expectation that Rogers would also sign, and that McCullough would deliver to him books and papers as an indemnity for their securityship, yet there was no evidence of any stipulation on the part of Stribling that his note should not take effect until one or both of these things were done, and there was no evidence that the signature of Stribling was obtained by any representation that Rogers would sign as surety, and that McCullough would place in the hands of Rogers his books and papers, to be collected and applied to the payment of the note. The case does not apply here. *Fowler v. Allen*, 32 S. C. 229, 10 S. E. 947, is also cited. In that case the action was against the surety upon a negotiable note, and the defense was that the surety had signed the note upon a condition, not communicated to the payee, which had not been performed. The court held "that where one signs a negotiable note, perfect on its face, as surety for another, upon the condition, known only to the principal, that it is not to be delivered to the payee until something else is done, the surety will be liable, even if such condition be not complied with, unless notice is brought home to the payee of such condition." It is very clear that this case is not in point here, not simply because the note in that case was a negotiable note, but because the note was perfect on its face, and there was nothing to excite inquiry on

the part of the payee. Besides, there the principal did not sign the note, and the surety based her claim for relief solely upon the ground that an undisclosed condition, of which the payee had no notice of any kind, had not been performed.

It seems to us that the circuit judge erred in refusing to allow appellants to offer evidence tending to show that the name of A. E. Susong, one of the principals, as appearing on the bond, was a forgery, and that the same showed upon its face that it was a forgery, and for this reason the case must go back for a new trial. I think, therefore, that the judgment of the circuit court should be reversed, and that the case should be remanded to that court for a new trial.

(91 Va. 143)

HOLLERAN v. MEISEL et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Feb. 14, 1895.)

BILL OF EXCEPTIONS—SUFFICIENCY—DECISION ON FORMER APPEAL—EFFECT—PATENT TO LAND—OPINION EVIDENCE.

1. A bill of exceptions must set forth a specific and definite allegation of error, and so much of the evidence as is necessary to a clear apprehension of the propriety of the ruling of the court.

2. When the supreme court has placed a construction upon an entry or memorandum in a public record, on a second appeal the question is *res adjudicata*.

3. Where the only evidence that a patent was ever issued by the commonwealth to defendant's ancestor is a certain memorandum in a book of patents, which the supreme court held on a former trial to be a nullity as a grant or patent, it is error in a court to speak of such memorandum in its instructions to the jury as a patent.

4. When witnesses admit that they cannot identify land in dispute as having been included in a description in a memorandum of a patent, it is error to allow them to express an opinion that the land was so included.

Error to circuit court of city of Richmond; B. R. Wellford, Jr., Judge.

Action by James Holleran against Phillip Meisel and another. Judgment for defendants, and plaintiff brings error. Reversed.

John Howard and J. Samuel Parrish, for plaintiff in error. W. W. & B. T. Crump and Edmund Waddill, for defendants in error.

RIELY, J. This is a writ of error to a judgment of the circuit court of the city of Richmond in an action of ejectment, and involves the title to a piece of land, containing 3.84 acres, in the county of Henrico, near the said city. The suit has been here before on a writ of error to a judgment of the said court, and the decision of this court is reported in 87 Va. 398, 13 S. E. 33. The plaintiff, James Holleran, claimed title to the land under a grant made to him by the commonwealth bearing date on the 12th day of Feb-

ruary, 1837; and the defendants, Phillip Meisel, Sr., and Phillip Meisel, Jr., endeavored to show an outstanding title in a third person, under one Joshua R. Stapps, to whom they claimed that the land had been patented by the colonial government in 1687. On the trial a verdict was rendered by the jury for the defendants, and judgment entered by the court according to the verdict. To this judgment a writ of error was awarded by one of the judges of this court.

Several bills of exception were taken by the plaintiff to the ruling of the court made during the progress of the trial, and also to the refusal of the court, after the verdict was rendered, to grant him a new trial, in which last bill of exceptions all the evidence, and not the facts, was certified. The rulings of this court to which exceptions were taken by the plaintiff during the progress of the trial, and which are embodied in the bills of exception, were as to the admission of documentary and other evidence tending to prove that a patent for the land in controversy had been issued to Joshua R. Stapps previous to the grant to James Holleran. In that view the evidence excepted to, so far as we are able to judge from the bills of exception, was admissible. It is the office of a bill of exception to set forth a specific and definite allegation of error, and so much of the evidence as is necessary to a clear apprehension of the propriety or impropriety of the ruling made by the court, and, if it failed to do this, the exception will prove unavailing. 4 Minor, Inst. pt. 1, p. 827; 1 Bart. Law Prac. 664. The bills in this case are not separate and distinct, but each seems to contain a number of "objections and exceptions," and they are so intermingled as to create confusion, and prevent a proper understanding of them. It is therefore doubtful whether the exceptions could be properly disposed of; and, as it is unnecessary to the decision of the case to do so, it will not be attempted. While this court held in *Brown v. Hall*, 85 Va. 146, 7 S. E. 182, that more than one objection may be certified in the same bill, provided that each objection, where there is more than one, "is therein distinctly set forth with the necessary circumstantiality, and not confused with others therein contained," it also added that, as a general rule, the better practice is to take separate bills of exception, as least likely to lead to confusion and uncertainty, which expression of opinion we would emphasize, especially in view of the contrary practice adopted in this case.

The plaintiff, after the evidence was all in, asked the court to give to the jury eight instructions, and the defendants asked it to give two instructions. The court rejected all of the instructions asked for by the plaintiff and the second instruction asked for by the defendants, and gave the first of the instructions asked for by the defendants, and two instructions of its own in lieu of those rejected. To the action of the court in refusing

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

the instructions asked for by the plaintiff, and in giving the first instruction asked for by the defendants and the two instructions of its own, the plaintiff excepted. The first instruction asked for by the defendants, and which was given by the court, accurately propounded the law, and the court committed no error in giving it. It is only necessary in the disposition of the writ of error awarded in this case, after what has been said, to notice the first instruction given by the court in lieu of those rejected. It is as follows: "The court instructs the jury that if they believe from the evidence that the land in controversy was embraced within the lines of Stapps' patent of October 21, 1687, and they shall further believe that the said alleged patent was executed and delivered by the proper authorities of the colonial government of Virginia, and that possession was held by Stapps or parties claiming under him, title derived from such alleged patent, they are instructed that the land claimed was not subject to grant by the commonwealth when the plaintiff's patent was issued; and, such patent being therefore void, they should find for the defendant. But, if the jury shall not so believe, they are instructed that the patent exhibited by the plaintiff in evidence passes to him the title of the commonwealth, and they shall find for the plaintiff; that the opinions of the witnesses Carrington and Redd are not proper evidence to be regarded by the jury, except so far as the jury may believe them to be correct inferences from the evidence in the case." On the trial at which the judgment was rendered from which the former writ of error was taken, the defendants, in support of their contention of a prior grant by the commonwealth of the land in controversy, offered in evidence a certified copy of an entry or memorandum contained in one of the books in the office of the register of the land office, labeled "Patents," which entry was without seal or signature, and claimed that such entry or memorandum was a patent from the government to one Joshua R. Stapps for the said land; and that, therefore, the said land was not thereafter open to further grant by the commonwealth to James Holleran as waste and unappropriated, and consequently his patent was void. On that trial the circuit court did not leave to the jury the question whether, upon the evidence, a patent had been issued to Joshua R. Stapps, but in an instruction to the jury, which was duly excepted to, assumed to and instructed the jury, in effect, that the entry or memorandum of which the copy aforesaid was given in evidence by the defendants was in itself a patent. The legal character and effect of the entry or memorandum, so relied on by the defendants to defeat the claim of the plaintiff, was thus directly and necessarily drawn in question on the former hearing, and this court then expressly pronounced upon it. It decided that, standing by itself, it was a nullity as a grant, and only admissible in

evidence as "a memorandum from the colonial records, tending to prove that proceedings had been taken looking to an execution and issuing of a grant, to be followed up, if possible, by evidence tending to show that the grant so contemplated and begun was actually executed, issued, and delivered." This court, in consequence of such erroneous instruction, reversed the judgment of the circuit court, and granted the plaintiff a new trial. It thus appears that this court then construed the entry or memorandum in the records of the colonial government in the land office, and held that it was not a patent or grant, and was therefore inoperative in itself to take the land out of the category of waste and unappropriated land. When such decision was made and certified to the circuit court, the legal character and effect of said entry or memorandum was henceforth *res adjudicata*, and not further open for question or reconsideration by the circuit court, or even by this court. We think that the construction thus placed on it was correct; but, whether correct or not, it is to that extent the law of this case. It was the mandate of this court to the lower court, and the paper or entry was henceforth not to be treated as a grant or patent. This is well settled by the decisions of this court and of other courts of highest authority. *Campbell's Ex'rs v. Campbell's Ex'r*, 22 Grat. 649; *Chahoon's Case*, 21 Grat. 822; *Turner's Adm'r v. Staples*, 86 Va. 300, 9 S. E. 1123; *Stuart v. Helskell's Trustee*, 86 Va. 191, 9 S. E. 984; *Supervisors v. Kennicott*, 94 U. S. 498; *Tyler v. Magwire*, 17 Wall. 284; *Clark v. Keith*, 106 U. S. 404, 1 Sup. Ct. 568; *Chaffin v. Taylor*, 116 U. S. 572, 6 Sup. Ct. 518; *Wilson v. Fridenberg*, 21 Fla. 386; *West v. Brash-ear*, 14 Pet. 51; and *Wagon Co. v. Swezy*, 68 Iowa, 520, 19 N. W. 298.

On the new trial granted by this court, when the judgment and verdict were again in favor of the defendants, the copy of said entry or memorandum was not again offered in evidence, but one of the books of "Patents" was itself introduced, and the entry or memorandum therein from which the copy used in the former trial was taken read to the jury, and witnesses were introduced to prove that these books were the records handed down from the colonial government, and contained the records of colonial grants of waste and unappropriated lands. No other paper or document was exhibited to the jury or offered in evidence as a grant or patent to Joshua R. Stapps; and so the instruction of the court quoted above had reference only to the entry in volume 7 of the books of patents. The original entry or memorandum was, of course, equally with the copy offered on the former trial, without signature or seal. The construction of the copy and determination of its legal effect by this court were at the same time the construction of the original, in which the defects of the copy inhered. The original entry or memorandum in volume 7 of the

books of patents, although these books are treated as the records of colonial grants of waste and unappropriated lands, was as directly the subject of the decision of this court on the former hearing as the copy, and its construction and effect equally with the copies adjudicata. It was therefore error in the circuit court to give it a different construction or any greater weight or effect.

The instruction given by the court, equally with the one pronounced on the former hearing to be erroneous, in effect instructed the jury that the entry or memorandum in the book of patents was a patent or grant to Joshua R. Stapps. The first part of the instruction assumes expressly that a patent was issued to Stapps on the 21st of October, 1687, and in doing so it directly disregards the mandate of this court. In subsequent parts of the instruction it is referred to as the "alleged patent" to Joshua R. Stapps; and it may be inferred from this that the court did not intend to instruct that it was a patent, but, if so, the instruction was calculated to mislead the jury, and for that reason was erroneous, and the effect the same. For this error the judgment of the circuit court must be reversed.

By his patent of the 12th of February, 1837, the plaintiff had a prima facie title to the land in controversy, with the right of immediate actual possession, and could only be defeated by an adversary possession in the defendants, under color or claim of title, for the statutory period, or by their showing a previous valid grant by the commonwealth to a third person, or a state of facts from which such patent might be presumed. The entry in volume 7 of the books of patents, which books contain the records of the colonial government previous to the Revolution, was admissible as evidence tending to show, after such great lapse of time, and the improbability that at this late day there still existed waste and unappropriated land so near to the seat of the state government, that such patent had issued, and to furnish, along with other proper and sufficient evidence, facts and circumstances from which its existence should be presumed. But this is not a matter for the court to decide, but to be left by it, under proper instructions, to the jury.

The latter part of the instruction is also objectionable in instructing the jury that the opinions of the witnesses Carrington and Redd are proper evidence, and to be regarded by the jury so far as the jury may believe them to be correct inferences from the evidence in the case. These witnesses were introduced to prove that the alleged patent to Stapps embraced the land in controversy; and, while admitting that they could not identify it from the entries or memoranda in the books of patents, deeds, and other documentary evidence, they gave it as their opinion that it included the land in controversy. This was not knowledge. It was not

the statement of a fact, but merely an opinion. Even if Carrington, who was an examiner of titles, and Redd, who was county surveyor of Henrico county, were experts, this was not a case in which expert testimony was admissible. It was perfectly proper for them, or either of them, to examine the deeds and other documentary evidence given in before the jury, and to state from their knowledge whether the land in controversy was within the boundaries of the entry purporting to be a memorandum of the issue of a patent to Joshua R. Stapps, but not to give merely their opinions upon the subject. Such mode of identification was inadmissible under the law, and the instruction to the jury that they might regard such opinions as proper evidence to that end, if they believed them to be correct inferences from the evidence in the case, was erroneous.

As the case must go back to the circuit court for a new trial, we do not deem it proper to discuss the evidence certified by the court in overruling the motion of the plaintiff for a new trial.

For the error of the court in giving said instruction, and in overruling the motion for a new trial on account of such erroneous instruction, the judgment complained of must be reversed, the verdict set aside, and the case remanded for a new trial, upon which, if the evidence be substantially the same and instructions be asked for, they shall conform to the views expressed in the foregoing opinion.

(31 Va. 122)

CLINCH RIVER MINERAL CO. v. HARRISON et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Feb. 14, 1895.)

ATTACHMENT AFFIDAVIT—GROUNDS—CONVERTING PROPERTY INTO MONEY—EQUITY PRACTICE—ALLEGATION—WHEN TAKEN AS CONFESSED.

1. A statement in an affidavit for attachment, that the claim is just, and that defendant is converting property into money, with intent to defraud, is a sufficient compliance with Code 1837, § 2959, requiring such an affidavit to state that the claim is believed to be just, and that, to the best of affiant's belief, defendant is converting the property with intent to defraud.

2. If defendant's answer is used to support complainant's bill, it must be read and taken as a whole.

3. The shipment of products of an enterprise out of the state in the due course of business is not sufficient ground for an attachment where the removal is not permanent, and the proceeds are brought back within the state.

4. An allegation in a bill, denied by the answer, cannot be taken as confessed until complainant has, after due notice, made a motion to that effect.

Appeal from circuit court, Russell county.

Bill by Joseph Harrison and N. J. Floyd against the Clinch River Mineral Company for an account of liens upon property conveyed in a certain trust deed to complainants,

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



for the enforcement of an attachment lien, for an injunction, and the appointment of a receiver, and for other relief. Decree for complainants, and defendant appeals. Reversed.

Henry A. Routh and Penn & Cocke, for appellants. Chapman & Gillespie, for appellees.

CARDWELL, J. The stockholders of the Clinch River Mineral Company, a corporation duly chartered under the laws of Virginia, engaged in the mining and manufacture of baryta, and other business connected therewith, desiring to sell their property and wind up their affairs, at a meeting held on the 7th day of March, 1893, passed a resolution appointing Joseph Harrison and N. J. Floyd a committee to sell the property of the corporation and settle up its business, and particularly setting forth that the committee was to sell certain property to one D. I. Bachman and his associates at a stipulated price, which action of the stockholders was ratified and approved by the then board of directors of the company. Pursuant to this resolution, Harrison and Floyd, as a committee, did sell to Bachman and his associates certain property, consisting of the leaseholds owned by the corporation, together with baryta mills, bleaching and drying factory, etc., situated at or near Gardner, in the county of Russell, at the price of \$18,000, one-third of which (\$6,000) was to be paid in cash, (which was paid), \$5,000 to be paid in 6 months, \$5,000 in 12 months, and the remainder, \$2,000, in 18 months from the 1st day of April, 1893; it being further agreed that the property should be sold and bought by a transfer of the certificates of the stock of the company, and that the deferred payments should be secured by a deed of trust upon all the property acquired by the purchase, excepting the manufactured baryta and the live stock. Accordingly all of the capital stock of the company was transferred and assigned to Bachman and his associates, and they accepted the same, and proceeded to organize under the charter thus transferred, by the election of D. I. Bachman as president, and one M. Fackenthal as secretary, and other proper officers; and the Clinch River Mineral Company, thus reorganized, executed to Harrison and Floyd, committee, as aforesaid, the three notes of the company for the deferred payments as above set forth, and, after being properly authorized by its board of directors, the company, on the 14th of August, 1893, executed to A. P. Gillespie, trustee, a deed conveying certain leaseholds for the purpose of mining baryta on real estate situated in the county of Russell, Va., set out in the deed, to secure the payment of the three notes dated April 1, 1893. Harrison and Floyd, committee, also sold to the Clinch River Mineral Company, as reorganized, certain other property, including a lot of crude baryta, all of which, was paid for except the

crude baryta, and for this the company was to pay \$1,298.52 on the 1st day of July, 1893, but defaulted in the payment; and when the first of the notes for \$5,000, secured by the deed to Gillespie, trustee, dated April 1, 1893, fell due on October 4, 1893, the company defaulted in its payment also, and the note was protested, whereupon Harrison and Floyd, committee, filed their bill of complaint, sworn to by Harrison, in the clerk's office of Russell county circuit court against the Clinch River Mineral Company, charging, among other things, that the "affairs of the company were being so managed as to involve the company in debt for the purpose of avoiding its liabilities"; that various liens by judgment and attachment had been acquired on the property of the company, rendering it improper for the trustee in the deed of trust securing complainants to sell the property before an account had been taken showing priority of liens; that the company had on hand a considerable quantity of manufactured baryta, which complainants believed would be shipped out of the state, and converted into money; that the company had on hand a considerable stock of general merchandise, which it was also converting into money, with intent to hinder, delay, and defraud complainants and other creditors of the company; that complainants had sued out of the clerk's office of Russell county circuit court an attachment which had been duly levied on the goods and other estate of the company for the amount already due to complainants, and the prayer of the bill was for an account of liens upon the property conveyed in the trust deed, the enforcement of the lien acquired by the attachment, for an injunction to restrain the company from collecting debts due to it, the appointment of a receiver, the execution of the trust deed under order of the court, and for general relief. The affidavit of Joseph Harrison, upon which the attachment issued, after setting out the aggregate debt due to complainants from the defendant company, says: "That the claim asserted is just; that complainants ought to recover of defendant in the suit the sum claimed (at the least), with interest; that the defendant is removing, and intends to remove, its own estate, or the proceeds of the sale of its property, or a material part of such estate or proceeds, out of this state, so that process of execution on a judgment when obtained in said suit will be unavailing; and that defendant is converting, or is about to convert, and has converted, its property, of whatever kind, or some part thereof, into money, securities or evidences of debt, with intent to hinder, delay, and defraud its creditors." The order to the sheriff to attach the property of the defendant company was indorsed on the writ that issued on the bill, and made returnable to rules to be held in the clerk's office on the last Monday in October, 1893. An injunction was granted according to the prayer of this bill, October 21, 1893, and, upon due notice being

given to the defendant company, complainants moved the circuit court of Russell county in term, November 16, 1893, for the appointment of a receiver, and for an order of sale upon the attachment issued in the cause; and thereupon the defendant company, by counsel, moved the court to dismiss the proceedings, on the grounds that no sufficient bonds had been executed as a condition for the issuing of the injunction and attachment; but the court overruled this motion, appointed a receiver, and directed sale of the livestock, etc. On the 8th day of February, 1894, a motion was made by complainants before the judge of the circuit court of Russell county, in vacation, for an order of account, and the defendant company appeared by its counsel, and agreed that the account might be ordered, which was done. Later the defendant company, by petition filed in the cause, united in the prayer of a petition filed by the receiver for the enlargement of the receiver's powers; but these petitions were not acted on until the hearing. The commissioner to whom the cause was referred for an account filed his report and supplemental report, to which the defendant company excepted, because the commissioner recognized the debt of \$1,208.52 as a lien on defendant company's property by reason of the attachment, and because certain other accounts are treated and reported as liens. The defendant company did not, however, file its answer in the cause till the regular term of the court, March 14, 1894, when the answer was filed, and asked to be treated as a cross bill, which was done; whereupon complainants filed their answer to the cross bill, together with certain affidavits, and the circuit court overruled the motion of the defendant company for a continuance, and overruled its exception to the commissioner's report relating to the lien of the attachment, but sustained it so far as it related to the other accounts reported as liens, and recognized these accounts as simple debts only. The report of the commissioner, in other respects being unexcepted to, was confirmed, and the decree of the court on the main question was as follows: "The court is of opinion that the affidavit on which the attachment was issued is sufficient, and the court is further of opinion that the fact sufficiently appears from the defendant's answer that it was removing its property out of the state, so that any execution obtainable at law by the plaintiffs would not be available; and therefore it is adjudged, ordered, and decreed that the motion to quash said attachment be overruled." From this decree an appeal to this court was allowed, and a supersedeas awarded. These are the assignments of error made in appellant's petition for the appeal: First. That the affidavit upon which the attachment issued is insufficient, because it does not state "that the claim is believed to be just," as the statute requires; and further, that it does not state the existence, "to the best of af-

flant's belief, that the defendant is converting or is about to convert," etc. Second. "That if it be granted that the affidavit is sufficient, then still it was incumbent upon the complainants to prove the truth of the allegations of said attachment; that is—First, that the defendant was moving its effects out of the commonwealth; second, that it was converting or disposing of its effects with intent to defraud its creditors"; and, as the allegations were not proven, the court should have quashed the attachment. Third. "That the attachment should have been quashed, for the reason that it was made returnable to rule day," and not to the term. And it is contended by the appellant in the petition and at bar that the circuit court erred in overruling its motion for a continuance, and in hearing the cause at the March term, 1894.

A motion for a continuance is addressed always to the sound discretion of the court, and the appellate court will always presume that the court properly exercised that discretion, unless the contrary be shown. The facts disclosing any impropriety in the ruling of the court below on this motion are not in this record; and, for us, what does not so appear does not exist.

As to the first ground stated why the attachment should have been quashed, it will be noted that the affidavit states "that the claim is just," and "that the defendant is converting," etc., while the language of the statute in the one instance is "that the claim is believed to be just," and in the other "that to the best of affiant's belief defendant is converting," etc. Code 1887, § 2959. It is true that the affidavit is always to be strictly construed, and any omission of the requirements of the law is fatal to the attachment, but, if the language of the affidavit necessarily implies the fact, it is sufficient. 1 Bart. Ch. Prac. 585. In this case the affidavit of Harrison leaves nothing to be implied, but states the facts. In the case of *Jones v. Leake*, 11 Smedes & M. 591, where the statute of Mississippi required that the affidavit should show "that the facts sworn to were within the personal knowledge of the affiant, or that he had been informed or believed them to be true, the affidavit sets out that defendant is indebted to affiant in a sum certain, and that he is about concealing his property, so as to defeat the affiant's claim"; and the high court of errors and appeals of Mississippi held this to be sufficient. Mr. Justice Thacker, in delivering the opinion of the court, said: "In these particulars there is the oath of the plaintiff plainly made to the facts. They do not purport to have been sworn to upon the information of others, but carry clearly the presumption that they were within the personal knowledge of the affiant. As they are stated upon the oath of the plaintiff, it is but a fair construction that he believed them to be true. Any other presumption in such a case would be violent, illiberal,

and unjust." This language of Mr. Justice Thacker can be applied to the case here, and hence we see no error in the refusal of the circuit court of Russell county to quash the attachment on this ground.

The affidavit being sufficient, as we have seen, we come to consider the question raised by the second assignment of error, viz. whether the allegations of the affidavit were sufficiently proven to justify the court below in overruling the motion to quash on this ground. The burden of proof was, as contended by the appellant, on the plaintiffs in the court below, to sustain the truth of the allegations; and this should have been required, unless the facts alleged, necessary to sustain the attachment, were admitted by the defendant. We are clearly of the opinion that the court erred in refusing to quash the attachment on the ground "that it sufficiently appears from the defendant's answer that it was removing portions of its property out of the state, so that any execution obtainable at law by the plaintiffs would not be available." The fact is that this does not appear in the defendant's answer, except in the same connection, with an explanation in the words "that such shipments were made in the due and regular course of business, and that the only market for baryta is outside of the state, and to no one is this fact better known than to the complainants." It is too well settled for argument here that the whole of the answer, if used at all in support of the complainants' bill, or as to a particular allegation, must be read and taken together. 1 Bart. Ch. Prac. 399, 400, and cases there colated, and especially the case of Morrison's Ex'rs v. Grubb, 23 Grat. 342. Following this established rule, the answer of the defendant company to the charge that it was removing portions of its property out of the state, etc., did not justify the circuit court in sustaining the attachment, in the absence of proof sustaining the allegation. This court cannot be too emphatic in the expression of its opinion that the shipment of products of any enterprise out of the state in the due course of business or trade, where the removal is not permanent, and the proceeds are brought back within the state, is not sufficient ground for an attachment; and we think that this rule applies with all of its force to the case at bar. The complainants had been conducting this business of mining, manufacturing, and selling baryta up to the time that the defendant company became the owner of the leaseholds and the entire equipment of the business, and it appears in the record that complainants were of necessity better informed than any one else that the only market for the baryta is outside of the state. In fact, it is not denied by complainants that, upon making the sale to Bachman and his associates, complainants furnished a list of parties who would purchase the products of the enterprise, and that all of the parties on the list were outside of the state. The stat-

ute does not mean to designate as cause for attachment every transitory or temporary removal. What is meant is a permanent removal. Wade, *Attachm.* § 91; *Warder v. Thrilkeld*, 52 Iowa, 134, 2 N. W. 1073; *Russell v. Wilson*, 18 La. 367. The defendant company could make no profitable use of the property bought of the complainants, unless the products of the business could be marketed. Hence, so long as it was honestly shipping such products to market, though out of the state, an attachment was not authorized, it appearing that the proceeds of the sales were being brought back into the state.

But on another ground appellees contend that the decree of the court below was justified, and that the attachment in this case should have been sustained, viz. the bill having charged that the defendant company had also on hand a considerable stock of general merchandise, which it was converting into money, with intent to hinder, delay, and defraud complainants and other creditors; and, the answer of the defendant company not denying this charge, or making reference to this stock of general merchandise, to this extent the bill stood as taken for confessed, or, in other words, this charge must be taken as admitted, and no proof of it was required of complainants. This is not what we understand to be the established rule. In *Dangerfield v. Claiborne*, 2 Hen. & M. 17, the learned chancellor of the superior court of chancery for the Richmond district, after stating the question to be whether allegations in the bill, not answered, shall be considered as admitted, or must be proved by the plaintiffs, says: "The rule in future will be understood and settled that where the answer is not responsive to a material allegation of the bill, the plaintiff may except to it as insufficient, or may move to have that part of the bill taken for confessed; but, if he does neither, he shall not, on the trial, avail himself of any implied admission by the defendant, for where the defendant does not answer at all the plaintiff cannot take his bill for confessed, without an order of the court to that effect, and having it served upon the defendants; and this is the only evidence of his admission. Of course, if this mode of proceeding as to the confession of the whole bill be correct, it must be equally correct as to the confession of any part." This rule has been followed in all cases reported in our state reports where the question has arisen, and maintained by our learned commentators. *Argenbright v. Campbell*, 3 Hen. & M. 165; *Coleman v. Lyne*, 4 Rand. (Va.) 454; *Cropper v. Burtons*, 5 Leigh, 426; *Miller v. Argyle*, Id. 400; 2 Rob. Prac. 313; and 1 Bart. Ch. Prac. 398, 399. Says Barton: "Those allegations of a bill which are not responded to by the answer, although an exception would properly lie on that account, are yet not to be taken as admitted, but must be proved by the plaintiff." "In those cases where a different doctrine is held, the allegation was

that some fact did not exist, or that something was not done." In *Argenbright v. Campbell*, *supra*, Judge Tucker, delivering the opinion of this court, says: "If the defendant does not answer the allegations of the plaintiff's bill, nor by his answer confess them, although there be allegata before the chancellor, there are no probata; and it was the folly of the plaintiff not to except to the answer if he relied upon a discovery of facts known to the defendant only, or not to have proceeded to take depositions to prove the allegations of the bill if he thought he could obtain such proof elsewhere." Even if it were proper to read and consider the affidavits submitted by the plaintiffs at the hearing of this case below, they do not relieve the situation, as they afford no proof of this allegation, nor of any other upon which the attachment could rest; nor is there any force in the contention of appellees that the rule as to the weight of a commissioner's report laid down in *Bowers v. Bowers*, 29 Grat. 697, and cases following, has application to this case. The commissioner does not report the validity of the attachment, but leaves the question, as he should have done, to the determination of the court. We are therefore further of the opinion that the decree of the court below, sustaining the attachment, was not justified on this ground, and the court, to the extent that it maintained the attachment in the case must be reversed.

Having reached this conclusion, we deem it unnecessary to consider the third assignment of error, which is, as we have seen, that the attachment should have been quashed, because made returnable to rules, and not to the term of the court. Suffice it to say that it sufficiently appears in the record that this irregularity was waived by the defendant company. The cause is remanded to the circuit court of Russell county for such proceedings therein as may appear proper in accordance with the opinion of this court.

(91 Va. 339)

**COCHRAN v. RICHMOND & A. R. CO. et al.**<sup>1</sup>  
(Supreme Court of Appeals of Virginia. April 18, 1895.)

**TRUSTEES UNDER RAILROAD MORTGAGE—COMPENSATION OF COUNSEL—SETTLEMENT OF LITIGATION—OBSTRUCTION BY BONDBOLDER—RIGHT TO INTEREST.**

1. Trustees, who in good faith engage counsel to aid in the execution of their trust, are entitled to pay them out of the trust fund.

2. Where a loss has occurred which must fall upon one of two persons, it must be borne by him whose act occasioned it.

3. Pending the reorganization of a railroad, money to discharge existing liens was paid in court. After this was done one of the bondholders contested the payment of proper counsel fees until the fund was insufficient to pay interest and principal on all the bonds. *Held*, that the loss should fall on him, as having delayed

the settlement, rather than on others, who raised no such obstructions.

Appeal from circuit court of city of Richmond; B. R. Wellford, Judge.

Appeal by J. C. Cochran from a decree against him, and in favor of the Richmond & Alleghany Railroad Company and others. Affirmed.

A. B. Guilgon, for appellant. H. T. Wickham and W. J. Robertson, for appellees.

**KEITH, P.** The controversy before us presents but a small portion of a very important litigation conducted in the circuit court of the city of Richmond, having for its object the enforcement of certain liens by deed of trust upon the franchises and property of the Richmond & Alleghany Railroad Company. The defendant acquired the franchises and property of the James River & Kanawha Canal Company subject to two deeds of trust for the payment of certain bonds, and proceeded to create other liens by deed of trust thereupon in favor of creditors of its own, which resulted in bills for foreclosure brought by the trustees in the last-mentioned trusts. Into the suits thus instituted against the Richmond & Alleghany Railroad Company came T. W. McCance and James Pleasants, surviving trustees in a deed from the James River & Kanawha Canal Company to secure certain bonds of said last-mentioned company, and John Dunlop, surviving trustee in the deed to secure its second-mortgage bonds. It appears that the parties interested in the suit were at one time upon the eve of an amicable arrangement of all the questions at issue, and the negotiations with respect to the reorganization of the affairs of the Richmond & Alleghany road had so far progressed that the decree for sale had been drawn by which the scheme was to be carried into effect. The proposed plan involved the sale of the Richmond & Alleghany Railroad subject to certain incumbrances, among them the deeds to secure the first and second mortgage bonds of the James River & Kanawha Canal Company. This feature seems not to have met with the concurrence of those charged with the control of these interests, and a change was made upon the motion of the aforesaid trustees, by their counsel, by which it was provided that the property should be sold for the cash payment sufficient to meet the demands, principal and interest, of holders of these James River & Kanawha Canal bonds, up to the day of sale. The property was sold to the Chesapeake & Ohio Railroad Company, one of the appellees, and the cash payment required was brought into court. In the meanwhile a controversy had arisen between Messrs. Cabell & Smith, counsel for the trustees of the James River & Kanawha Canal trusts and some of the beneficiaries under said trusts. Cabell & Smith had been employed by the trustees, and had received compensation for what they had done, but, having performed additional serv-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

ices, claimed additional compensation. Their claim for additional compensation seems to have been based upon the change which they had brought about in the terms of the decree, by which the amount of the liens represented by them was brought into court in cash, instead of resting upon the property. Their petition was filed April 17, 1889, and excited great opposition. It was strenuously resisted by those interested in the fund out of which it was to be paid, and by none more earnestly than by J. C. Cochran, the appellant, who on the 24th of May, 1889, filed his answer to the petition. The contest waged over this petition caused the trouble which has resulted in the appeal which we are now called upon to decide. The money to pay off every claimant was in the hands of the court, and every demand would have been settled, principal and interest, without delay, had not this controversy arisen. The result of it has been that in 1891 the additional compensation to Cabell & Smith was agreed upon by all concerned, including the appellant, who, however, still claimed that it ought not to have been charged upon the fund in which he was interested. Every other litigant dropped out. The court decreed the fee to be distributed among the owners of the James River & Kanawha Canal bonds in proportion to their several holdings, and the objection to this ruling constitutes the first assignment of error by the appellant.

Pending this litigation, the money with which these bonds were to be paid lay idle in the hands of the court, while the interest on the bonds continued to accumulate, with the inevitable result that the assets ultimately proved insufficient to meet the liabilities which were charged upon them. Cochran insisted that he was entitled to full interest upon his bonds, while the court was of opinion and decreed that he was only entitled to interest up to the date when the fund was paid into the court in part for his benefit, and the objection to this action of the court constitutes the only other assignment of error.

The rule is, without doubt, that contended for by the plaintiff, but there are exceptions to it. It cannot be denied that trustees, who in good faith engage the services of counsel to aid them in the execution of their duties, are entitled to pay them out of the trust fund, or to be reimbursed out of that fund for all expenses which they have incurred, including reasonable fees to attorneys. It was certainly an important service rendered by Cabell & Smith in having the money due upon the first and second trusts of the James River & Kanawha Company brought into court. Presumably it was right and proper that it should be done, and that it was beneficial to those interested. Counsel appear to have advised it in good faith, and the trustees in good faith to have acted upon their advice. These trustees were not only authorized, but it was their duty, having accepted the trust, to do all that in their judgment the situation

required, to protect the interest of the beneficiaries of the trust, and, acting within the scope of this duty, the beneficiaries are bound by their action. In this case there is not the slightest suspicion of impropriety upon the part of either the trustees or their counsel. Their demand being just, its payment should not have been resisted, and, had that demand been promptly recognized and paid, all difficulty as to the distribution of this fund would have been obviated. This being so, and loss having resulted by reason of the fact that an opposite course was pursued, who shall suffer the consequences? The purchaser did as it was required by the court to do. It placed in the hands of the court a sum ascertained to be sufficient to satisfy every just demand. It is a familiar principle that, where a loss has occurred which must fall upon one of two persons, it must be borne by him by whose act of omission or commission it has been occasioned. In this case it was the result of a protracted litigation carried on in resisting a righteous claim; and it continued after other individuals, who, at the beginning, made common cause with the appellant, had become convinced that their position was untenable, and had accepted the situation and acquiesced in the result. There can be no doubt that the appellant was the efficient cause of the loss which has been sustained, and he therefore must suffer the consequences.

It seems that during the course of the proceedings in the circuit court the appellant was allowed to become a borrower of the fund which he claimed to the extent of 90 per cent. of the face value of his demand, giving his obligation therefor, and depositing the original bonds, of which he was the holder, as collaterals for its payment. We think that in the final settlement with him this transaction should not be considered as a loan, but as a payment to him as of its date, and, with this direction as to the terms upon which a final settlement is to be made with the appellant, the decree appealed from is affirmed.

#### BOWLES v. ALLEN et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 3, 1895.)

#### REAL-ESTATE BROKERS—RECOVERY OF COMMISSIONS.

Where, by a contract in regard to the sale of property, a broker arranges with all the parties that his compensation shall be paid in certain stock of a company to be formed by him and others to buy the land, he cannot hold the vendors responsible for the amount of such compensation.

Appeal from circuit court, Page county.

Action by John Bowles against Stephen M. Allen and George H. Pollock for breach of contract. From a decree for defendants, plaintiff appeals. Affirmed.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

W. Willoughby, for appellant. A. R. Blakey and R. B. Lewis, for appellees.

RIELY, J. Alzire A. Chevallier, in whom was vested the legal title to a tract of land of 5,371 acres lying in Page and Madison counties, on that part of the Blue Ridge Mountains called "Stony Man," employed John Bowles, a real-estate agent who resided in the city of Washington, to sell it for her. Her price was \$50,000, and she agreed to pay him a commission of 10 per cent. The contract between them for this purpose was made on the 26th day of June, 1888, and given by her in the form of an option to John Bowles to buy said land within one year for the sum of \$50,000, of which \$10,000 was to be paid in cash, and if credit was desired for the residue of the purchase money it was to be secured by a mortgage on the land. He did not make a sale of the land within the year, and the option and employment to sell the land expired by limitation. She resided in the state of Massachusetts, and when the option expired he endeavored to obtain from her another contract to sell the land. He went to Boston, Mass., for this purpose. He failed to see her, but had several interviews with her agent and attorney, Stephen M. Allen. He succeeded in obtaining from Allen on the 1st day of July, 1889, an agreement in writing for the sale of the land to himself and other persons, not named, as representatives of the Stony Man Park Association, for the sum of \$2,000, to be paid her within three months, and 5,000 shares of the capital stock of the said association, of the par value of \$500,000, of which Bowles was to receive 500 shares "as compensation for his past and future services in the sale of said tract of land." This contract was signed with the name of A. A. Chevallier, by her attorney, Stephen M. Allen, and by John Bowles. Allen was reluctant to enter into the contract, and made it a condition that it should be subject to the approval of George H. Pollock, to whom Bowles was to show it on his return to Washington. If Pollock disapproved of it, the contract was to be at an end, and returned by Bowles to Allen. Pollock refused to give it his approval. Bowles failed, however, to return it to Allen. When afterwards reminded by Allen that he had not returned it, he said that he had mislaid it, but, as Pollock had refused to agree to it, it was of no value. In spite of the failure of this scheme for the sale of the land, Bowles endeavored to obtain still another contract for its sale, and proposed another scheme, by which Alzire A. Chevallier was to convey the land to John Bowles, George H. Pollock, and Stephen M. Allen, as trustees for a new company, to be chartered under the name of the Blue Ridge Park Association. An agreement was drawn up between such association, of the one part, and the said Bowles, Pollock, and Allen, as trustees, of

the other part, bearing date on the 24th day of August, 1889, in which it was set forth that they were to buy and hold the said land for such association on certain terms and conditions. It was stipulated that the land was to be paid for with 5,000 shares of the stock of the company, as full paid up-stock (but for which nothing was ever paid), of the par value of \$100 each; that 371 acres of the land were to be set apart as a town site, and divided into lots, and from the sale of the lots and a part of the said stock \$50,000 was to be raised, and paid to the proprietors of the land. Bowles, Allen, and Pollock were each to receive 1,000 shares of said stock as their own property. This agreement was not executed by all the parties, but was repudiated by Pollock and Allen before its delivery, and never became operative upon them. A deed bearing the same date, to wit, August 24, 1889, conveying the property to the said trustees in accordance with such plan, was executed by Alzire A. Chevallier, and intrusted to Allen, her agent and attorney, but not to be delivered by him unless a sale of the land was made, by which she would get her money. When Pollock refused to sanction the scheme for the sale of the property to the Blue Ridge Association, and erased his signature to the agreement, Allen made no use of this deed, but canceled it. Allen and Pollock refused afterwards to consider further the schemes of Bowles, and all negotiations for the sale of the land terminated. The Blue Ridge Park Association then instituted its suit in chancery in the circuit court of Page county against Chevallier, Allen, Pollock, and Bowles, to compel a specific performance of the alleged contract for the sale of the land; and at the same time Bowles brought suit against Allen and Pollock for \$100,000, the par value of the stock which he was to receive if the scheme for the sale of the property to the said association had been carried out. He brought his suit against Allen and Pollock as the equitable owners of the land, it appearing that Alzire Chevallier merely held the legal title to secure the payment of the sum of about \$2,000 which she had paid out for taxes on the land, and based his claim on the agreement of the 24th of August, 1889, which, as we have seen, was not perfected by execution and delivery, so as to be operative and binding on those who were to become parties to it.

The depositions of many witnesses were taken, which, it was agreed, should be read in each suit, and the two causes were heard together. The evidence is voluminous and contradictory, and any attempt to analyze it would be unprofitable discussion. At the hearing the court, by a joint decree entered in both causes, dismissed both bills. An appeal was taken in each case, but that of the Blue Ridge Park Association was afterwards abandoned. The effect of the dismissal of the bill in that case was to hold that no valid

sale was made of the land. The decree of the court is presumed to be right; and, no sale having been made,—at least, no valid sale of the land, none which the circuit court would enforce,—the decree of the court dismissing the bill in that case would seem to conclude all pretension on the part of Bowles to compensation for having made a sale of the land.

But, aside from that view, the agreement of the 24th of August, 1889, not only never became operative on Allen and Pollock, by reason of the failure to execute and deliver it, but does not contain any promise by them, or either of them, to pay him for his services in organizing a joint-stock company for the purchase of the property, and there is nothing in it from which it can be implied. That was not in contemplation by him. He looked for his compensation to the large interest he was to have in the company if it could be successfully foisted on the public. No sale was in fact ever effected by him, and he consequently earned no commission or compensation. But he claims that it was not his fault that the sale was not made, as contemplated by him, to the Blue Ridge Park Association, but that it fell through by the refusal of Allen and Pollock to accept the scheme of sale, and to sanction and ratify what he had brought about, and that, therefore, he ought not to be deprived of all remuneration for his services. The only contract he ever had was to sell the land for money,—for \$50,000. This amount, or a considerable part of it, was required to be paid in cash, and any sum not paid to be safely secured. There is no evidence that he ever attempted to make the sale for the said price in the usual way of a real-estate agent, but that his whole effort was directed to the formation of a company for its purchase at a fictitious value, and to be paid for in stock of the company, which would have no basis of value, except the land itself. The land was to be sold for \$50,000, which was an exorbitant price for it. It was to be bought by a company chartered and organized by Bowles solely for its purchase, and capitalized at \$500,000, which was 10 times the exorbitant price asked for it by the owners. And they were to be dependent for their purchase money on the sale of town lots, into which the town site was to be divided, and from the sale of a part of the stock. Bowles was to get one-fifth of the whole capital stock, which he claims in his bill would have been worth \$100,000,—just twice the price asked by the owners for the whole land. Pollock and Allen were justified in refusing to risk the sale of their property to a company upon a scheme which showed upon its face that it was exceedingly speculative and visionary, and vitiated by illegality. The claim asserted by Bowles in his bill against Allen and Pollock for services in attempting to dispose of the said land is without merit. He does not show that he made any sale of

which they have taken advantage, or ought to have accepted. The circuit court of Page county rightly dismissed his bill, and the decree appealed from must be affirmed.

#### BEALE'S ADM'R v. GORDON et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 18, 1895.)

RES JUDICATA — MATTERS DETERMINABLE IN FORMER SUIT.

1. When a judgment or decree has been rendered by a court of competent jurisdiction in a suit, it is a bar to any further action between the same parties upon the same matter of controversy.

2. A decree is final, not only as to the matters actually determined, but as to every matter which the parties might have litigated within the scope of the pleadings in the cause, and which might have been decided.

Appeal from circuit court, Fauquier county; James Keith, Judge.

Bill by L. D. Beale, administrator of William Beale, against Charles H. Gordon and others. From a decree dismissing the bill as to defendant A. D. Payne, administrator of John H. Rixey, plaintiff appeals. Affirmed.

Brooke & Scott, for appellant. Eppa Hunton, Jr., and Rixey & Barbour, for appellees.

CARDWELL, J. This is an appeal from a decree of the circuit court of Fauquier county, and the sole question to be disposed of is whether the rule of *res adjudicata* applies to the case. In 1872 S. F. G. Beale, as treasurer of Fauquier county, executed his official bond, with William Beale, Charles H. Gordon, James W. James, John H. Rixey, and Wellington Millon as his sureties. Beale, the treasurer, on the 15th of November, 1872, executed a deed of trust to R. Taylor Scott, trustee, to indemnify and save harmless his said sureties from loss by reason of their suretyship; conveying to the trustee certain real estate in Fauquier county, and personal property consisting of cattle, horses, his household and kitchen furniture, and farming implements. This treasurer afterwards defaulted, and at the March term, 1875, of the circuit court of the city of Richmond, two judgments were obtained against him and his sureties in favor of the commonwealth, aggregating a large amount. In 1874, Treasurer Beale brought suit against John H. Rixey, who was his deputy in Fauquier county, as well as his surety; and at the September term, 1877, of the circuit court of Fauquier county, judgment was awarded against John F. Rixey, administrator c. t. a. of John H. Rixey (the latter having died after the institution of the suit), for the sum of \$3,624, with interest from May 1, 1873, to be paid out of the assets of John H. Rixey, the testator, in the hands of his administrator,

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

which judgment was marked, "For the benefit of R. Taylor Scott, trustee of S. F. G. Beale." In the month of August, 1876, John F. Rixey, administrator c. t. a. of John H. Rixey, deceased, filed his bill in the circuit court of Fauquier county against the widow and heirs of his testator, convening the creditors, and praying the guidance and protection of the circuit court in the administration of the assets of his testator, and that an account be taken of all claims and debts against the estate in his hands, or to come into his hands, with their respective priorities, and for general relief. In this suit a decree was entered September 5, 1877, referring the cause to a master commissioner to state and report to the court an account of all the personal estate and effects which went into the hands of John F. Rixey, as administrator of John H. Rixey, deceased, to be by him administered as assets; second, an account of all real estate directed by the will of John H. Rixey to be sold, and of all assets arising therefrom, and of all other real estate; third, an account of any other assets of the deceased which may have come into the hands of his administrator to be administered; fourth, an account of all outstanding claims and debts against the estate of John H. Rixey, deceased, with their respective priorities and order of payment; and, fifth, an account of the transactions of John F. Rixey, administrator. And this decree directed the commissioner, before taking the accounts, to give thirty days' notice, by publication in one of the newspapers published in the town of Warrenton and one in the town of Culpeper, of the time and place of taking the accounts, and provided that such notice should be equivalent to personal notice to all parties interested, and required all parties having claims and debts against the estate of John H. Rixey, deceased, to come forward and prove their debts, on the pain of exclusion from all participation in the assets of said estate. On the 13th of December, 1884, R. T. Scott, trustee for S. F. G. Beale, filed his petition in the suit, setting forth the judgment obtained at the September term, 1877, in favor of S. F. G. Beale, against John H. Rixey's administrator, as aforesaid, and praying that the administrator be required to pay to petitioner the amount due upon the judgment; alleging that the judgment had been acquired by petitioner from S. F. G. Beale by parol assignment, the proceeds to be applied to the indemnity of the sureties upon the official bond given by S. F. G. Beale, as treasurer of Fauquier county. To this petition answer was filed by John H. Rixey's administrator, denying the right of petitioner to the judgment, and claiming that out of the estate of John H. Rixey, his testator, large sums of money had been paid in discharge of the judgment aforesaid obtained in favor of the commonwealth against S. F. G. Beale, treasurer, and his sureties; that the amounts so paid by John H. Rixey's

estate, as one of the sureties, aggregated \$4,095.01, under date of July 12, 1884, and that John H. Rixey's estate was entitled to offset the judgment claimed by petitioner R. T. Scott, trustee, with this amount, and such other sums as the estate might thereafter have to pay. While the matters put in issue by the original bill, the petition of R. T. Scott, trustee, and answer of John H. Rixey's administrator thereto, were still undetermined, Charles H. Gordon and L. D. Beale, administrator of William Beale (the latter having died during the pendency of the suit), filed their joint petition in that suit, and, on their motion, were admitted parties defendant thereto, and setting forth in their petition that they had also paid large sums in discharge of the judgment aforesaid obtained on behalf of the commonwealth against S. F. G. Beale, treasurer of Fauquier, and his sureties, the payments alleged to have been made by petitioners, but in point of fact made solely by William Beale, aggregating \$1,816.91, and claiming that the amount due on the judgment in favor of S. F. G. Beale against John H. Rixey's administrator should be paid to R. T. Scott, and dedicated to the protection of all the sureties upon S. F. G. Beale's bond as treasurer; but, in the event of John H. Rixey's administrator being allowed to set off against recovery of this judgment the money paid by him out of the testator's estate upon the commonwealth's judgment, petitioners then claimed that the estate of John H. Rixey, deceased, must prorate with petitioners according to the amount of payments made by them as sureties upon the debt of their principal, and that the well-established doctrine of equity relating to contribution among sureties must apply, and prayed the court to direct the application and payment of the money evidenced and represented by the judgment of S. F. G. Beale against John H. Rixey's administrator, and "that there be contribution to petitioners from the estate of their cosurety John H. Rixey in such sum as shall be just in the premises." On the 10th of September, 1888, A. D. Payne, administrator d. b. n. c. t. a. of John H. Rixey, deceased (having been appointed as such administrator in the place of John F. Rixey) filed his answer to this petition of Gordon and William Beale's administrator, denying both the right of R. T. Scott, trustee, to have the money due on the judgment in favor of S. F. G. Beale against John H. Rixey's administrator; insisting upon the right to set off the judgment by the amounts paid by John H. Rixey's estate as surety for treasurer Beale; and denying the right of petitioners Gordon and William Beale's administrator to have contribution from John H. Rixey's estate, as cosurety on treasurer Beale's bond.

A master commissioner's report was filed in the cause, showing the amounts paid by William Beale and John H. Rixey's administrator, respectively, in the discharge of the



judgment in favor of the commonwealth, and showing that John H. Rixey's administrator had applied the whole amount due from him on the judgment in favor of Beale, the treasurer, to the discharge of the judgment of the commonwealth aforesaid, with the exception of \$1,087.86; and with the report alternate statements were made and filed, but which need not be noticed in particular. The circuit court, by its decree, September 10, 1888, confirmed so much of the master commissioner's report as showed the balance due by John H. Rixey's estate on the judgment in favor of Beale, the treasurer, to be \$1,087.86 as of the 18th of July, 1884, and, rejecting the alternate statements contained in the report, decreed and ordered A. D. Payne, d. b. n. c. t. a. of John H. Rixey, deceased, out of the estate in his hands to be administered, to pay to L. D. Beale, administrator of William Beale, deceased, or to Brooke & Scott, his attorneys, the said sum of \$1,087.86, with interest. From this decree Charles H. Gordon and William Beale's administrator obtained an appeal to this court, and this court affirmed the decree appealed from, as appears in the case of *Gordon v. Rixey's Adm'r*, 86 Va. 853, 11 S. E. 562. Subsequently, and in December, 1890, L. D. Beale, administrator of William Beale, filed his bill in the circuit court of Fauquier county against Charles H. Gordon, James W. James, Wellington Millon's administrator, and John H. Rixey's administrator d. b. n. c. t. a., setting forth that William Beale had paid a certain part of the judgment in favor of the commonwealth against S. F. G. Beale, late treasurer of Fauquier county, and his sureties, and demanding contribution from Charles H. Gordon, James W. James, the estate of Wellington Millon, and of John H. Rixey, deceased, his cosureties, and praying for general relief. To this bill, A. D. Payne, administrator d. b. n. c. t. a. of John H. Rixey, deceased, filed his demurrer and answer, and a special plea of *res adjudicata*, and vouched in support of his plea the record of *Rixey's Adm'r v. Rixey* and others, as styled in the circuit court of Fauquier county, and as *Gordon v. Rixey's Adm'r* in the supreme court of appeals; and at the hearing of the cause, April 16, 1891, the circuit court of Fauquier county decreed that the matters set forth in this bill are *res adjudicata* as to the defendant A. D. Payne, administrator d. b. n. c. t. a. of John H. Rixey, deceased, and dismissed the bill, as to this defendant, with costs. This is the decree appealed from in the case at bar.

From the foregoing statement, it would seem clear that William Beale's administrator was a party to the suit to wind up the estate of John H. Rixey, deceased, finally disposed of by this court in the case of *Gordon v. Rixey's Adm'r*, *supra*, and by his petition in that suit all questions were raised, or might have been raised, that are now

put in issue by the pleadings in the case here. When a judgment or decree has been rendered by a court of competent jurisdiction in a suit, it is a bar to any further action between the same parties upon the same matter of controversy. 1 Bart. Law Prac. 553, 554; 7 Rob. Prac. 172; Findlay v. Trigg's Adm'r, 83 Va. 543, 3 S. E. 142; Simpson v. Dugger and Boisseau v. Same, 88 Va. 963, 14 S. E. 760. The decree in the first cause is not only final as to the matters actually determined, but as to every matter which the parties might have litigated, within the scope of the pleadings in the cause, and which might have been decided. Diehl v. Marchant, 87 Va. 447, 12 S. E. 803; Withers' Adm'r v. Sims, 80 Va. 660, 661; Blackwell v. Bragg, 78 Va. 529; Fishburne v. Ferguson, 85 Va. 321, 7 S. E. 361; Davis v. Brown, 94 U. S. 423; Cromwell v. County of Sac, Id. 351; Wells, Res. Adj. § 252; Stearns v. Beckham, 81 Grat. 391; Durant v. Essex Co., 7 Wall. 107; Malloney v. Horan, 49 N. Y. 116; Freem. Judgm. §§ 246, 254. In the case of *McCullough v. Dashiell*, 85 Va. 41, 6 S. E. 610, the learned judge delivering the opinion of this court says, "The doctrine of *res adjudicata* applies to all matters which existed at the time of the giving of the judgment or rendering the decree, and which the party had the opportunity of bringing before the court." The question as to the right of William Beale's administrator to have contribution from John H. Rixey's estate, his cosurety on Beale the treasurer's bond, was expressly and pointedly raised and put in issue in the first suit referred to, and finally disposed of by this court; and this is identically the same issue made in the case at bar. Hence the decree of the circuit court of Fauquier county sustaining the plea of *res adjudicata* was clearly right; and, as this conclusion disposes of the case, other matters of defense relied on by appellees' counsel will not be considered. The decree of the circuit court is affirmed.

KEITH, P., not sitting.

DILLARD v. DILLARD'S EX'RS et al.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. April 4, 1895.)

MARRIED WOMEN—CONTROL OF SEPARATE ESTATE  
—DISPOSITION BY WILL—TRUSTEES—DISCRETIONARY POWERS—CONTINUANCE.

1. A married woman, as to property settled to her use, is to be regarded as a feme sole, and has a right to dispose of all her separate personal property, and the rents and profits of her separate real property, in the same manner as if she were unmarried, unless her power of alienation is restrained by the instrument creating the separate estate; and, when absolute dominion is given her over her separate property, it vests in her the absolute estate.

2. A woman had no power to dispose of her separate real estate acquired prior to January

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

1. 1850, unless the deed or instrument creating the same confers such power; but by Code 1849, c. 122, § 3, and Code 1887, § 2513, she is given power to dispose of her separate property by will.

3. If a married woman is given power to dispose of her property in fee or for a less estate, she has absolute ownership thereof, and may delegate to trustees the power to appoint one of two classes who shall hold the fee.

4. A court of chancery cannot control trustees in the exercise of a discretionary power reposed in them, nor compel them to exercise such discretion.

5. Where the record fails to show that complainant asked for further time to prepare his case, there can be no error charged to a failure to grant further time.

Appeal from circuit court, Nelson county; D. A. Grimsby, Judge.

Action by J. T. Dillard against the executors of N. E. Dillard and others. Decree for defendants; and complainant appeals. Affirmed.

F. P. Fitzpatrick, for appellant. Caskie & Coleman and J. Thompson Brown, for appellees.

**BUCHANAN, J.** This is an appeal from a decree of the circuit court of Nelson county rendered in the cause of J. T. Dillard against the executors of N. E. Dillard and others, in which the complainant in that court is the appellant here.

The object of the suit, the proceedings had, and the reasons of the court for rendering the decree complained of are so clearly stated in the written opinion of the circuit judge filed in the cause, and printed in the record, that we will adopt that opinion, so far as it discusses the questions raised by this appeal, as our opinion. It is as follows:

"The primary object of the bill of the plaintiff is to obtain from the court a construction of the will of Narcissa E. Dillard, and to have the alleged devise to John Dillard stripped of all restrictions thrown around it by the testatrix, and of the discretionary power in regard to the subject-matter vested in the trustee by the will; and, secondly, in the event that the construction placed upon the will by the court should be adverse to the pretensions of the complainant, then the plaintiff asks for an account of personal property, and of the rents and profits of the real estate which passed to trustees for Mrs. Dillard for life, and, after death, to her children under the deed of 1830, and also an account of the profits of John Turner's estate, from his death, in 1872, to the death of his mother, in 1877, both of which, it is alleged, were appropriated by Mrs. Dillard or her acting trustee, her husband, and were used to augment the estate disposed of by will, and as to plaintiff's share of which he claims and asks to be regarded as a creditor of her estate; and the bill also embraces a third object, to wit, the specific execution of an alleged understanding and agreement between his father and mother and himself, to be remunerated

for his interest in the Amherst estate, conveyed in 1860. \* \* \* So far as the estate of John Turner is concerned, the court holds that, under the will of his father, Narcissa E. Dillard had a mere naked power of appointment, not coupled with any interest; and that upon the death of John Turner, in 1872, the estate passed to the children of N. E. D. as tenants in common, and that they were entitled to the rents, issues, and profits thereof, until their interest in the estate was divested by the exercise of the power of appointment; and if, as alleged in the bill, N. E. D. in her lifetime, from the death of John to her own death, appropriated the rents to her own use, she would be responsible therefor; but, as her executors rely on and have pleaded the statute of limitations to this demand, it is a complete and effectual defense to any recovery therein.

"The plaintiff alleges an understanding and agreement with his mother and father (her acting trustee), in consideration of his uniting in the deed of the Amherst property to his brother Terisha, to compensate him therefor by a suitable provision. This is, however, denied by the answer of the defendants, and there is no proof in the cause of such an agreement; in fact, what the agreement or understanding, if any, is, is not set out with any degree of certainty or definiteness. But, even if it were so, the court is further of opinion that the statute of a parol agreement, as well as the laches and delay of the plaintiff in asserting his rights, and the vagueness and uncertainty of the understanding, is a complete bar to any recovery on this question.

"This brings us, then, to the main question in the case, viz. the true construction of the wills of Terisha Turner and of Narcissa E. Dillard. The first question is, what estate or interest did Mrs. Dillard take under the will of her father,—whether a life estate, with a power of appointment, or a fee-simple or absolute estate, with an unlimited power to devise? for, whether the estate be one for life or in fee, the disability of coverture attaches, unless that disability is relieved by the deed or will creating the estate. I think the rule in Virginia is that a married woman, as to property settled to her use, is to be regarded as a feme sole, and has a right to dispose of all her separate personal property, and the rents and profits of her separate real estate, in the same manner as if she were a feme sole, unless her power of alienation is restrained by the instrument creating the separate estate (*Burnett v. Hawpe*, 25 Grat. 481); and, when absolute dominion is given the feme over the separate property, that being the highest evidence of absolute property, it necessarily vests in her the absolute estate (*Justis v. English*, 30 Grat. 571). But, as to her separate real estate, she has no power to dispose of the same, unless the deed or instrument creating the same confers such power on her. *West v. West*, 3 Rand. (Va.) 373,

where the will took effect prior to July 1, 1850. Code 1849, c. 122, § 3; Code 1887, § 2513.

"By the ninth clause of the will of Turner, the property, real and personal (omitting unnecessary verblage), is devised to trustees for the separate use and benefit of his daughter, N. E. This, of itself, would give her the right to charge and the right to bequeath the personal estate, and the rents, issues, and profits of the real estate, there being no words of restriction upon such power, but not to devise the real estate. But the testator goes further than this, and expressly authorizes his daughter, at any time, by deed or will, attested in the manner indicated, to appoint the persons or person to take the property in fee or for any less estate, as if she were a feme sole, and in the limitation over it is only of that which is unused or unappropriated by her. So that there are not only the incidents to an ordinary separate estate without restriction, but an absolute power, at any time, to dispose of any portion by deed or will, as if she were a feme sole, and a limitation over only of that which was unused. So that I think there was such absolute dominion over said property given the feme as is only consistent with an estate in fee or in absolute property.

"But considering that she took an estate in fee, as the incapacity of coverture existed, the question still arises whether or not she can execute the power, except in the manner indicated in the instrument, and only to the extent of the power. In other words, having been given the power to dispose of the property in fee or for a less estate, can she, in the execution of that power, delegate to trustees the power to indicate one of two classes who should hold the fee? Ordinarily this cannot be done, on the principle of *delegatus non delegare*. 2 Lomax, Dig. p. 172.

"But it has also been held that when the power is equivalent to absolute ownership, and does not involve any personal confidence, it may be executed by an attorney in the same manner as a conveyance in fee simple. In like manner, when an estate is limited to such uses as A. may appoint, the power is equivalent to an estate in fee simple, and he may limit it to such uses as B. may appoint. It is merely a species of ownership, and no delegation of personal confidence. *Id.* 173. Hence I conclude that such power, use, dominion, and control is given by the will of Turner over the estate devised to the devisee, as is equivalent to a fee simple, and she may delegate to another the power of disposing of it, as though she were *sui juris* and owner of the fee.

"I also conclude that it is not within the power of a court of chancery to control the trustees in the exercise of a discretionary power reposed in them by the testator, nor to compel them to exercise such discretion. It is perhaps true that, if such discretion were exercised from fraudulent or improper

motives, a court of equity might interfere, but in such cases it must be so alleged in the bill and sustained by the proofs. It is not so alleged in the case at bar. A state of facts is set out, from which it is feared that the discretion may be exercised to the prejudice of the rights of the complainant; but the defendants, in their answer, insist that they are not responsible for the existing state of feeling between the parties, and repudiate the idea that it will affect their action.

"I cannot see in the present condition of affairs that the plaintiff is entitled to the relief asked for, and the bill will have to be dismissed. An interesting question may arise hereafter, resulting from the death of one of the trustees, and that is whether or not the surviving trustee can exercise the discretion vested in them by the will, and, if not, what becomes of the devise. But, under the present state of pleadings, it would not be proper to pass upon any such question until it arises."

That opinion disposes of all the questions arising in the appeal, except the assignment of error that, when the court determined that the complainant took nothing under the will of Mrs. Narcissa E. Dillard, it ought to have given him time to have shown what he was entitled to out of the profits of the John Turner estate, etc., under the will of Terisha Turner, as he only made a claim to an interest in the profits of that estate in the event the court held that he took nothing under his mother's will.

A reasonable time within which to prepare his case upon this point ought to have been given him if it had been asked for at the proper time. But the decree recites that "this cause, which has been regularly matured and set for hearing at the rules upon the bill of the complainant taken for confessed, upon proper process duly executed as to all the defendants, came on this day to be heard upon the bill and exhibits therewith, the demurrer and answer of William S. Dillard, Stephen T. Dillard, and John C. Monday, trustees, under the will of N. E. Dillard, and upon the demurrer and answer of William S. Dillard in his own right and as executor of N. E. Dillard, which said demurrers and answers were heretofore filed by leave of the court, and was argued by counsel." From this it is clear that the cause was submitted, not upon one branch, but upon the whole case, and there is nothing in the record to show that the complainant then, or at any other time, asked, or even intimated, that he desired further time to prepare his case. The manner in which the cause was submitted, and his failure to ask for further time to prepare his case for trial, show that this assignment of error ought also to be overruled.

I am of opinion, therefore, that there is no error in the decree complained of, and that it should be affirmed.

(91 Va. 244)

**MARSHALL v. PALMER.**<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 18, 1895.)

**EJECTMENT—COTENANT AS PLAINTIFF—AMOUNT OF RECOVERY—EVIDENCE.**

1. One cannot recover as sole plaintiff in ejectment the interests of both himself and his cotenants.

2. Where plaintiff shows that he is only a cotenant, he must show the extent of the interest claimed by him so that the verdict or the judgment will clearly show the amount of his interest.

Error to circuit court, Northumberland county.

Action by Henry M. Marshall against one Palmer. Judgment for defendant, and plaintiff brings error. Affirmed.

Robert M. Mayo, for plaintiff in error.

**RIELY, J.** This is a suit in ejectment, brought by Henry M. Marshall as one of the heirs of James Marshall, deceased. At the trial, by agreement of the parties, a jury was waived, and all matters of law and fact submitted to the court, which rendered judgment for the defendant. The plaintiff brought suit for the premises in controversy, both for himself and all the other heirs of James Marshall, through whom he claims, and sought to recover the entirety for himself and them. This, I apprehend, cannot be done. One may sue in ejectment, and recover less than he claims in his declaration (*Clay v. White*, 1 Munf. 162; *Callis v. Kemp*, 11 Grat. 78; and 2 Tuck. Comm. 174), but he cannot recover more than he proves that he has title to in himself. He cannot, in his own name, as sole plaintiff, recover the respective interests of his cotenants. Their several interests, though undivided, are distinct and different. He cannot, in his own name, represent or bind his cotenants. Each must sue for himself, and in his own name. The plaintiff can only recover such interest in the premises as he may prove that he himself is entitled to. *Hellyer v. King*, 6 Exch. 791; *Saul v. Dawson*, 3 Wils. 49; *Gray v. Givens*, 26 Mo. 291, 303; and *Dewey v. Brown*, 2 Pick. 387. And while one may bring suit for the whole of the premises, and his action will not be defeated, if he should fail to prove that he was entitled to the entirety, but showed that he was entitled to some less interest, yet it is incumbent upon him not only to establish the legal title in himself to such less interest, but he must also establish the extent of such interest. If it appears that there are other persons interested with him as cotenants, he must prove what is the share or proportion of the land that belongs to him. His undivided interest must be made certain and definite. It must be clearly designated. Code Va. § 2747. If he fails to do this, so that it cannot be specified by the verdict of the jury or the judgment of the court, he cannot re-

cover, and judgment must be rendered for the defendant. *Craig v. McBride*, 9 Dana, 427; *Craig v. Taylor*, 6 B. Mon. 457; *Callis v. Kemp*, 11 Grat. 78; and *Dawson v. Mills*, 32 Pa. St. 302. The record discloses that the plaintiff in error sued as only one of the heirs of James Marshall. He does not pretend that he is the only heir, but in the declaration alleges that there are other heirs of said decedent. And the evidence offered on the trial is to the same effect. He does not allege in his declaration the names or the number of the heirs. Nor does he state the extent of his undivided share or interest in the land, nor the proportion to which he is entitled. Neither does the evidence supply this fatal defect. It only shows that he is one of the said heirs. They may be few, or they may be many. The extent of the interest which the plaintiff claims for himself is left wholly in doubt. There is nothing in the entire record by which his interest may be designated or rendered certain; nothing on which a judgment in his favor could be founded, even if we were to come to the conclusion that the heirs of James Marshall were entitled to recover the premises sued for, as to which we do not wish to be considered as expressing or intimating any opinion whatever. No other judgment could have been rendered by the circuit court of Northumberland county than for the defendant, and for the foregoing reasons the same is affirmed.

(116 N. C. 595)

**WEBB et al. v. HICKS et al.**

(Supreme Court of North Carolina. April 2, 1895.)

**ASSUMPSIT—PLEADING—CAUSE OF ACTION.**

A petition alleging that the assignee of an insolvent debtor, while carrying on the business of the assignor under an agreement with the defendants and other creditors of such assignor, and for their benefit, became indebted to plaintiffs, and that all matters between such assignee and creditors relative to the assigned estate had been submitted to arbitration under an agreement not alleged to have been signed by plaintiffs, and the resulting award found the assigned estate indebted to plaintiffs in the sum sued for, does not state a cause of action against defendants.

Appeal from superior court, Cumberland county; Brown, Judge.

Action by C. A. Webb and O. E. Webb, partners as A. L. Webb & Sons, M. McD. Williams, and G. W. Buhman, assignee of M. McD. Williams, against R. W. Hicks and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Plaintiffs filed the following complaint: "(1) That Chas. A. Webb and Oscar E. Webb, above-named plaintiffs, at the times hereinafter named, were partners doing business at Baltimore, Maryland, as A. L. Webb & Sons. (2) That the plaintiff M. McD. Williams, at said times, during the year 1891, was, at the instance of and as agent for the defendants J. Y. Gossler and R. W. Hicks,

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

and by their consent, doing business at Sprout Springs, N. C., and as such became indebted to the said A. L. Webb & Sons in the sum of eight hundred and ninety-five dollars and thirty-six cents (\$895.30), with interest from April 19, 1892, which is the amount of said indebtedness. (3) That on or about January 2, 1892, the said J. Y. Gossler and R. W. Hicks agreed with said M. McD. Williams to submit to arbitration, in order to ascertain the amounts due, and to settle all matters of difference between the said M. McD. Williams, J. Y. Gossler, R. W. Hicks, and the creditors of W. J. McDiarmid & Bro. and the said Williams. (4) That on said January 2, 1892, as plaintiffs are informed and believe, the said J. Y. Gossler and R. W. Hicks contemplated and were intending to form a corporation for the purpose of working the properties which had been in the possession and use of M. McD. Williams whilst so doing business for them, and as their agent, as above alleged; and, as part of the agreement to arbitrate, it was stipulated that the corporation to be formed should immediately, upon the coming in of the award, become bound therefor, together with said Gossler & Hicks. (5) That in accordance with the intention of said Gossler & Hicks, as above set forth, they procured to be formed a corporation under the name of the Consolidated Lumber Company,—the above-named defendant. (6) That, in accordance with said agreement to arbitrate, Jas. C. MacRae and N. A. Sinclair were duly named as arbitrators, and C. W. Broadfoot as umpire. (7) That said M. McD. Williams, on or about the 6th day of January, 1892, failed in business, and made an assignment of his property to G. W. Buhman, above-named plaintiff, for the benefit of his creditors, and his estate is insolvent. (8) That afterwards, said arbitrators and umpire, after hearing and due consideration of the matters of difference submitted to them, adjudged that the indebtedness to the plaintiffs A. L. Webb & Sons was eight hundred and ninety and  $\frac{46}{100}$  dollars, which award was duly made on July 1st, 1892. Wherefore the plaintiffs demand judgment (1) against the defendants John Y. Gossler and R. W. Hicks for eight hundred and ninety-five and  $\frac{36}{100}$  dollars, with interest on same from April 19, 1892, and against the defendant the Consolidated Lumber Company for eight hundred and ninety and  $\frac{46}{100}$  dollars, and interest on same from July 1st, 1892; (2) against all the defendants for the costs and disbursements expended in this action, and for all other and further relief to which plaintiffs may be justly entitled."

The agreement of 1891, referred to in paragraph 2 of the complaint, was, in effect, an agreement between the creditors of W. J. McDiarmid & Bro. that M. McD. Williams, as assignee, should continue the business of McDiarmid & Bro. for one year

from January, 1891, at the end of which time he should "render an account of the said business to the said creditors, when it may be determined by a majority in value of the creditors then unsatisfied whether, and for how long, it shall be further continued, or whether the said business shall then be wound up by a sale of the said property." It was further provided that the assignee should receive, as his entire compensation, 5 per cent. on all receipts from sales, in lieu of the 5 per cent. on receipts and disbursements provided for in the assignment. The agreement referred to in paragraph 3 of the complaint was not signed by plaintiffs, nor were they in any way made parties thereto; and the award mentioned in paragraph 8 found that the "estate held by M. McD. Williams, assignee," was indebted to plaintiffs in the sum of \$890.46, but did not adjudge this to be an indebtedness of defendants.

The court held "(1) that A. L. Webb & Son were not parties to the agreement to arbitrate, and the award thereon, and not bound by it, and cannot maintain an action upon it; (2) that the agreement of January, 1891, does not render the defendants Gossler & Hicks liable to A. L. Webb & Son for the debt sued on; (3) that the defendant the Consolidated Lumber Company is not liable to plaintiffs." And judgment was rendered accordingly.

N. A. Sinclair and Shepherd & Busbee, for appellants. MacRae & Day and H. McD. Robinson, for appellees.

FURCHES, J. The first thing called to our attention in considering this case is the allegations of plaintiffs' complaint, and it was admitted by the learned counsel who argued the case in this court not to be a very clear statement of plaintiffs' cause of action. But they contended that it was a defective statement of a cause of action, and not a statement of a defective cause of action; that a cause of action is stated with sufficient clearness and certainty not to mislead defendants, but to give them notice of plaintiffs' claim, when and how it was created, and how they became liable; that, this being so, the court ought to sustain the complaint; and cite *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566; *Fulps v. Mock*, 108 N. C. 601, 13 S. E. 92. These cases went to the very verge, but we think they were allowable under the liberal spirit of the Code, and we do not propose to disturb them. But we do not think they sustain the complaint in this case. They properly named all the parties, and they stated fully the facts constituting a cause of action. Though they declared on a special contract, they stated facts that entitled them to recover on the general or implied contract, for services performed. The form of actions having been abolished by the Code, the court did not stop to consider whether, under the old practice, they should

have been actions of debt or actions of assumpsit, but took up the facts, and found that a cause of action was stated entitling the plaintiff to recover, and sustained the ruling of the court below in so holding. These were cases where a cause of action was stated, and is called a defective statement of a cause of action, in which the courts will lend their aid in putting a proper construction on the facts stated. But, in our opinion, the complaint in this case fails to state a cause of action, and in this lies the distinction between this case and the cases of *Stokes v. Taylor* and *Fulps v. Mock*, *supra*. This case does not state facts constituting a cause of action.

Chief Justice Shepherd, in the case of *Lassiter v. Roper*, 114 N. C. 17, 18 S. E. 946, in a well-considered opinion, says, quoting from the opinion of Chief Justice Kent in *Bayard v. Malcolm*, 1 Johns. 453: "I entertain a decided opinion that the established principles of pleading, which compose what is called its science, are rational, concise, luminous, and admirably adapted to the investigation of truth, and ought consequently to be very carefully touched by the hand of innovation." It was but in keeping with the spirit of these views that our present system of civil procedure was framed and enacted, and we find this court, very shortly after its adoption, repudiating the idea that loose and uncertain pleadings would be tolerated. In *Crump v. Mims*, 64 N. C. 767, the court said: "We take occasion here to suggest to pleaders that the rules of common law as to the pleading, which are only the rules of logic, have not been abolished by the Code,"—quoting, to sustain this position, *Parsley v. Nicholson*, 65 N. C. 210; *Oats v. Gray*, 66 N. C. 442; *Vass v. Association*, 91 N. C. 55. "It was a false notion, entertained by some of the legal profession, that the Code of Civil Procedure is without order or certainty, and that any pleading, however loose and irregular, may be upheld. On the contrary, while it is not perfect, it has both logical order, precision, and certainty, when it is properly observed. Bad practice, too often tolerated and encouraged by the courts, brings about confusion and unjust complaints against it." \* \* \* It is still essential to state the facts. \* \* \* Code, §§ 233-243, which provide that there must be a 'plain, concise statement of the facts, constituting a cause of action.' *Rountree v. Brinson*, 98 N. C. 107, 3 S. E. 747. A complaint which merely states a conclusion of law—that is, that the defendant is indebted to the plaintiff, and that the debt has not been paid—is demurrable both at common law and under the Code." We have quoted thus extensively from the case of *Lassiter v. Roper*, 114 N. C. 17, 18 S. E. 946, for the reason that it is the latest exposition we have from this court on the question of defective pleadings, and because it appears to have been fully considered by the court, and ably and exhaustively treated in the opinion, and

because we think it controls, and, indeed, disposes of, the case under consideration. It is not for us to say what rights the plaintiffs might have under a proper conception of their case and under proper pleadings, treating the creditors of *McDermied Bros.*, who signed Exhibit A, as a partnership. It is only for us to say that there is no error in the judgment of the court below. No error.

(116 N. C. 1069)

#### STATE v. GUNTER.

(Supreme Court of North Carolina. April 30, 1895.)

#### ASSAULT FROM AMBUSH.

In a trial for assault from ambush, complainant testified that, after he had been ordered from the premises in dispute, he saw defendant come out, and point to a place near by, from which he inferred that it was defendant's intention to go there and shoot him. Complainant ran home, returned with a gun, and searched for defendant, but, before he discovered his hiding place, was himself shot, recognizing defendant as his assailant by the flash of the gun. *Hdd* not an assault made in a "secret manner." *Clark, J., dissenting.*

Appeal from superior court, Graham county; Shuford, Judge.

J. S. Gunter was convicted of assault, and appeals. Reversed.

J. F. Ray, for appellant. The Attorney General, for the State.

AVERY, J. An "assault cannot be said to have been made in a secret manner except where the person assaulted is unconscious of the presence as well as of the purpose of his adversary." *State v. Patton*, 115 N. C. 755, 20 S. E. 538. According to the testimony of the prosecuting witness himself, he saw the defendant come out of the house after ordering himself and his party to leave his premises, and he (prosecutor) inferred from defendant's pointing to a place near where he stood that it was the defendant's purpose to go to that place and shoot him. Acting upon this inference, the prosecutor ran to his own house, a distance of a few hundred yards, and returned armed with a gun and a pistol, and began to search for the defendant about the place where the latter had indicated to his wife, by pointing, that it was his intention to go. The defendant, "from ambush," as the prosecutor testifies, shot at him, before his hiding place was discovered. At the flash of the gun, however, the assailant was seen and recognized by the prosecutor. It seems, therefore, that, though not previously discovered, the defendant was not concealed, but was within the range of the prosecutor's vision, if properly directed, all the while.

It was never intended by the legislature that one who had run several hundred yards to arm himself with gun and pistol, and had returned for a battle royal with an adversary, whom he knew to be armed and ready and anxious for the conflict, should be allowed,

because the adversary had meantime taken the prudent precaution to step behind a bush in order to get the first fire, to invoke the aid of the criminal law to have him convicted of a felony for exhibiting such superior strategy. The statute was enacted to protect the innocent and unwary, not armed belligerents who, in the search for an enemy, draw his fire from behind a masked battery. From the prosecutor's own testimony, he was fully aware of the defendant's design, and, instead of keeping out of his way, sought him where he expected to find him. The state cannot now, because the latter changed his position in the face of apparent danger, and shot before he had been thrown on the defensive, insist that the assault was a secret one, or that the injured party was surprised. He had been taken at no disadvantage, because he knew of the intent to shoot on the part of defendant, and was thoroughly prepared to meet it. *State v. Jennings*, 104 N. C. 776, 10 S. E. 249. He knew the neighborhood of his proposed rendezvous, and was beating the bushes for him, as his own game, when he was anticipated in his design.

It was never intended by the legislature that one who is armed and on the alert, seeking an opportunity to shoot another, should be held the victim of a secret assault, because his adversary steps out of the open way, in order (if we may use a provincialism) "to get the drop on him," instead of boldly confronting him, till pressed to the wall by a deadly assault. The law was not intended to drive a defendant to the dilemma of either waiting till he can make out a case of self-defense, with all of the attendant risk, or subjecting himself to liability for a secret assault by taking the initiative as against one who is searching for him with deadly purpose, and prepared to carry it out, and who is fully aware that he is in the vicinity, and is likewise armed. With such knowledge of the presence and purpose of the defendant, if the prosecutor was taken at any disadvantage, it was because he willfully exposed himself with notice of the extent of his own danger. It further appears that the person who, for the purposes of the prosecution, poses as an innocent sufferer from a secret and unexpected assault, was himself trying to overcome forcible resistance to a forcible entry upon land in possession of the person who offered the resistance. The assault was not, in any aspect of the testimony relied upon by the state, made in a secret manner. In refusing to instruct the jury as requested, there was error, which entitles the defendant to a new trial.

CLARK, J. (dissenting). There is no exception raising any suggestion that the defendant acted in self-defense. The sole exception is that he did not commit the assault "in a secret manner." The legislature taking note of the fact that, while an attempt to commit either of the other three capital of-

fense was a felony, the attempt to murder was only a misdemeanor, punishable with fine and imprisonment, enacted chapter 32, Acts 1887, which provides that a malicious assault and battery with deadly weapon, "by waylaying or otherwise, in a secret manner, with intent to kill," should be a felony. This assault was made with a gun, and with intent to kill, the prosecutor being shot in the leg. The witness is uncontradicted who testified that the defendant "fired his gun at him from ambush." It would seem that this was "by waylaying or otherwise in a secret manner." Indeed, it is the very mischief intended to be met by the act which proposed to lessen the number and danger of assaults with intent to kill by requiring the party, under fear of heavier penalty, to fight without concealment, openly and fairly. Furthermore, the judge charged the jury that the defendant was guilty of a secret assault if "he was at the time concealed from the witness' view (the witness being the man who was shot), so that the witness could not see him, nor see that the assault was about to be made, although the witness might have had reason to believe that the defendant was near, and meant to assault him." This would seem correct. If a man intending to travel a certain road is told that an enemy is lying in ambush for him, and such enemy does fire on him from ambush and wound him, it is none the less an assault in a secret manner because the victim was put on his guard, and was looking out, gun in hand, to protect himself. The only difference in this case is that the witness was warned, not by a friend, but by seeing the defendant enter the thicket along the intended path of the witness, with a gun in his hand. The witness got his gun, and, while going along the path, "was shot from ambush" by defendant, who was "concealed from view," so that witness could neither "see him, nor that he was about to shoot." The secret manner deprecated by the statute is just this mode of proceeding, and its secrecy is not taken away by the fact that, by warning of friends or the previous evidence of his eyes, the witness had reason to believe that a man is lying in ambush with intent to kill him. In *State v. Jennings*, 104 N. C. 774, 10 S. E. 249, it was held to be a secret assault when the prosecutor, standing in the public square of a town, was cut with a knife from behind by the defendant, whom the prosecutor immediately grabbed. The court held that it was not necessary that defendant should have endeavored to conceal his identity, but that the statute was based "on the idea of fair play," and to make it "doubly dangerous to assail a person on unequal terms," which in that case consisted in striking the witness with a knife before he was seen. This is approved in *State v. Shade*, 115 N. C. 757, 20 S. E. 537, and *State v. Patton*, 115 N. C. 753, 20 S. E. 538. In all three cases it is expressly stated that "shooting by one lying in ambush" would be plenary proof of an assault in a secret man-

ner, and that less would be sufficient. In the present case the testimony of the witness is uncontradicted that he was shot from ambush by a concealed person, whom he could neither see, nor see that he was about to shoot. The jury found from the evidence that the defendant was the man who, while thus concealed in ambush, shot the prosecutor.

(116 N. C. 771)

**COWEN v. WITHROW et al.**

(Supreme Court of North Carolina. April 30, 1895.)

**PURCHASE AT EXECUTION SALE—NOTICE—PREVIOUS UNREGISTERED DEED—ACT OF 1885—PROVISION FOR REGISTRATION.**

1. Act 1885, c. 147, providing that no purchase from a bargainor or lessor shall pass title as against an unregistered deed executed prior to December 1, 1885, of which the purchaser has notice, applies to a purchase at an execution sale.

2. Act 1885, c. 147, providing that an unregistered deed should not be good against an after purchaser, whose deed is first registered, also provides that the act should not apply to deeds previously executed until January 1, 1886, and that an unregistered deed should be good as against an after purchaser taking with notice thereof, and in express terms repeals Code, § 1245, which requires the registration of deeds. Held, that the act, by implication, continued in force section 1245 until 1886, so as to authorize the registration until then of previously executed deeds.

Clark and Montgomery, JJ., dissenting.

Appeal from superior court, Rutherford county; Winston, Judge.

Action of ejectment by J. C. Cowen against T. J. Withrow and others. From a judgment for plaintiff, defendants appeal. Reversed.

For reports on former appeals, see 13 S. E. 1022, 16 S. E. 397, 17 S. E. 575, and 19 S. E. 645.

S. Gallert, for appellants. Justice & Justice, for appellee.

FURCHES, J. We are now considering this case for the fifth time, and propose to treat it on a different line from that heretofore pursued, with the hope it may not return to trouble us again. This is an action of ejectment, in which plaintiff alleges title in himself, and this is denied by defendants. This allegation of plaintiff and denial of defendants make an issue of title, and plaintiff must recover, if he recovers at all, upon the strength of his title, and not on the weakness of defendants' title. It is not necessary that defendants should do anything until plaintiff has shown that he is the owner of the land. If he fails to do this, he must fail to recover. But this is not the case with defendants. They need not show any title in them to defeat plaintiff's recovery. It is sufficient for them to show that plaintiff has no title to the land in controversy. Plaintiff, recognizing the

fact that the burden was on him, undertook to show that he was the owner; and, to do this, introduced in evidence a deed from the sheriff of Rutherford county, dated the 3d day of December, 1883, for the lands in dispute, showing that they were sold as the lands of T. J. Withrow. He then placed in evidence three executions against T. J. Withrow, based upon docketed judgments in Rutherford county. One of these judgments was docketed on the 10th of September, 1885, and the other two after that time. Possession of defendants being admitted, plaintiff closed his case, and defendants undertook their defense.

The defendant P. J. Withrow offered in evidence a deed from T. J. Withrow to her for the lands in controversy, dated the 5th day of August, 1882, and registered on the 26th day of November, 1889. This deed was objected to by plaintiff, objection sustained by the court, deed ruled out, and defendants excepted. The defendant P. J. Withrow then introduced as a witness her husband, T. J. Withrow, and offered to prove by him that, before the plaintiff bought the land in controversy, he (witness) told the plaintiff that the land was not his; that he had sold it to P. J. Withrow; that she had paid him for it, and he had made her a deed to the same. She also proposed to prove by this witness that on the day of sale he gave public notice of the fact that he had sold the land to P. J. Withrow; that she had paid him for the same; and that he had made her a deed therefor; and that he informed J. C. Erwin, the agent of the plaintiff, who bid off the land for the plaintiff, before he bid off said land, of the facts above stated. But all this evidence was objected to by plaintiff, and excluded by the court, and the defendants excepted. Was there error in the court's excluding this evidence? If there was, the defendants are entitled to a new trial. If there was not, the judgment should be affirmed.

The case on appeal does not state the grounds upon which the court held that the deed of T. J. Withrow to the defendant P. J. Withrow was incompetent. It was registered, and there is no objection made to the sufficiency of the probate or to the form of the certificate. It was for the very land then in controversy, and why it was not competent evidence we are unable to see. As to what effect it should have upon the issues then before the court, and being tried, was a different thing, and one proper for the instructions or rulings of the court, according to its understanding of the law. We can conceive of no reason for excluding this deed, unless we hold that a deed executed in 1882 could not be probated and registered in 1889. Indeed, this was the ground upon which plaintiff's counsel undertook to sustain the ruling of the court, in rejecting this evidence, in his argument before us. That



it was executed before December, 1885, and was not registered before December, 1885, and could not be registered after that time. This court is not prepared to give its sanction to this proposition. We can see no law to sustain such proposition, and we are glad we do not, as such a ruling at this time would unsettle the title to thousands of tracts of land in North Carolina that are now considered settled. Then, was there error in ruling out the testimony of T. J. Withrow? We have stated that plaintiff must recover, if he recover at all, upon the strength of his own title, and not for the want of a title in defendants. And this evidence, as we understand, was offered by defendants for the purpose of showing that plaintiff's deed was invalid; and if it would do this, or tend to do so, then it was competent, and should have been received, and it was error to exclude it. We might stop here.

But the law as contained in chapter 147, p. 233, Acts 1885, is that after December 1, 1885, where a party purchases land, with the knowledge that another has purchased the same land, and has a deed therefor dated prior to December 1, 1885, which has not been registered, the second purchaser shall acquire no title as against the prior unregistered deed. Then, if this be the law, and the evidence of T. J. Withrow would have proved, or tended to prove, that plaintiff had knowledge of the prior unregistered deed of the defendant, the evidence was competent, and should have been admitted. Indeed, it was not only competent, but bore directly upon the main issue in the case. The defendant's deed being put in evidence, it seems to us there was but one issue left for the jury, and that was whether the plaintiff bought with knowledge of the defendant's deed, made in 1882. This court decided, when this case was here before, that notice to the agent, Erwin, was notice to the plaintiff (111 N. C. 306, 16 S. E. 397); but defendants here propose to prove actual personal notice. It was also contended by plaintiff that the act of 1885 did not apply to plaintiff; that, as he purchased at a sheriff's sale, he was not such after purchaser as was prevented from purchasing with knowledge of a former deed. But this court has held otherwise, and we have no disposition to overrule that opinion. 114 N. C. 558, 19 S. E. 645.

But it is contended by plaintiff that the judgment creditors of T. J. Withrow acquired liens on this land, attaching at the date of docketing their judgments, and that plaintiff, by becoming the purchaser at execution sale, stands in the shoes of and has the benefit of said liens. We admit this proposition of law. But plaintiff got no more than T. J. Withrow had (granting that his deed is valid to pass title, and this is only admitted for this argument); and this was but the naked legal title, the equitable estate being in P. J. Withrow. And when her deed was registered, in

1889, it became a perfect legal and equitable title, and related back to the date of her deed (Phifer v. Barnhart, 88 N. C. 333), and wiped out all estate that T. J. Withrow had in said land, and also the interest plaintiff had acquired under his deed. And, while we understand it to be admitted that this would ordinarily be the case, yet it is claimed that this case is an exception to this general rule. It is contended that when the judgment of the State v. T. J. Withrow was docketed, in 1885, the defendant P. J. Withrow could not have registered her deed. And, this being so, the judgment liens attached, and thereby took a priority. And this brings us to a consideration of the act of 1885 (chapter 147). This act was ratified on the 27th of February, 1885, and provides, in the fifth paragraph, that it shall be in force from and after the 1st day of December, 1885. And it is further contended that section 1245 of the Code expired by limitation, upon the adjournment of the legislature in 1885, and that there was no law authorizing the registration of any deed or other paper required to be registered, from the adjournment of the legislature of 1885 until January, 1886, and that deeds dated prior to December, 1885, cannot now be registered. This is an important question, not to say a startling one to us, and, if true, will probably unsettle the title to 10,000 tracts of land in North Carolina. It would be most remarkable, if this is true, that we have lived for 10 years without discovering so important a matter as this. We are not prepared to yield our assent to this proposition. The act of 1885 certainly contemplated that the registration of deeds should go on. In the first section it provides that the provisions of this act shall not apply to deeds, etc., already executed, until the 1st of January, 1886. Why and what reason was there for postponing the application of this act, which was to place deeds on the same footing as mortgages, and to make them invalid against an after purchaser, who gets his deed registered first, if the owner of the deed had no right to have his "prior deed" registered? Would it not be adding insult to the injury to notify the citizen that we will not apply the mortgage law to you until the 1st of January, 1886, but in the meantime we will not let you register your deeds and perfect your titles?

But, again, the second proviso of the same section (Act 1885) provides that, if any person shall purchase any land from any prior donor or lessor, it "shall avail or pass no title as against any unregistered deed executed prior to the 1st day of December, 1885, when the person or persons claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person or by his or their tenants, at the time of the execution of such prior deed, or when the person or persons, claiming under or taking such second deed, had, at the time of taking or purchasing under such deed, actual

or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder." Can it be possible that the legislature would have made such a provision as this without intending to provide a means by which such prior deeds might be registered? Or did the legislature intend to say to the holder of such deed that "you cannot register it, but you had better be on the lookout, or some fellow will get your land"?

But, again, the second section of this act provides that persons holding unregistered deeds executed prior to the 1st of January, 1886, may have them recorded without proving their execution, but "upon the affidavit of the holder, and that such deeds and affidavits shall be entitled to registration in the same manner and with the same effect as if proved in the manner prescribed by law for other deeds." Why should the legislature say this if there was no means by which they could be registered? And the legislature is so anxious that everybody should have their deeds registered before the mortgage law applied that the fourth section reduces the fees of the clerks and registers on such deeds. And the fifth section provides that the secretary of state shall cause this act to be published in at least three newspapers in each judicial district, and shall send copies thereof to the clerks and registers, to be posted in their offices. And the register of each county shall cause the same to be posted in as many as four public places in each township in his county, for at least 60 days before this act of 1885 goes into effect. Then, why do all this, if no one could have any deed or contract registered?

We know, as a matter of fact, there never was such a harvest for clerks and registers. Almost everybody was rushing forward to get their deeds registered before the new act took effect. And we have no doubt that more deeds were registered in the year 1885 than had been registered in any other 10 years in the history of the state. It must be manifest that the act of February, 1885, regarded section 1245 of the Code as continuing in force and effect until repealed by that act. The first sentence in the act of February, 1885, is to repeal section 1245 of the Code. This act is to go into effect on the 1st day of January, 1886. Why, then, should the act of February, 1885, which does not go into effect until January, 1886, by express terms, repeal section 1245, if this section had expired at the adjournment of the legislature in March, 1885, as contended by the plaintiff? We are not willing to cast that imputation upon the legislature and the learned gentleman said to be the author of the act of 1885, as it would do to say that this act was passed, in express terms, for the purpose of repealing an act that would expire and be lifeless with the adjournment of the legislature, and make the act repealing it take effect eight or nine

months after the act they were repealing was dead. Our opinion is that, by clear implication, the act of February, 1885, continued in force section 1245 of the Code until it went into effect on the 1st day of January, 1886; and that there has been no time since August 5, 1882, when defendant might not have registered her deed. There is error, and the defendants are entitled to a new trial.

CLARK, J. (dissenting). The plaintiff claims under a deed from the sheriff upon execution sale against T. J. Withrow, dated December 3, 1888, and registered December 11, 1888. The execution issued on two docketed judgments against him, one of them taken at spring term, 1885, and docketed. His homestead was laid off in other property, and this tract was returned as his property in excess September, 1888. The feme defendant claims under an alleged deed from her husband dated August, 1882, but not registered till November 26, 1889, nearly a year after the registration of the plaintiff's deed. By section 1245 of the Code, which is a copy of the law in force at the date of the deed to the feme defendant, such deed was not "good and available unless registered within two years after the date of said deed." It was not so registered, and was therefore, like an unregistered mortgage, a nullity as to executions or liens against the grantor, unless the two-years limitation was extended. No statute of extension has since been passed, unless the second proviso of section 1, c. 147, Act 1885, be so construed. But it is unnecessary to construe it, for, granting it bears that construction, by its terms it only took effect December 1, 1885, and in the meantime, in the spring of 1885, the lien of the judgment docketed against T. J. Withrow at a time when the alleged unregistered deed to his wife was a nullity (it being then more than two years "after date of said deed," in August, 1882) became a vested right, which could not be divested by an act taking effect thereafter on December 1, 1885. The sale under execution issuing on said judgment, and deed thereunder to plaintiff, dated back to the spring of 1885, and the plaintiff acquired a good title. This is stated in the dissenting opinion of the two dissenting judges in this case (112 N. C., on page 743, 17 S. E. 575), and the opinion of the other three judges, delivered by the then chief justice, in its concluding paragraph, on page 739, 112 N. C., and page 575, 17 S. E., impliedly concedes the proposition, but avoids it on the ground that the point was not made, and no exception taken, on the trial. This time the point was made and ruled in accordance with the intimation of the court, and the defendant excepted and appealed. Fraud was alleged, but his honor excluded the proof offered to sustain the charge, as unnecessary, on the ground

that the above principles entitled the plaintiff to recover, without going into the evidence of fraud.

The act of 1885 (chapter 147), by its terms, did not take effect till December 1, 1885. One of its provisions is the repeal of section 1245 of the Code. The plaintiff does not contend that the repeal of this section took place prior to December 1, 1885, when the rest of the act took effect. On the contrary, he insists that section 1245 remained in full force till that date. By its terms, the deed of T. J. Withrow was void and of no effect, because not registered "within two years after date of the deed," which was August 2, 1882. The deed being null and void as to the creditors of the grantor after August 2, 1884, just as an unregistered mortgage would have been, the judgment docketed against T. J. Withrow, spring term, 1885, conferred a vested right in the land, which could not be disturbed by an act taking effect December 1, 1885. Such act might revive the rights of the holder of an unregistered deed, but it could not destroy liens acquired under the docketed judgment while the unregistered deed was null and void by the terms of the law then in force. It must be noted that the Code (section 1245) did not extend the time for the registration of deeds for two years from its ratification, which previous legislatures had been in the custom of doing, as seems to be supposed, but simply kept in force the former act that deeds should not be "good and available," unless registered in two years "after date of the deed." The date of the deed being August 2, 1882, it ceased to be "good and available" August 2, 1884. If revived, it could only be by virtue of the act taking effect December 1, 1885, for section 1245 was the law up to that date. Now, in the interval, while the deed was a nullity as to the creditors of the grantor, just as an unregistered mortgage would have been, the lien of the docketed judgment was acquired at the spring term, 1885. The plaintiff, as purchaser under execution issued on that docketed judgment, gets a vested interest, thereby acquired, free from any subsequent rights or liens of the unregistered deed of the grantee, however conferred, by statute or otherwise. This is the office and purpose of docketing judgments. Otherwise they would be of small use. The plaintiff having acquired by purchase, under execution issued thereon, the vested right and lien on the property conferred by such docketed judgment, antedates any rights which could be conferred on the holder of the unregistered deed by the act, which did not take effect till December 1, 1885. Whatever the intent of the legislature may be supposed to have been, it had not the power, nor can it be supposed to have intended, to destroy vested interests in the land acquired by the lien of the docketed judgment before the act became operative. So, in *McKethan v. Terry*,

64 N. C. 25, it was held that the lien acquired by a levy in 1867 could not be divested by the homestead provision of the constitution adopted in 1868. Such transactions as the one here attempted to be set up are the strongest example and vindication of the wisdom and necessity of the act of 1885, *supra*. The husband in possession of land under a registered deed continues to receive the rents and profits, and to list and pay taxes on it in his own name. When his homestead is set apart, this is laid off as his excess, without exception. When the excess is offered for sale, then, for the first time, it is contended that the wife claimed that a deed had been made to her seven years before. When the plaintiff offered to show fraud, and to rebut the evidence that the notice was even then given, the deed in fact not being recorded till a year later, his honor excluded it (and properly) as unnecessary, on the ground above stated,—that the lien of the docketed judgment was not divested by the subsequent act of the legislature.

MONTGOMERY, J., concurs in this dissent.

(116 N. C. 847)

PATTON v. GARRETT.

(Supreme Court of North Carolina. April 30, 1895.)

AWARD BY ARBITRATORS — RIGHT TO SET ASIDE FOR MISTAKE—PARTIAL EXECUTION OF AWARD —EFFECT AS ESTOPPEL.

1. The use of the words "adjudge," "determine," and "award," by arbitrators, in their award, does not necessarily carry with them the idea of a judgment according to law, so as to enable one of the parties to have the award set aside, for errors of law, where the point decided was doubtful.

2. A naked promise by a party to an award to allow to the other party an additional credit for an item, if it was inadvertently omitted by the arbitrators from the award, is without consideration, and hence not binding.

3. A mistake in an award, arising from inadvertence and undue haste on the part of the arbitrators, if not caused by the fraud of either party, is not ground for setting aside the award, in whole or in part.

4. Where one of the parties executes his bond for the amount of an award, in fulfillment of the agreement for arbitration, he is estopped to defend an action thereon on the ground that he executed it in ignorance of a mistake in the award, and of the fact that the award was reviewable by a court.

Appeal from superior court, Buncombe county; McIver, Judge.

Action by T. W. Patton against Paul Garrett on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 13th of January, 1890, C. W. Garrett & Co. and Paul Garrett, the defendant, entered into a contract by which the defendant was to sell for C. W. Garrett & Co., for a commission, their wines and brandies made at their Medoc Vineyards, in Halifax county. Afterwards, a disagreement having arisen between the parties concerning their

rights and interests under the contract, they agreed to submit the matters in dispute to arbitration, the agreement being in the following words: "State of North Carolina, Halifax County. This indenture, made this the — day of —, 1891, between Lucy W. Garrett and H. S. Harrison and his wife, Mary S. Harrison, composing the firm of C. W. Garrett & Co., party of the first part, and Paul Garrett, party of the second part, witnesseth: That whereas, certain matters of controversy have arisen between said parties, which are now in litigation in the superior court of Halifax county; and whereas, all the parties above named desire to avoid the delay, expense, and unfriendly relations which necessarily attend litigation, and that all such matters as are now in controversy shall be settled by arbitration; and whereas, the following are the questions in dispute and to be arbitrated, to wit: First. What amount does Paul Garrett, trading as Garrett & Co., owe to C. W. Garrett & Co., for wines, brandies, and other merchandise sold and delivered? Second. What amount, if any, is Paul Garrett entitled to recover of C. W. Garrett & Co. for the alleged breach or breaches of contract which existed between said parties, a copy of which contract is hereto attached, and made a part of this instrument? Third. It is agreed that all matters pertaining to the business of Garrett & Co., as may be supposed by either party to influence his interest, may be considered in this arbitration, and that, in the event the arbitrators shall conclude that either party has been damaged by the course of the other, they shall decide the amount of such damages: Now, therefore, for the avoidance of litigation and for other purposes above indicated, the parties of this indenture hereby agree to submit all matters of controversy to Mr. John A. Collins, of Enfield, N. C., and Mr. William P. Simpson, of Wilson, N. C., and to a third party to be selected by the said Collins and Simpson, as arbitrators. The award of any two of the arbitrators shall be final. In the event of an award of damages to either party, the amount may be arranged by note at six months for said amount, bearing interest at eight per cent., and with such security as the arbitrators may deem sufficient. It is further agreed that no evidence shall be considered by said arbitrators, except such as would be admissible in a court of law; and, in the event that either party shall wish to submit evidence which is objected to by the other party, the arbitrators shall pass on the question of admissibility. The place of meeting of the arbitrators shall be at the Medoc Vineyards, and the time for said arbitration shall be fixed by the arbitrators. That, at the meeting or meetings of the arbitrators, it is agreed that neither party shall be represented by legal counsel, but C. W. Garrett & Co. may be represented by T. W. Patton, and Paul Garrett may represent his own interests. The parties hereto do hereby bind

themselves, their heirs, executors, and assigns, in the sum of five thousand dollars that they will abide by the award of the arbitrators. In testimony whereof, the parties above named have hereunto set their hands and seals, the day and year above mentioned." The arbitrators met at Medoc Vineyards on the 12th of November, 1891, the plaintiff representing C. W. Garrett & Co., and the defendant being present in person. The arbitrators, after hearing all the testimony offered on both sides, made the following award: "November 12, 1891. Whereas, certain matters of controversy between C. W. Garrett & Co. and Garrett & Co. have been referred to the undersigned, T. J. Hadley, J. A. Collins, and W. P. Simpson, and whereas we have this day met at Medoc, and carefully examined and weighed such evidence as was presented by parties to said controversy, do make the following award: First. We award that said Garrett & Co. pay to C. W. Garrett & Co. twenty-two hundred and sixty-nine dollars and fifty-five one hundredth dollars, as per account of C. W. Garrett & Co., admitted to be correct. Second. We award that C. W. Garrett & Co. pay to Garrett & Co. one hundred dollars and seventeen one hundredth dollars, being balance due Paul Garrett on book of C. W. Garrett & Co., per account rendered; and also that C. W. Garrett & Co. pay Garrett & Co. sixty-seven and sixty-one one hundredth dollars for sour wine and discount, the discount being half the amount charged against Paul Garrett, in account rendered against him by C. W. Garrett & Co. Third. We award that, whereas the contract between the parties was indefinite as to its duration, we adjudge it should mean to continue for twelve months; and whereas, by reason of a supposed sale of the Medoc property, for the failure of which sale Paul Garrett was in no way responsible, the contract was annulled before the expiration of twelve months, and the said Paul Garrett was deprived of the reasonable profits under said contract: Now, therefore, we adjudge that C. W. Garrett & Co. pay to said Paul Garrett eight hundred dollars as damages. Fourth. We award that Garrett & Co. execute to C. W. Garrett & Co. a note of even date herewith, bearing interest from date at 8% per annum, for \$1,301.87, due six months from date, in full settlement of all claims between the parties to date. Fifth. We award that the matter of security to said note be left to be agreed upon between Paul Garrett and T. W. Patton, as agreed upon by these gentlemen now present. [Signed by the arbitrators.]"

The defendant, immediately upon the making of the award, and in pursuance of it, executed the bond upon which this action is based, which is as follows: "Six months after date, I promise to pay to the order of C. W. Garrett & Co. thirteen hundred and one and 87/100 dollars, this being the amount awarded in an arbitration held this day, with interest from date at 8% per annum. Witness my hand and

seal, this the 12th day of November, 1891. [Signed and sealed by Paul Garrett.]” The bond was assigned and indorsed to Lucy W. Garrett, for value, by C. W. Garrett & Co., and by her indorsed for value to the plaintiff. This action was brought to recover of the defendant the amount of the bond. The defendant set up as a defense all of the matters about which he had complained under his contract with C. W. Garrett & Co., and which were submitted to arbitration, and averred, further, that he had executed the bond immediately upon the rendition of the award, and in ignorance of any omission therein, and in further ignorance of the power of the court to review said award, and in ignorance of the erroneous construction of the law in regard to the contract, as set out in section 15 of this answer, and of his right in the premises.” He then, in his answer, after denying that the plaintiff was the owner of the bond, averred other matters of defense, as follows: “(13) That, after delivering the note to the plaintiff, Patton, as agent of the said C. W. Garrett & Co., the defendant discovered that there was omitted from said award an account of this defendant (called Garrett & Co.) against said C. W. Garrett & Co., mainly for sour wines which had been taken back from customers on account of their defective quality, which on the hearing was admitted to be correct by the plaintiff, Patton, and which the said arbitrators were directed by him to allow. The said arbitrators inadvertently overlooked the same in making their calculations, and allowed defendant no credit therefor. Said account amounted to \$241.60. As soon as defendant detected the omission, he called the attention of the said Patton to the same, and he then and there agreed that, if the arbitrators intended to allow the account, he would credit the same on said note; and he directed the defendant to see Messrs. Hadley & Simpson, who spent the night in Ringwood, and ascertain from them whether they intended to allow the same. Said Patton took the copy of the account filed with the arbitrators, and said he would show it to the other arbitrator Dr. John A. Collins. On the next morning this defendant saw said Hadley and Simpson, and they declared that it was their intention to allow the account, and they wrote out a supplemental award allowing the same, and delivered it to this defendant. Defendant sent said paper to the plaintiff, Patton, and has not seen it since. (14) That said account was omitted by the arbitrators from undue haste and by a mere clerical mistake, contrary to their real intentions, and the same ought to be credited on the note sued upon, which has never been done. (15) That the said arbitrators endeavored in the third article of their award to follow the law in the construction of the contract thereinbefore referred to, and the defendant insists put an erroneous construction thereon; wherefore said award should be set aside and annulled. (16) That defendant requested the arbitrators

to examine the account of the defendant with said C. W. Garrett & Co., pointing out various items which he alleged to be erroneous, and which amounted to at least two hundred dollars, but they neglected and failed to do so. (17) That, if said plaintiff owns said note, he took the same with notice of the aforesaid matters and things, and after its maturity. (18) That the action brought by C. W. Garrett & Co. on their claim for \$2,300 is still pending in Halifax superior court. (19) That on the 23d day of March, 1891, said C. W. Garrett & Co. brought an action against this defendant, trading as Garrett & Co., to recover damages, which they claimed to have suffered by reason of the defendant trading under the name of Garrett & Co. This defendant insists that this controversy was submitted to the aforesaid arbitrators under the agreement set out in section 10, but said arbitrators failed to decide the same or make any award in regard thereto. (20) That said action is still pending in the superior court of Halifax county, although no complaint has been filed therein. (21) That the defendant has instituted an action in the superior court of Halifax county, returnable to March term, 1893, thereof, against said C. W. Garrett & Co., to vacate said award and recover his damages. Wherefore the defendant prays judgment that said award be set aside; that he have credit for said account of \$241.60 and interest; that said note be declared paid in full; for such other and further relief as may be proper; and for costs.” The plaintiff made replication, denying the averments of the answer except the sixteenth, which he replies to in these words: “The plaintiff denies the allegations in the sixteenth paragraph of said answer, excepting so much of the said allegations which state that the defendant requested the arbitrators to examine the account of the defendant with said C. W. Garrett & Co., pointing out various items at the time. That, during the investigation of the arbitrators, the defendant introduced evidence, and the plaintiff is informed and believes that the same was properly heard and considered by the arbitrators in making up their award.”

Jas. H. Merrimon, for appellant. W. W. Jones and F. A. Sondley, for appellee.

MONTGOMERY, J. At the opening of the trial, the defendant prepared and asked the court to submit the following issues: “Did the arbitrators undertake to decide the law in construing the contract between C. W. Garrett & Co. and Paul Garrett, and decide said questions of law erroneously? Did the arbitrators pass upon and settle all material matters submitted to them for their arbitration and award? Did the plaintiff, as agent of C. W. Garrett & Co., agree with the defendant that, if the arbitrators intended to allow the account of \$241.60, it should be credited on the note sued on?” The court re-

fused to give them, and submitted the following: (1) "Was the plaintiff the owner of the note sued on at the date of the issuing of the summons in this action? (2) Is the defendant indebted to the plaintiff, and, if so, in what sum?" The defendant excepted. His honor committed no error in either refusing the defendant's issues, or in submitting the ones he did. There are only two issuable facts raised by the pleadings in this case: (1) Was the plaintiff the owner of the bond? (2) Was it still due and unpaid?

It has been settled in *Emery v. Railroad Co.*, 102 N. C. 225, 9 S. E. 139, following *McAdoo v. Railroad Co.*, 105 N. C. 151, 11 S. E. 316, and a large number of cases in which the ruling has been affirmed, that it is within the sound discretion of the trial judge to determine what issues shall be submitted, and to frame them subject to the restrictions (1) that only issues of fact raised by the pleadings are submitted; (2) that the verdict constitutes a sufficient basis for a judgment; (3) that it does not appear that a party was debarred for want of an additional issue or issues of the opportunity to present to the jury some view of the law arising out of the evidence. This has been approved in *Bonds v. Smith*, 106 N. C. 564, 11 S. E. 322; *Denmark v. Railroad Co.*, 107 N. C. 187, 12 S. E. 54; *Blackwell v. Railroad Co.*, 111 N. C. 151, 16 S. E. 12; *Black v. Black*, 110 N. C. 393, 14 S. E. 971.

By taking up and passing upon the defendant's exceptions a little out of their numerical order, we find that it will be unnecessary to go into the first and second exceptions.

Third exception: "The defendant then asked his honor to pass upon the point made in the fifteenth paragraph of defendant's answer, to wit, 'that said arbitrators endeavored, in the third article of their award, to follow the law in the construction of the contract hereinbefore referred to, and, the defendant insists, put an erroneous construction thereon; wherefore such award should be set aside and annulled,' and to hold that the arbitrators made a mistake in law, and put an erroneous construction upon said contract, and assessed defendant's damages upon such erroneous construction, and that such award was void." His honor committed no error in overruling this exception. Looking at the face of the award, to which we are confined, so far as this exception is concerned, we cannot say that the arbitrators intended to decide the matters embraced in that exception according to law. The words "adjudge," "determine," "award," when used by the arbitrators, do not necessarily carry with them the idea of a judgment according to law. Arbitration, as a means of settling disputed matters, being so much favored by the courts, they will be slow to set aside awards because it is alleged that the arbitrators have attempted to decide according to law, and have "missed it." The language of the award

in this case is not stronger than that used by the arbitrators in the case of *King v. Manufacturing Co.*, 79 N. C. 360, and that award was upheld. Besides, an award ought not to be set aside unless in cases where the decision is plainly and grossly against law, not where the point decided might be doubtful. *Cleary v. Coor*, 1 Hayw. (N. C.) 225.

Fourth exception: "The defendant offered to show that plaintiff agreed with the defendant that, if the arbitrators intended to allow a credit of \$241.60 on account of sour wines, the note should be credited with that amount, and that the arbitrators did intend to allow same, and omitted it by inadvertence; that this was after the note was executed. Plaintiff objected. His honor sustained the objection, and the defendant excepted." We can see no error in his honor's overruling this exception. The promise alleged to have been made by the plaintiff was clearly without consideration. No benefit could possibly have accrued to the plaintiff, but a loss; and the defendant does not pretend that he was put to any loss, inconvenience, or trouble by reason of the promise.

Fifth exception: "Defendant offered to show that the arbitrators did not pass upon all matters submitted to them between C. W. Garrett & Co. and Garrett & Co., and between C. W. Garrett & Co. and defendant. The plaintiff objected. His honor sustained the objection, and defendant excepted." Sixth exception: "Defendant offered to show that the account for sour wine was omitted by the arbitrators from defendant's credits by undue haste and a mere clerical mistake, contrary to the real intention of the arbitrators. The plaintiff objected. His honor sustained the objection, and defendant excepted." We will consider as one the fifth and sixth exceptions, for the fifth cannot be considered if it is disconnected from the sixth, because it is too general in its terms and language. It does not point out any particular matter which was presented to the arbitrators and which they refused to hear, as was the case in *Walker v. Walker*, 60 N. C. 259, cited by the defendant. But, if the fifth exception should be considered as another form of exception 6, we then have the question presented as to whether a mistake of the arbitrators can be set up to defeat, in whole or in part, the award. We are clear that it cannot be. Corruption or partiality are grounds for setting aside an award, but not so a mistake, unless the arbitrators have been led into that mistake by undue means, or unless they have fallen into the mistake by the fraudulent concealment of a party. A mistake committed by an arbitrator is not of itself sufficient ground to set aside the award. If an arbitrator makes a mistake either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal, and the court has no power to revise the decisions of "judges who are of the parties' own choosing." An award is intended to

settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake, either of law or fact, may be suggested by the dissatisfied party. Thus, the object of references would be defeated, and arbitration, instead of ending, would tend to increase, litigation. *Eaton v. Eaton*, 8 Ired. Eq. 102. There was no error in his honor's overruling these exceptions.

In thus disposing of the exceptions which we have discussed, it is not necessary to pass upon the others. We have given these exceptions more consideration probably than they were entitled to, because of the earnestness and ability with which they were discussed by the counsel for both sides; for, beyond question, when the defendant, agreeably to the award, executed his bond for the amount awarded to C. W. Garrett & Co., he could not be heard to say, when sued for the amount, that he had executed the bond in ignorance of mistake in the award, and in further ignorance of the power of the court to revise the same. In executing the bond, the defendant partially performed the award, and he is estopped thereby. *Bryan v. Jeffreys*, 104 N. C. 242, 10 S. E. 167. No error.

(116 N. C. 1061)

#### STATE v. WERNWAG.

(Supreme Court of North Carolina. April 30, 1895.)

##### ORDINANCE—VIOLATION.

An ordinance prohibited the sale of fresh meats without license within certain limits. A butcher doing business outside of these limits, in response to an order for fresh meats, delivered them, for a price agreed on, to the purchaser within the limits. *Held* a sale in violation of the ordinance.

Appeal from criminal court, Buncombe county; Jones, Judge.

A. Wernwag was convicted of selling fresh meat without a license, in violation of a city ordinance of Asheville, and appeals. Affirmed.

The Attorney General, for the State.

**MONTGOMERY, J.** The city of Asheville, by one of its ordinances, prohibits by fine the sale of fresh meats, without a license first had from the city, within a radius of three-fourths of a mile from the courthouse as the center of the circle, except at the market established by the city. The defendant, who lived and conducted the business of a seller of fresh meats outside of the three-fourths mile limit, received a telephonic message from C. H. Southwick, manager of an hotel inside of the limit, to bring to him at the hotel some fresh meats, the prices being agreed on. Agreeably to this message, the defendant brought, in his own wagon, the meats to the hotel, and delivered the same, receiving pay-

ment afterwards. In making this transaction, did the defendant violate the city ordinance, and thereby become liable for the fine imposed by the city? We are of the opinion that he did. In the first place, the goods ordered were not of a specific character, and therefore the contract was only executory. The witness said, "I telephoned to the defendant to send me some fresh beef and fresh mutton, describing such as I desired." It cannot be doubted that if the meat, when delivered at the hotel, had not been of the kind ordered, the buyer could have refused to receive it. "Where there is a sale of goods generally, no property in them passes until delivery, because until then the very goods sold are not ascertained." *Benj. Sales*, § 315. The general rule is that, if it is a part of the contract of sale that the seller shall deliver the property sold at some place specified, and receive payment on delivery, title will not pass until such delivery. *Id.* § 325; *Edmondson v. Fort*, 75 N. C. 405.

2. The transaction was executory. The difference between this and a sale is that in the latter the goods which are the subject of the contract become the property of the buyer immediately upon the conclusion of the contract, regardless of delivery, and the risk of loss or injury is upon the buyer; whereas in an executory contract the title to the goods is in the seller until the contract is executed. If, in this case, the fresh meats had been lost or destroyed on their way from the defendant's shop to the hotel, how could it be thought that the proprietor of the hotel would be compelled to pay for that which he had never received, and which the defendant promised to deliver to him at his hotel in good condition? The plain meaning of this matter is this: The hotel manager sent a message to a seller of meats outside of the three-fourths mile limit: "Bring me some fresh meats of a certain description. If they are such as I order, I will take them, and pay you for them; if they are not of the kind I order, I will not." Surely there is no sale in this.

3. The transaction cannot be a sale. In a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, without regard to whether the goods are delivered to the buyer or remain in the possession of the seller. *Lester v. East*, 49 Ind. 588. If, by the terms of the contract, the seller is required to send or forward the goods to the buyer, the title and risk remain in the seller until the transference is at an end, after which time the title is vested in the buyer. *Bloyd v. Pollocks*, 27 W. Va. 75; *Taylor v. Cole*, 111 Mass. 363; *Fry v. Lucas*, 20 Pa. St. 356. The cases of *Armstrong v. Best*, 112 N. C. 59, 17 S. E. 14, and *Ober v. Smith*, 78 N. C. 313, are easily to be distinguished from the cases above cited, and the points are not of the same character with those. In *Armstrong v. Best*, and *Ober v. Smith* the orders for goods were written in North Caro-

lina, and sent by letter to Baltimore. The goods were selected by the sellers, and delivered to common carriers, unconditionally, for the purchasers. The delivery to the common carriers completed the contract, and upon that completion our court held that the contract was governed by the laws of North Carolina, and not that the sale was complete when the goods were ordered in North Carolina.

There is no merit in the exception made by the defendant to the court's allowing an amendment to the warrant issued by the mayor. The amendment did not change the nature of the action, and therefore the power of the court to allow an amendment was unrestricted. *State v. Vaughan*, 91 N. C. 535; *State v. Norman*, 110 N. C. 484, 14 S. E. 968. There was no error in the judgment of the court below, and the same is affirmed.

(116 N. C. 185)

**HOLDEN v. STRICKLAND et ux.**

(Supreme Court of North Carolina. April 30, 1895.)

**RESULTING TRUST — PAYMENT FOR LAND — DISCHARGE OF TRUST—SUBROGATION OF SURETY — ISSUES—SUBMISSION TO JURY.**

1. Whether there was sufficient evidence to authorize the submission of certain issues to the jury will not be considered on appeal unless the point was raised before such issues were submitted.

2. The assets of a decedent, real or personal, cannot be applied to the payment of debts, where there is no lien, except through the personal representatives.

3. Where one holds land under a trust first for the payment of money advanced for its purchase, and then for the benefit of another, the lender has an equitable estate therein until his debt is paid; and the surrender of the trustee's note representing such debt for a new one, made by other persons, will not discharge the trust.

4. Where land is held in trust for the payment of a debt, a third person, who is compelled by law to pay the amount, becomes subrogated to the rights of the cestui que trust, and may collect the amount so paid from the land.

Appeal from superior court, Franklin county; Shuford, Judge.

Action by T. B. Holden against B. P. Strickland and Dora C. Strickland, his wife, to have lands held by defendant Dora C. Strickland declared subject to a parol trust. From a judgment for plaintiff, defendants appeal. Affirmed.

N. Y. Gulley, for appellants. C. M. Cooke, for appellee.

**FURCHES, J.** It appears: That Richard Holden, Sr., father of the plaintiff and of the feme defendant, was the owner of a considerable body of land, but was in debt, upon which judgments had been recovered against him for more than \$1,000; and in March, 1872, the sheriff of Franklin county sold said land under execution, then in his hands, issuing on the judgments. At the sale these lands were bid off by Richard Holden, Jr., at the

price of \$1,629,—an amount sufficient to satisfy the judgments. Young Holden did not have the money to make this purchase, but bid them off under an arrangement made between himself, his father, Richard Holden, Sr., and F. L. B. Harris. Harris was to furnish the money to pay for the land, and Richard Holden, Jr., gave his note to Harris for the same, and was to take a deed for the land, and hold it, first, in trust to pay Harris back his money, and then in trust for his father, Richard Holden, Sr. This was all done, and the Holdens, it seems, commenced to pay Harris his money. But in 1874, and before Harris had been paid in full, Richard Holden, Jr., died, the legal title to the land still being in him. That not long after the death of Richard Holden, Jr., his father, Richard Holden, Sr., commenced an action against his widow and heirs at law in the superior court of Franklin county, alleging the facts above stated, and demanding a judgment declaring the defendants (the widow and heirs at law of Richard Holden, Jr.) trustees of said land, and that they be required to convey to him. And the court so adjudged, and under the decree of the court the legal title to the land was made to Richard Holden, Sr. Harris was not a party to this action, and not bound by the judgment therein, nor the conveyance made thereunder. That after this, in the month of May, 1888, the debt to Harris then being reduced to \$409.38, Harris surrenders the note given him in 1872 by Richard Holden, Jr., and Richard Holden, Sr., Bryant M. Holden, F. C. Holden, and T. B. Holden execute their note to the said F. L. B. Harris for the amount still remaining due on the note of Richard Holden, Jr. (B. M. Holden, F. C. Holden, and T. C. Holden being sons of Richard Holden, Sr.). That after this last note was given there was paid on it the sum of \$182.50, and some time after this the said Richard Holden, Sr., died, leaving the remainder of the Harris debt unpaid. At the time of the execution of this last note to Harris, Richard Holden, Sr., was still the legal owner of 450 acres of the land originally bought by Richard Holden, Jr., which he divided into three lots, and executed separate deeds therefor, conveying one of the said lots to the plaintiff, T. B. Holden, one lot to F. C. Holden, and the other lot to his daughter, Dora C. Strickland, then the wife of Frank Green; and the consideration expressed in all these deeds is natural love and affection. But the plaintiff alleges that there was another consideration for all these deeds, in addition to that of natural love and affection, and that was that the grantees should each pay one-third of the Harris debt, then unpaid, and that the deeds were executed with this understanding, and that the defendant Dora took her lot under this agreement, which plaintiff says was a parol trust. He then alleges that after the death of his father, Richard Holden, Sr., Harris brought a suit in the superior



court of Franklin county on the note given him by Richard Holden, Sr., and B. M. Holden, F. C. Holden, and himself, in which he set up the trust of 1872, when the land was purchased by Richard Holden, Jr.; that in this action Harris recovered judgment on his note, and had the trust of 1872 declared, and decree and order to sell said land to satisfy his judgment; that plaintiff was one of the signers of said note, and a defendant in said action, and Harris was proceeding to sell his land under said judgment, and to prevent his lands from being sold he paid off and satisfied the Harris judgment,—and now asks that the lot conveyed to the defendant Dora be subjected to the payment of one-third of the amount he paid said Harris. Defendants, in their answer, admit that the land was bought by Richard Holden, Jr., as alleged; that Harris furnished the money, and that said Richard took an absolute deed for the land, but in trust first to pay Harris back the purchase money, and then in trust for his father, Richard Holden, Sr., and that Richard, Sr., is dead; and that Harris brought suit and recovered judgment as alleged. But they say that the defendants were not parties to this action, and not bound by the judgment; and they deny that the defendant Dora agreed to pay anything on the Harris debt, or that she took her lot under any parol trust from her father, but, on the contrary, she took it free from any trust whatever, and is now the absolute owner thereof, free from any claim of the plaintiff thereon,—and denies the plaintiff's right to recover. The court submitted the following issues to the jury: "(1) Did Richard Holden leave any personal property applicable to the debt of F. L. B. Harris? Ans. No. (2) If so, what was the value? Ans. None. (3) What was the proportion in value of the tract conveyed to defendant Dora to the whole tract of 450 acres, as conveyed? Ans. One-third. (4) Did Richard Holden, at the time of his conveyance of the land to defendant Dora Strickland, retain sufficient property to pay his debts, and available for that purpose? Ans. No. (5) Did Richard Holden, Sr., convey the land to defendant Dora in trust to pay its proportion of the Harris debt, as alleged in the complaint? Ans. Yes. (6) Did Harris abandon his original trust on the land before the conveyance of the land to the feme defendant? Ans. No."

The case on appeal appears to set out the whole evidence. F. C. Holden, a witness for plaintiff, among other things, testified, under objection of defendants, as follows: "I have settled my part of the Harris debt with my brother T. B. Holden. I paid him in land to the amount of \$150. There was no money passed. When my father divided up the land, he told me and T. B. Holden and Frank Green, who was then my sister's husband, that the Harris debt had not been paid; that he wished to divide his land, and we must help him pay that debt. He said he would

do what he could, but if he could not pay it all we would have to pay the balance. This was the day the land was being run out for division. Mine was run out before that time. Frank Green was my sister's husband, and was there to see how the lines were run. My sister was not there. I went home after the land was surveyed, and was not present when the deeds were written,"—and defendants excepted. This is the only exception presented by the record, and the evidence above quoted and objected to seems to be all the evidence as to a parol trust, as between Richard Holden, Sr., and the defendant Dora, except the testimony of W. R. Martin, in which he says: "I went over there to take probate on some deeds, and Richard Holden, Sr., in the course of a conversation, said something about he had divided up his lands, and his children would have to pay the Harris debt." We do not think this evidence competent or sufficient to authorize the court to submit the fourth issue to the jury, and, if the defendants had asked the court so to instruct the jury, we would have sustained their prayer. But, as no such prayer was made, we cannot consider this question as to whether there was any evidence, or any such evidence as should have been submitted to the jury. *State v. Kiger*, 115 N. C. 746, 20 S. E. 456. And we prefer to put our opinion upon facts admitted, or not disputed, rather than upon the exception to evidence which seems to us to have been immaterial, and to have proved so little, if anything.

It is contended that the judgment below should be sustained upon the doctrine of contribution, and the case of *Badger v. Daniel*, 79 N. C. 372, is cited as authority for this position. But we do not think so. Nor do we think *Badger v. Daniel* supports this position. In that case the personal representative of Joyner, the debtor, as well as his devisees, were made parties to the action. This being so,—that is, the estate of Joyner being represented,—the matter of contribution was worked out. But our case differs from *Badger v. Daniel* in several important, and we think essential, respects. The first is, as we have stated, in that case the personal representative of the debtor's estate was a party, and in this case the personal representative is not a party. And we think it a well-settled rule in this state that no assets of a deceased person can be applied to the payment of debts, where there is no lien, except by or through the personal representative, whether lands or personal effects. *Tuck v. Walker*, 106 N. C. 285, 11 S. E. 183; *Mauvey v. Holmes*, 87 N. C. 428; *Murchison v. Williams*, 71 N. C. 135. Another distinction is that in *Badger v. Daniel* the lands there subjected to the payment of the debts of the testator were willed to the defendants, other than the executor, and under the law they were subject to the payment of debts, while in this case the lands of the defendant were not willed to her by the debtor, but were

conveyed to her by deed during the lifetime of the debtor, and were not, like the lands devised in the case of *Badger v. Daniel*, subject to the payment of any debt due by Richard Holden, Sr., at the time of his death, unless the conveyance was made in fraud of such debt. They are not void, as contended, but only voidable, under the statute of 13 Eliz., if conveyed in fraud of creditors. And this, under our law, can only be determined by or through the personal representative. *Murchison v. Williams* and *Tuck v. Walker*, *supra*.

But it is admitted that Richard Holden, Jr., bought the land, and that Harris' money paid for it; that Holden took a deed for the same under the express agreement to hold it in trust, first to repay Harris the purchase money, and then in trust for his father Richard Holden, Sr. The fact that the land was bought and paid for with the money of Harris constituted Holden a trustee for Harris' benefit, to the extent of the money paid, without the express agreement that he was to hold it in trust for Harris. *York v. Landis*, 65 N. C. 535; *Stallings v. Lane*, 88 N. C. 214. And the equitable estate would have been in Harris by operation of law. But in this case there was not only the trust the law created, but there was an express trust that Richard Holden, Jr., should hold it, first to pay Harris' debt, and then for his father. This being so, the equitable estate in said land was in Harris until his debt was paid. *Shelton v. Shelton*, 5 Jones, Eq. 292; *Shields v. Whitaker*, 82 N. C. 516. And the fact that he surrendered the note given him by Richard Holden, Jr., and took the note of Richard Holden, Sr., and his three sons B. M. Holden, F. C. Holden, and T. B. Holden, did not discharge the trust to him. *Hyman v. Devereux*, 63 N. C. 624; *James v. Galtner*, 93 N. C. 358. But it did change the evidence of debt, and give him other additional security therefor. Before this note was executed, neither was Richard Holden, Sr., B. M. Holden, or F. C. Holden, or T. B. Holden, bound to Harris for the debt. But after that they were all bound for the debt, and he might collect it out of either of them, if it became necessary to do so. And, though the case does not say so in so many words, we think sufficient appears to show that this new note was given by Richard Holden, Sr., as principal, and his sons, as sureties. This being so, Richard, Sr., and then the lands, were bound for this debt first; the sureties to the note were only bound as sureties, both to Richard, Sr., and to the land, which had already been dedicated to the payment of this debt. In other words, B. M. Holden, F. C. Holden, and T. B. Holden were sureties to both Richard Holden, Sr., and also to the land. And Richard Holden, Sr., and the land, were both principal debtors, as to these sureties. And, this being so, it would seem that, as T. B. Holden had paid the debt of his principal, he would have the right to be reimbursed out

of the principal,—the land. *York v. Landis*, *supra*; *Nelson v. Williams*, 2 Dev. & B. Eq. 118; *Bank v. Jenkins*, 64 N. C. 719; *Matthews v. Joyce*, 85 N. C. 258.

But there is another view presented by the facts in this case which seems to us to sustain the plaintiff's right to recover, as against the defendants, and that is, the whole of the 450 acres of land was dedicated to the payment of the Harris debt. He had the right to collect one-third of his debt out of the lot given to defendant Dora. And when the plaintiff was compelled, by judgment, to pay Harris, he was subrogated to the rights of Harris. *Bell v. Jasper*, 2 Ired. Eq. 597; *Fox v. Alexander*, 1 Ired. Eq. 340; *Harris v. Harrison*, 78 N. C. 202; *Herron v. Marshall*, 42 Am. Dec. 447, and note; *Insurance Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625. This being so, it seems to us the judgment below should be sustained. Affirmed.

EVERY, J. (concurring). The only testimony offered to subject the land conveyed by the father to his daughter (now Mrs. Strickland, then Mrs. Green) by deed absolute upon its face, with the burden of the trust, is that of the grantee's brother, and is as follows: "When my father divided up the land, he told me and T. B. Holden and Frank Green, who was then my sister's husband, that the Harris debt had not been paid; that he wished to divide up his land, and we must help to pay that debt. He said he would do what he could, but if he could not pay it all we would have to pay the balance. This was the day the land was being run out for division. Mine had been run out before that time. Frank Green was my sister's husband, and was there. My sister was not present. I went home after the land was surveyed, and was not present when the deeds were written." It is an established rule of law that, in order to the creation of a parol trust thereby, the declaration of a grantor must be made either prior to or contemporaneously with the execution of the deed, and must be sufficiently explicit and definite to indicate clearly what is the subject-matter of the trust, the extent of the charge or burden imposed, and the purpose for which it is imposed. 1 *Perry, Trusts*, § 77. This principle arises out of the very nature of a trust, which is an unexecuted use, and which, when created, before the enactment of the statute of uses, by a declaration accompanying or preceding a feoffment, must have been so certain that the witnesses could bear in their memories such a clear and determinate recollection of the conscientious duty devolved upon the feoffee as would enable the ecclesiastical court to enforce it. If one had simply said, when erecting monuments to indicate division boundaries, that unless he should meantime discharge a certain debt, his children, who would be enfeoffed by him of shares unequal in quantity and value of his land, must pay it, without indicating in what

proportion, no court of conscience would have assumed to declare that his purpose was to require them to pay equal portions of the debt out of unequal bounties bestowed by him. This is but an illustration of the necessity for the rule that while trusts attending the transmission of the legal estate by deed may be created by oral declarations, and while the proof need not be supported by testimony such as is required to convert an absolute deed into a mortgage (*Shields v. Whitaker*, 82 N. C. 520), the courts will not attempt to enforce them unless the purpose of the grantor be clearly expressed. 1 *Perry, Trusts*, § 83. "Indeed," says Perry in the section cited, "courts require demonstration on the latter point, and the trust will not be executed if the precise nature of it (the subject-matter of the trust), and the particular persons who are to take as cestuis que trustent, and the proportions in which they are to take, cannot be ascertained." The same rule as to ascertaining from the terms of the trust the certainty of the subject-matter, and the manner of disposition of the trust fund among those who are to receive it, obtains, whether the trust be declared orally or in writing, and whether by devise, by other writing, or by oral declarations made prior to or accompanying the execution of a deed, and whether the trust is created for the benefit of children, or in favor of creditors. It is competent to create a charge upon land to pay debts by declarations made at the same time, and subject to the same limitations, as where the trust is raised to provide for children. 3 *Pom. Eq. Jur.* §§ 1244-1248. In either case the declaration, in order to its enforcement, ought to show, or in some way enable the court to ascertain, either in what proportion the burden is to be borne by several holders of the legal estate, or in what ratio benefits are to be apportioned between cestuis que trustent, as the case may be. Speaking of this subject, *Lewin* (volume 1, p. \*56, of his work on Trusts) says that a trust will not "be executed if the precise nature of the trust cannot be ascertained." Has the exact nature of the trust been determined in this case? "Id certum est quod certum reddi potest." It has been found by the jury that the tract of land conveyed to the feme defendant was one-third in value of the whole landed estate of her father. The purpose of the father, therefore, to impose a charge of one-third of whatever debt was still due at the time of his death may be fairly implied from his language. This conclusion is not reached without difficulty, but it is probably safe to rest the decision upon the principle that it was the expressed intention of Richard Holden, Sr., to charge all of the tracts of land conveyed to his children by voluntary deed with the debt for the purchase money unpaid at his death, and that he could so charge it by declaration preceding or accompanying the execution of the deed. 3 *Pom. Eq. Jur.*, supra. If her share is one-third, as

the jury found, it is not inequitable to subject it to one-third of the debt still due, in furtherance of what appeared to be her father's purpose. If the amount of the charge in favor of the original creditor was one-third of the debt, then, when her brother discharged the lien, was he not subrogated, pro tanto, to the rights of the creditor against her? It must be admitted, as already stated, that Richard Holden, Sr., could create, and did create, by his declaration, a charge upon the whole of the land, in favor of the creditor, and that charge could have been enforced by the creditor or his representatives. 2 *Story, Eq. Jur.* p. 589, § 1244.

If T. B. Holden was his father's surety, and as such paid the whole of the debt, then the statute (Code, §§ 2092-2096) gives him a right of action against cosureties at law, and also such priority as the creditor would have had as a claimant against his father's estate. The creditor had a priority as an incumbrance holding a claim that must have been satisfied out of the land before it could have been subjected to pay any claim against the grantee, and before her title could be perfected. 19 *Am. & Eng. Enc. Law*, 84; *Abb. Law Dict.* "Priority." If by virtue of the declaration a charge was created in favor of Harris, the creditor, then T. B. Holden, on payment of that debt, constituting the charge, and having priority over other claims, was, as surety, subrogated in equity to the rights of the creditor, arising either out of any prior lien or indemnity in his favor against the land conveyed to the feme defendant (*Peebles v. Gay*, 115 N. C. 40, 20 S. E. 173), and was entitled to recover one-third of the debt, which he paid as surety of his father, from the feme defendant, as the holder, subject to the charge imposed by her father upon the one-third in value of the land burdened with the debt, which he conveyed to her. It seems to have been conceded, if it did not appear positively, that T. B. Holden was, though nominally a principal, in reality the surety, of his father. *Welfare v. Thompson*, 83 N. C. 276. For the reasons given, I think the judgment should be affirmed.

CLARK, J. (concurring). Richard Holden died, leaving an indebtedness for the balance due on purchase money for land, and no personal property applicable to his debts. Prior to his death he had divided this land, the sole property he had, among his three children, one of whom is the defendant, and conveyed it to them by deed. The jury find that Richard Holden, at the time of these conveyances by him, did not retain sufficient property to pay his debts, and available for that purpose, and that the defendant received one-third of the land in value. The deeds, on their face, express that they are made in consideration of natural love and affection, and it is admitted that there was no valuable consideration. Harris brought an action on the bond for the purchase money against the

executor of Richard Holden, and obtained judgment for the amount due, with a decree that the one-third of the land conveyed by Richard Holden to the plaintiff should be subject to payment of the debts, because it was a voluntary deed, and void as to creditors. The plaintiff paid off said judgment, and his brother has repaid him one-third, and this is a proceeding to subject that third of the land which is in possession of the defendant to the repayment of the other third. The jury find, as a fact, that, when Richard Holden conveyed this third of the land to the defendant, it was expressly charged with the duty of paying its one-third of the Harris debt. This should be conclusive. But if we put that entirely on one side, this would still be so by operation of law, without any agreement, on two grounds: First. It is alleged in the complaint, and admitted in the answer, that the indebtedness to Harris was secured by the conveyance of the land to a trustee to pay the purchase money, and afterwards to convey to Richard Holden. The trustee having died, a decree was made in an action brought by Richard Holden against the widow and heirs at law of the trustee for a conveyance to Richard Holden; but the creditor, Harris, was not a party to that proceeding, and was unaffected by it. His honor also correctly instructed the jury that the trust in favor of the creditor was not abandoned. His taking a new note for the balance due and unpaid on the purchase money, in the absence of evidence to show such an intention, was not an abandonment of the security. *Hyman v. Devereux*, 63 N. C. 624. One part of the trust property having paid the debt, this part, which passed, without any consideration, to the defendant, is chargeable to contribute its pro rata. *Adams, Eq. 270*; *Stanly v. Stock*, 16 N. C. 314. Secondly. The conveyances to the three children, being entirely voluntary, were void as to creditors, since property sufficient and available to pay his debts was not retained by the father. Each share so conveyed is liable for its proportionate part of the debt, and as the plaintiff's share has, by decree of a court, been subjected to the payment of the whole debt, he is clearly entitled to be reimbursed by a decree subjecting the one-third of the land conveyed to the defendants to an order of sale for the repayment of the one-third of the debt for which the defendant's share was chargeable, and which plaintiff has been heretofore forced to pay under the orders of the court. This would be so if the defendant had been a devisee. *Badger v. Daniel*, 79 N. C. 372, 382; *Green v. Green*, 69 N. C. 25; 4 Am. & Eng. Enc. Law, 11; *Taylor v. Taylor*, 48 Am. Dec. 400; *Schermerhorn v. Barhydt*, 9 Paige, 28; *Clowes v. Dickenson*, 5 Johns. Ch. 235. And she is in no better position as one of the grantees of the father under a deed void as to creditors. This view renders the exceptions taken immaterial, and

if there was error, as to which it is unnecessary to intimate any opinion, such error was harmless.

(116 N. C. 815)

# CHIPPEWA VALLEY BANK v. NATIONAL BANK OF ASHEVILLE.

(Supreme Court of North Carolina. April 30, 1895.)

## NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—DEPOSITION.

1. The fact that the maker of certain notes, by an arrangement with the payee, had, at different times, drawn on the latter, at maturity of one of the notes, for such part as he was unable to pay, and that the drafts so drawn had passed through plaintiff's hands, was not sufficient to charge the plaintiff with notice of a similar arrangement relative to a note by the same maker to the same payee, which the plaintiff had purchased before maturity, without actual notice of any equities against it.

2. Where there was nothing to indicate that a deposition, taken on oral interrogatories, did not contain all of the deponent's testimony, or that it was not written down at the time, and in his presence, a motion to quash the deposition on such grounds was properly overruled.

Appeal from superior court, Buncombe county; McIver, Judge.

Action by the Chippewa Valley Bank against the National Bank of Asheville. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Jones and F. A. Sondley, for appellant. J. H. Merrimon, for appellee.

CLARK, J. The defendant bank, having for collection a note which was sent to it by plaintiff, who had acquired it as assignee, for value and before maturity, accepted of the maker part payment, and a draft at 60 days drawn by the maker on the payee, and sent its own check for the full amount of the note to the plaintiff, the holder of the note. The said draft not being accepted, the defendant stopped payment of its check, and this action is brought by the plaintiff to recover the amount of the same. The defendant introduced evidence that there was an agreement between the maker and the payee that when the notes of the former to the latter became due, and were presented for payment, if the maker was not in funds, he might pay what he could, and draw back on the payee for the difference; that this had occurred several times, and the notes had always been forwarded to defendant, for collection, by the plaintiff bank, and the remittances made through the same agency,—and the defendant contended that this fixed the plaintiff bank with notice of the agreement. The testimony of the cashier of the plaintiff bank, which is uncontradicted, is that the plaintiff took the note for value, before maturity, and without notice of any equity; that it was not the agent of the payee, but purchaser for value, and had no knowledge or notice whatever of any agreement between payee and maker, of the

kind alleged by the defendant. His honor, upon the evidence, properly instructed the jury to return a verdict for plaintiff. The fact that the plaintiff bank had several times forwarded notes against the maker, for collection, to the defendant bank, and that drafts drawn by the maker against the payee had thereafter passed through the two banks, even if known to plaintiff bank to have been in renewal or indulgence of part of said notes (which is not shown), was not of itself notice, in law, to the plaintiff, that there was such agreement as to this note. Actual notice of such agreement is negatived, and it is not fixed with constructive notice, by a course of dealing between parties transmitting or collecting through its bank, that the promissory note of the maker, who had often given counter drafts on the payee, is given on the agreement that he has that standing privilege, and is always to have a similar indulgence.

The motion to quash the deposition was properly refused. The interrogatories were verbal, and are not required to be in writing. There is nothing to indicate that the paper does not contain the whole of the deposition, or that it was not written down at the time, and in the presence of the witness. The only evidence on the point is the certificate of the commissioner, which certainly does not sustain the exception. No error.

(116 N. C. 1064)

#### STATE v. DOWNS et al.

(Supreme Court of North Carolina. April 30, 1895.)

#### INTOXICATING LIQUORS—ILLEGAL SALES—VERDICT—INDICTMENT—INTENT—DEFENSES.

1. Where an indictment charged the unlawful sale of spirituous liquors within two miles of "Bethel Methodist Church in Macon county," a verdict describing the church merely as "Bethel Church in Macon county" did not constitute a material variance.

2. An indictment charging the unlawful sale of spirituous liquors need not specify what kind of spirituous liquors was sold.

3. The unlawful sale of spirituous liquors is not excused by the fact that the defendant, acting under advice of his counsel, believed that the particular sale was not a violation of the law.

4. The intention with which an unlawful sale of intoxicating liquors was made by one having no authority to make the sale for any purpose is immaterial.

5. A government license for the sale of intoxicating liquors will not protect the holder thereof from prosecution by the state for selling in violation of state laws.

6. An indictment charging the violation of a certain section of the statute need not specify that the act charged does not come within an exception created by a subsequent section of the same statute.

Appeal from superior court, Macon county; Shuford, Judge.

G. W. Downs and others were convicted of the unlawful sale of spirituous liquors, and appeal. Affirmed.

v.21s.E.no.10—44

J. F. Ray, for appellants. The Attorney General, for the State.

CLARK, J. The indictment charges the sale of spirituous liquor within two miles of Bethel Methodist Church in Macon county. The statute (Acts 1831, c. 234) and the verdict both describe the church simply as "Bethel Church in Macon county." There is nothing to indicate that the church is not one and the same. The added word "Methodist" in the indictment is simply harmless surplusage or immaterial variance. *State v. Eaves*, 106 N. C. 752, 11 S. E. 370. There is nothing tending to show that there was any ambiguity or more than one Bethel Church in the county, as in *State v. Partlow*, 91 N. C. 550, or that the defendants were in any wise prejudiced in their defense or misled as to the church which was meant.

It was not necessary that the indictment should specify the kind of spirituous liquor sold. That was a matter of evidence. *State v. Packer*, 80 N. C. 439. Nor was it necessary to refer to the statute in the indictment, as it was a public local statute. *State v. Wallace*, 94 N. C. 827.

Neither was it any defense that before making sale of the liquor the defendants, on inquiry of counsel, were told that the church was not incorporated, and that it would be no violation of the law for the defendants to sell within two miles thereof at the place of manufacture, in quantities less than a gallon. "Ignorance of the law excuses no one," and the vicarious ignorance of counsel has no greater value. *State v. Boyett*, 32 N. C. 336. The law does not encourage ignorance in either. *State v. Dickens*, 2 N. C. 406. If ignorance of counsel would excuse violations of the criminal law, the more ignorant counsel could manage to be, the more valuable, and sought for, in many cases, would be his advice.

The criminal intent is not the intent to violate the law, but the intentional doing the act which is a violation of law. It is only when the criminality depends, not merely upon the act, but upon the motive or intent with which it is done, that the intent becomes material. *State v. McBrayer*, 98 N. C. 619, 2 S. E. 755; *State v. Dalton*, 101 N. C. 680, 8 S. E. 154. *State v. Wray*, 72 N. C. 253, pressed by defendant's counsel, applies only to parties (as druggists) authorized to sell for medical purposes, and who therefore cannot be found guilty for merely selling, but only if they sell not in good faith for such purposes.

The license from the United States government was only a protection from prosecution by its authority. It did not protect the defendants from prosecution in the state courts for selling contrary to state laws. *State v. Stevens*, 114 N. C. 873, 19 S. E. 861.

When there is an exception in the same clause which creates the offense, it should be negatived in the indictment. If the exception is in another clause, this is not neces-

sary, but it is matter to be shown in defense. *State v. Norman*, 13 N. C. 222; *State v. Tomlinson*, 77 N. C. 528; *State v. Heaton*, 81 N. C. 542; *State v. Lanier*, 88 N. C. 658; *State v. George*, 93 N. C. 567. Here the proviso that the act should not apply to the sale of vinous liquors is in a separate clause,—the ninth,—while the provision violated by the defendants is in the second clause. If the liquor sold had been vinous, and the defendants had wished to rely upon that fact, this was matter of defense, and it was not necessary to anticipate and negative it in the indictment. No error.

(116 N. C. 1059)

#### STATE v. McCOY.

(Supreme Court of North Carolina. April 30, 1895.)

##### CITY ORDINANCES—CONFLICT WITH STATUTE.

Where gambling is made criminal by a general law (Acts 1891, c. 29), a city ordinance covering the same subject is void.

Appeal from criminal court, Buncombe county; Jones, Judge.

T. C. McCoy was convicted of gambling, in violation of a city ordinance, and appeals. Reversed.

The Attorney General, for the State.

FAIRCLOTH, C. J. The act of assembly of 1891 (chapter 29) declares "that it shall be unlawful for any person to play at any game of chance, at which money, property or other thing of value is bet, whether the same be in stake or not, and those who play and those who bet thereon shall be guilty of a misdemeanor." The ordinance of the city of Asheville under which the defendant is arraigned, adopted July 8, 1887, says, "Any and all persons who shall [play] at any game of chance in the corporate limits of the city of Asheville with cards, for any money or other articles of value, whether said money is staked or not, shall pay a fine of \$50." The defendant is charged with gambling in said city in 1894, by playing a game of chance, with cards, for money, etc.; and the only question submitted is, "Does the mayor have jurisdiction of such offenses?" Under the act of 1891, *supra*, it is clear that the superior court has jurisdiction of the offense therein declared; and it is so well settled that municipal by-laws and ordinances must be in harmony with the general laws of the state, and when they are in conflict the by-laws and ordinances must give way, that we deem it unnecessary to reargue the question. *Town of Washington v. Hammond*, 76 N. C. 33; *State v. Langston*, 88 N. C. 692; *State v. Brittain*, 89 N. C. 574; *State v. Keith*, 94 N. C. 933. The fact that cities may have different regulations on the same subject can make no difference, for they are all subject to the rule above stated. We think the mayor, in the present case, was without jurisdiction of the offense charged. Error.

(116 N. C. 949)

#### HAYNES v. COWARD.

(Supreme Court of North Carolina. April 30, 1895.)

##### APPEAL—CERTIORARI TO PERFECT RECORD—TIME OF APPLICATION.

Where the transcript is not filed at the first term after trial, as required by rule 5 (12 S. E. v.), on the failure of the appellant to apply at such term, as required by rule 41 (12 S. E. ix.), for a writ of certiorari to procure it, he is not entitled to such writ.

Petition by Nathan Coward for writ of certiorari to bring up the transcript in the case of J. P. Haynes against petitioner, in which judgment was rendered for plaintiff, and on appeal the clerk failed to send up the transcript. Writ denied.

J. F. Ray, for petitioner. J. H. Merrimon, for respondent.

CLARK, J. If there is delay in sending up the transcript on appeal in time to be docketed for hearing during the call of the district to which it belongs at the first term of this court beginning after the trial below, as required by rule 5 (115 N. C. 833, 12 S. E. v.), and such delay is caused by the neglect of the clerk or judge, all the authorities are to the effect that the appellant, if without laches himself, is entitled to a certiorari to bring up the transcript, or the omitted part of it, as the case may be. But the writ must be applied for regularly, at such term (rule 41, 12 S. E. ix.), and before the appeal is dismissed. The appellant's failure to do this is negligence, which is not atoned for by the previous neglect of the clerk or judge, which had otherwise entitled the appellant to a certiorari. *Paine v. Cureton*, 114 N. C. 606, 19 S. E. 631. This is very plain, and has been repeatedly stated, and reasons pointed out therefor. Among the very numerous cases it is sufficient to cite *Pittman v. Kimberly*, 92 N. C. 562; *Porter v. Railroad Co.*, 106 N. C. 478, 11 S. E. 515; *Triplett v. Foster*, 113 N. C. 389, 18 S. E. 714; *Graham v. Edwards*, 114 N. C. 228, 19 S. E. 150. If the transcript is not sent up, the appellant, with very little trouble, can ascertain that fact below in time either to get it sent up, or to apply, when the district is called, for a certiorari. Or if, for any reason, he cannot learn this below, the counsel who represents him here will see that the transcript, or some essential part of it, has not arrived, and should apply for a certiorari when the district is reached or before. If the appellant has no counsel in this court, he cannot be put in a better condition than an appellant who has paid enough attention to his appeal to have counsel here to argue it. If he have no counsel to look after the case here, he should at least ascertain below whether the transcript has been properly made out and forwarded here. The Code discountenances mere technicalities, but it exacts proper diligence and a business-like attention to matters in

court. The presumption is in favor of the correctness of the judgment below, and a party seeking to reverse it must do so without delaying the argument here and a decision beyond the regular time prescribed as above. Granting, as alleged by appellant, that the failure to send up the transcript to the spring term, 1894, of this court, was due to the negligence of the clerk, and was without any fault on the part of the appellant, still his failure to apply at such term for a certiorari waived his right to ask it at the next term. Furthermore, a motion to reinstate was made at fall term, 1894, and when reached in regular order was denied. It is true, the defendant did not take care to be represented when the motion came up. That does not make his position any better. There has been no notice served since of another motion to reinstate, and, if it had been, the matter is *res judicata*. This case is almost identical with *Dunn v. Underwood*, 20 S. E. 965; *Causey v. Snow*, 21 S. E. 179 (at this term). Motion denied.

(116 N. C. 517)

**JONES v. CITY OF ASHEVILLE.**  
Appeal of CAMPBELL.

(Supreme Court of North Carolina. May 7, 1895.)

**EMINENT DOMAIN—ACTION FOR DAMAGES—PARTIES.**

The refusal of the court to allow a reversioner, upon his application, to be made a party defendant in a suit brought by the holder of the life estate against a city for damage to the land caused by the widening of a street, was error, although such reversioner had refused to join in the suit at request of the plaintiff.

Appeal from superior court, Buncombe county; Armfield, Judge.

Action by Laura E. Jones against the city of Asheville to recover damages for land taken under the right of eminent domain. J. M. Campbell, upon application, was made a party defendant. From a judgment entered in compliance with an agreement between plaintiff and defendant city, defendant Campbell appeals. Reversed.

C. M. Stedman, for appellant. W. W. Jones, F. A. Sondley, and J. H. Merrimon, for appellee.

**FURCHES, J.** The plaintiff and J. M. Campbell are the owners of a house and lot in the city of Asheville, the plaintiff owning a life estate therein, and Campbell owning the remainder in fee simple. In 1892 the defendant city, acting in accordance with the provisions of its charter and in the exercise of its right of eminent domain, for the purpose of widening the streets of the city of Asheville, took and appropriated a part of the lot above mentioned, belonging to the plaintiff and the said J. M. Campbell. Some time after the appropriation of the property above mentioned, the damage to said lot was assessed in the name of the plaintiff, report-

ed to the commissioners as the law provided, and by them ratified and affirmed. This report assessed the damage at \$875, but before it was paid Campbell put in a claim for his part, as he alleged, of the \$875, and forbade the defendant city paying it to the plaintiff; and under this condition of things the city refused to pay, and the plaintiff brought this action; and at December term, 1892, the plaintiff filed her complaint, and some time in March, 1893, the defendant filed an answer, in which it set up the fact that Campbell was the owner of the reversion, and Mrs. Jones the owner of the life estate, in said lot, and asked that Campbell be made a party defendant, and the matter adjusted. But it does not appear that any steps were taken to make Campbell a party, until August term, 1893, when he appeared in court by his attorneys, and asked to be made a party defendant, and that he be allowed to file an answer, and set up his claim to a part of the \$875. Before this the plaintiff, Jones, and the defendant city had agreed upon a judgment, but the same had not been signed and filed. The court refused the motion of Campbell to be allowed to make himself a party defendant and to file his answer, and Campbell appealed.

It appears in the facts found by the court that the plaintiff had requested Campbell, before she commenced her action, to join her in trying to get pay for their property; and he declined to do so, saying that his interest in the property did not commence until after her life estate ended, and he would have nothing to do with it till then. And it seems that the court below thought this was not very nice treatment, on the part of Campbell, to refuse to assist her, until she was about to get the money, and then come in and claim a part of it; and the court, it would seem, was holding him to what he had said. But it is not denied that Campbell is the owner in fee of the remainder after the plaintiff's life estate. In fact it is so found by the court. It is not denied that the city of Asheville, in the proper exercise of its right of eminent domain, had taken a part of the property, and endangered the same to the amount of \$875. In fact this is admitted, and these facts present the question of law whether Campbell is not entitled to a part of the money, now in the hands of the city of Asheville, arising out of this damage, and, if so, whether he is not entitled as a matter of law to be made a party to this action. The rule seems to be that a party, only interested in the subject-matter of litigation, is not entitled as a matter of right to intervene. *Colgrove v. Koonce*, 76 N. C. 364; *Wade v. Saunders*, 70 N. C. 270. But, where a party is interested in the action jointly with either plaintiff or defendant in the subject of litigation, such party may claim to intervene as a matter of right. *Lytle v. Burkin*, 82 N. C. 304. Such a party as this is considered a necessary party to a com-

plete determination and settlement of the litigation. *Colgrove v. Koonce*, supra. Where a party may intervene as a matter of right, and his application to do so is refused by the court, he has the right to appeal. *Rollins v. Rollins*, 76 N. C. 264. Where one may intervene as a matter of right, it is error in the court to proceed with the case, after application is made, until the question of such right is settled. *Keathly v. Branch*, 84 N. C. 202. Therefore we are of the opinion that the appellant, Campbell, was entitled to intervene as a matter of right; that, having this right, he had the right to appeal to this court, when this right to intervene was denied him; and the court should not have proceeded to judgment, after the application was made, until that question was settled. We are not called upon in this appeal to pass upon the relative rights of the plaintiff, Jones, and the appellant, Campbell, and we do not do so. We only say that it appears that they are jointly interested in this fund. But in what proportion we do not undertake to say. That is left to be determined hereafter, taking into consideration the nature and character of the damage, as to how it affects the value of the life estate, and also as to what damage it has been to the remainder in fee. There is error, and the case is remanded, with directions to allow the appellant, Campbell, to intervene, and set up his defense, and that the case then be proceeded with according to law. Error.

AVERY, J., did not sit.

(116 N. C. 979)

#### STATE v. WILSON.

(Supreme Court of North Carolina. May 7, 1895.)

##### FALSE PRETENSES—INDICTMENT.

Failure of an indictment for obtaining goods under false pretenses to charge that they were obtained feloniously is a fatal defect.

Appeal from superior court, Vance county; Coble, Judge.

J. B. Wilson was convicted of obtaining money under false pretenses, and appeals. Reversed.

The indictment was as follows: The jurors for the state, upon their oaths, present: That J. B. Wilson, late of the county of Vance, on the 22d day of October, in the year of our Lord 1894, at and in the county of Vance, unlawfully and knowingly devising and intending to cheat and defraud Anderson Hester of his goods, moneys, chattels, and property, did then and there unlawfully and designedly falsely pretend to Anderson Hester, knowingly, that he, the said J. B. Wilson, had a partner, with a wagon on the way from Louisburg, bringing a lot of dress goods, and that he gave every purchaser of his hair tonic a dress pattern of 14 yards of said goods, and that if he would pay him, the said Wilson, fifty cents for a bottle of

said medicine, he, the said Wilson, would, on the morrow, upon the arrival of his wagon and partner, deliver to the said Anderson Hester 14 yards of dress goods; and did further represent that he had sold to the wife of John I. Rowland a bottle of said hair tonic, and she had gotten her dress goods, and was well pleased with it. He also showed samples of the goods he represented to have. Whereas, in truth and fact, the said Wilson had no wagon and partner on the road from Louisburg, bringing dress goods, and had no wagon at all, and had no dress goods, but is but a traveler carrying a colored fluid, which he represents to be a hair vigor, which is worthless, and, to obtain fifty cents for every bottle disposed of, represents that he will give a dress pattern with each bottle, and proposes to sell only to the ignorant and unsuspecting; and further, that he had not delivered to the wife of John I. Rowland any goods, as he, the said J. B. Wilson, well knew to be false. By color and means of said false pretense and pretenses, he, the said J. B. Wilson, did then and there unlawfully and knowingly designedly obtain from the said Hester, fifty cents, being then and there the property of the said Hester, with intent to cheat and defraud the said Hester, to the great damage of the said Hester, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

Hicks & Hicks, for appellant. The Attorney General, for the State.

FAIRCLOTH, C. J. The defendant is indicted for obtaining goods under false pretenses. He was convicted, and he entered a motion to arrest the judgment, which was refused, and he appealed. The indictment fails to charge that the goods were obtained "feloniously," and is therefore fatally defective. This is so by reason of the act of 1891 (chapter 205). *State v. Bryan*, 112 N. C. 848, 16 S. E. 909; *State v. Caldwell*, 112 N. C. 854, 16 S. E. 1010, and authorities there cited. Judgment arrested.

(116 N. C. 795)

#### HENDERSON v. DOWD.

(Supreme Court of North Carolina. May 7, 1895.)

##### CONSTITUTIONAL LAW—LEGISLATIVE POWERS—APPOINTMENT OF GUARDIAN.

An act authorizing a particular person to act as guardian, without giving the usual bond, is constitutional.

Appeal from superior court, Mecklenburg county; Robinson, Judge.

Action by James M. Henderson against Willis B. Dowd, guardian. Judgment for plaintiff, and defendant appeals. Affirmed.

Clement Dowd, for appellant. McCall & Nixon and Jones & Tillett, for appellee.



**FAIRCLOTH, C. J.** This court is of opinion that the legislature has the power to enact that the plaintiff be appointed guardian of Margaret E. Henderson without bond, etc., because there is no restriction on such power in the organic law. The policy of so doing is not for this court to consider. It is by the authority of the legislature that the duties of the clerk are prescribed and regulated, and, if that body can delegate the execution of such duties to the clerk, it must have the power to do the same. We are not to be understood as saying that the guardian, when thus appointed, is exempt from accountability, nor from the supervision of the clerk, as in cases of appointment by the clerk, except in the matter of entering into bond. The objection to the name of the plaintiff is without force. There is an interesting list of *idem sonans* cases collected in *State v. Collins*, 115 N. C. 716, 20 S. E. 452. Judgment affirmed.

(116 N. C. 460)

**WRIGHT v. HARRIS.**

(Supreme Court of North Carolina. May 7, 1895.)

**JUSTICE OF THE PEACE—JURISDICTION.**

Where, under a will devising all testator's land to his wife, remainder to plaintiff in fee, except 50 acres in some suitable place, on certain conditions, to defendant, and defendant, who was a tenant of the wife during her life of 50 acres, claims title to the same as being in a suitable place, and on conditions performed, an action by plaintiff for possession, involves the title to land, and a justice of the peace has no jurisdiction.

Appeal from superior court, Person county; Hoke, Judge.

Action by Thomas D. Wright against Jesse Harris before a justice for possession of land. From a judgment affirming a judgment of the justice of the peace dismissing the action for want of jurisdiction, plaintiff appeals. Affirmed.

James H. Harris, by his will, devised all his real estate to his wife for life, remainder to Thomas D. Wright, except 50 acres of land, at some suitable place, to Jesse Harris, on certain conditions. During the life of Mrs. Harris, Jesse Harris leased by the year 50 acres from her, and paid his rent annually. After her death he paid no rent to Wright, and claimed title to the 50 acres.

Shepherd, Manning & Foushee, for appellant. W. W. Kitchin, for appellee.

**CLARK, J.** The defense pleaded was not a mere claim or bare assertion that the title to real estate was in issue. But upon its face the clause of the will set out as the foundation of the defendant's plea showed a bona fide controversy, which involved the title to real estate. *Parker v. Allen*, 84 N. C. 466; Code, § 836. The defendant had not entered into possession, and did not hold under the plaintiff; hence there was no estoppel. On the death of the life tenant, the tenancy under her

ceased, if his right then accrued, and the defendant claimed adversely to the plaintiff as owner of an unallotted 50 acres in the tract, and to that extent, as tenant in common with the plaintiff; while the plaintiff claimed that sole seisin of the whole tract had devolved on him at the death of the life tenant, and denied the defendant's claim to the 50 acres. His honor properly affirmed the ruling of the justice of the peace that the justice did not have jurisdiction to decide such controversy, and dismissed the action. Code, § 837. Affirmed.

(116 N. C. 1033)

**STATE v. McCORMACK.**

(Supreme Court of North Carolina. May 7, 1895.)

**MURDER IN THE FIRST DEGREE—PREMEDITATION.**

1. In a prosecution for murder in the first degree, where it appeared: That defendant had gone to the house of deceased in the evening, armed; had, in conversation with deceased, shown two pistols; had remained until 2 o'clock, when the deceased was shot. That there was no quarrel immediately before the shooting. That when he fired he said, "I guess that will do you," laid one of his pistols beside deceased, and remarked, "I reckon you will let me alone now,"—it is not error to submit the question of defendant's guilt of murder in the first degree to the jury.

2. If the purpose to kill has been deliberately formed, the interval which elapses before its execution is immaterial.

Appeal from superior court, Robeson county; Brown, Judge.

John B. McCormack was convicted of murder, and appeals. Affirmed.

French & Norment and Herbert McClammy, for appellant. The Attorney General, for the State.

**AVERY, J.** It is not essential that the prosecution, in order to show *prima facie* premeditation and deliberation on the part of a prisoner charged with murder in the first degree, should offer testimony tending to prove a preconceived purpose to kill, formed at a time anterior to the meeting when it was carried into execution. "In order to conviction of murder in the first degree [said this court in *State v. Norwood*, 115 N. C. 793, 20 S. E. 712], as the judge below properly instructed the jury, it is necessary that the state should show that the prisoner deliberately determined to take the child's life by putting the pins into its mouth, and thereupon (it being immaterial how soon after resolving to do so) carried her purpose of so using the pins into execution, and thereby caused death." It must have appeared, in some aspect of the evidence, that the accused deliberately determined to kill the prisoner before inflicting the wound, in order to warrant the judge in submitting the question of his guilt on the charge of murder in the first degree to the jury. If the witnesses testified to the truth of facts and circumstances tending to show that while they were together on the occasion when the

homicide occurred, or even during the conversation which terminated in the shooting, the prisoner, upon sufficient deliberation to make it a fixed and definite determination, formed the purpose to shoot and kill the deceased, it was the duty of the court to allow the jury to pass upon the issue of guilt or innocence of murder in the first degree. There was, we think, testimony tending to show that the shooting was done after premeditation and deliberation. The prisoner had gone to the house where the deceased, his brothers, and others were, during the evening, and had remained talking, either to the deceased alone, or to the others with him, till 12 o'clock at night, when the deceased was shot. During all of that time his horse, harnessed to his buggy, was hitched near where they were talking. A witness stepped out into the field, leaving a lamp burning, and the other members of the party drinking with prisoner and deceased. The pistol fired while he was out, and on his return the lamp was extinguished, and deceased was shot, the two brothers of deceased being then asleep. When the pistol was fired the prisoner said, "I guess that will do you." He then walked up to deceased, where he was lying dead, and, placing one of his pistols beside him, said, "I reckon you will let me alone now." During his conversation with deceased, it was in evidence that prisoner had two pistols in his hip pockets, and that in the earlier part of the evening one of them was stuck in his pocket with the muzzle upwards, but that later, while talking with deceased, he had the two pistols out in his hands, and put them back into his pockets, in the usual position. Just before the shooting occurred the prisoner walked off from the deceased, as if going out of the piazza, and while deceased was standing with his side towards him. He turned, however, as he was walking away, and fired at Smith, whose relative position still remained the same. Apart from the testimony of the prisoner, it does not appear that deceased was even quarrelling with prisoner just before the latter walked down the piazza and fired. Defendant's own version of the affair, if believed, would unquestionably put a different hue upon the transaction; but there was not only no other evidence of legal provocation, but no other evidence of a quarrel, abuse, or insult that might have tended to show that he acted under the influence of sudden passion. While premeditation and deliberation are not to be inferred, as a matter of course, from the want either of legal provocation, or of proof of the use of provoking language, yet all such circumstances may be considered by the jury in determining whether the testimony is inconsistent with any other hypothesis than that the prisoner acted upon a deliberately formed purpose. *State v. Fuller*, 114 N. C. 897, 19 S. E. 797. Kerr, in his work on Homicide (section 72), says: "The question whether there has been deliberation is not ordinarily capable of actual proof, but

must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense." The test is involved in the question whether the accused acted under the influence of ungovernable passion, or whether there was evidence of the exercise of reason and judgment. The conduct of the accused just before or immediately after the killing would tend, at least, to show the state of mind at the moment of inflicting the fatal wound. In passing upon the question whether the facts in a given case are sufficient to show, beyond a reasonable doubt, that the killing was done with deliberation and premeditation, while sudden passion, aroused by provocation that would neither excuse nor mitigate to manslaughter the killing with a deadly weapon, is sufficient, if the homicide is committed under its immediate influence, yet the want of provocation, the preparation of a weapon, proof that there was no quarrelling just before the killing, may be considered by the jury, with other circumstances, in determining whether the act shall be attributed to sudden impulse or premeditated design.

We think that there was no error in leaving the jury to find upon the testimony whether or not the killing was done in pursuance of a preconceived purpose, deliberately formed. In arriving at a conclusion, they would naturally look to the testimony as to the conduct of the prisoner at and about the time of the homicide, and the attendant circumstances, to throw light upon the question, rather than to a computation of the time intervening between the formation and execution of the purpose. The guilt or innocence of the prisoner depended upon whether his intent to kill had been definitely formed, not upon the length of time that he had cherished the purpose. For the reasons given the judgment is affirmed.

(116 N. C. 1037)

#### STATE v. HORN.

(Supreme Court of North Carolina. May 7, 1895.)

#### MANSLAUGHTER.

In a prosecution for murder there was evidence that defendant had made threats against the life of deceased, but that subsequently, on the day of the homicide, the men were on friendly terms, and that the immediate provocation to the crime was the shooting of defendant's brother by deceased. *Held*, that the jury should have been instructed that, if they found these facts, defendant could be convicted of manslaughter only, since, after the reconciliation, the law would presume the crime to be due to the new and sudden provocation, not to previous malice.

Appeal from superior court, Robeson county; Brown, Judge.

Henry Horn was convicted of murder committed in 1882, and appeals. Reversed.

French & Norment and Herbert McClammy, for appellant. The Attorney General, for the State.

FURCHES, J. We do not think defendant's exceptions to the reply of the court to the questions asked the court during the argument of the case to the jury can be sustained. We do not know whether they are excepted to as being out of time or as being erroneous. But we do not think they can be sustained on either ground. If the exceptions are put on the question of time, it would seem they were made in response to questions addressed to the court by defendant's counsel; and it may fairly be inferred that the counsel for defendant wished to know the views of the court at that time, that he might the better know how to direct his argument, and that the court so understood him; and, whether this was the object of counsel or not, it is a reasonable inference to be drawn from the questions, and we do not think defendant has any just ground for complaint. Nor do we think these exceptions can be sustained upon the ground of error in law, as, in our opinion, there was evidence in the case involving murder, manslaughter, and excusable homicide. It was admitted that the defendant killed the deceased, David Butler, with a pistol. This threw the burden on the defendant. The state then offered two witnesses, whose testimony tended to show previous threats and express malice on the part of defendant; and, while these were denied by defendant, he offered evidence tending to show that, after the alleged threats (which the state insisted showed express malice), the deceased and the prisoner had talked the matter of John Horn over; that prisoner had assured the deceased that he had nothing to do with that trouble, telling the deceased that they had always been friends, and that he did not want any trouble with the deceased. And the court, in the case on appeal, states that "no one testified that Henry Horn was not friendly with Butler on the day that Butler was killed, or that Henry Horn had ever done or said anything to show that he was unfriendly with Butler, except as it may appear as herein recited"; evidently referring to the testimony of Campbell and Gaddy. And defendant insisted that, if it should be found by the jury that defendant had made the alleged threats, it also appeared that he (defendant) had become reconciled and was friendly with the deceased on the day of the homicide, and asked the court to charge that the law inferred the killing was from the recent provocation. This the court declined to do, and upon this view of the case we think there was error.

We do not think courts and juries should give too much weight to threats made in a thoughtless, bragging manner, without any

purpose of ever carrying them into execution, and sometimes made in the moment of passion, soon to pass away with the passion that produced them; but still they are competent and proper evidence, and as to what weight they shall have is a question for the jury, considered under proper instruction from the court and all the circumstances under which they were made. This evidence made it necessary to submit the question of murder to the jury. But, to remove this testimony from the case, it would seem that the offense would be reduced to manslaughter, as the provocation of defendant, seeing the deceased shoot down his brother, or seeing his brother and the deceased a few moments after the deceased had shot down defendant's brother, was very great. Therefore, it became of the utmost importance in the trial that the court should properly charge and instruct the jury as to the law of previous threats tending to show express malice, as affected by an after reconciliation. This the court did not do. The court should have charged the jury that every question of fact necessary for the conviction of defendant and every question of fact necessary for defendant's defense should be found, from the evidence in the case, to be true; that if the defendant did make the threats, as testified to by the witnesses for the state, then this would tend to show express malice on the part of the defendant; but, if they should so find, then they should consider the evidence offered by the defendant tending to show a reconciliation on the part of the defendant, and that defendant, after the threats, was friendly with the deceased; and, if they should find from the evidence that he was, then the law no longer attributed the killing to previous malice, but inferred it was from the new and sudden provocation (*State v. Barnwell*, 80 N. C. 460); and, if it was done under the new provocation, the defendant would not be guilty of murder, but only of manslaughter (*State v. Hill*, 4 Dev. & B. 494; *State v. Ta-cha-na-tah*, 64 N. C. 618; *State v. Johnson*, 2 Jones [N. C.] 247; *State v. Matthews*, 78 N. C. 523).

In this opinion we have not considered the question of self-defense, as it was not necessary that we should do so, and merely mention it here to show that we have not considered it. We notice his honor (doubtless through inadvertence, as we find the same thing in other cases), in charging the jury, uses the expression "believe," where we think he should have said: "If you find as a fact from the evidence." We merely mention this, as we see it in this case and in other cases; but in this opinion we have laid no stress upon this matter, and do not consider it in making up our judgment. There is error in the matter pointed out in this opinion, for which defendant is entitled to a new trial.

(116 N. C. 871)

**SMITH v. ARTHUR et al.**

Appeal of COOPER.

(Supreme Court of North Carolina. May 7, 1895.)

**COSTS—LIABILITY OF PLAINTIFF'S SURETY—AGREEMENT OF PARTIES.**

Under Code, § 209, requiring the clerk to take a bond conditioned to be void if plaintiff pay defendant all costs that defendant recover of him "in the action," the surety is not liable where plaintiff obtained judgment for a certain amount and costs, though the case having been retained for future disposition of the counterclaim, such claim was compromised, and an agreement made that plaintiff pay costs.

Appeal from superior court, Swain county; Shuford, Judge.

Action by J. H. Smith against Arthur, Coffin & Co., to which defendants set up a counterclaim. R. L. Cooper became plaintiff's surety for prosecution of suit. Plaintiff recovered judgment on his claim, and for costs of action. Afterwards, in compromising defendants' counterclaim, plaintiff agreed to pay all unpaid costs, and defendants made a motion to retax them against plaintiff and R. L. Cooper, his surety, and from a judgment so taxing them Cooper appeals. Reversed.

J. W. Cooper, for appellant. Fry & Newby, for appellees.

**FURCHES, J.** On the 12th day of July, 1889, plaintiff brought suit against defendants, returnable to fall term of Swain superior court. In this action R. L. Cooper became plaintiff's surety for the prosecution of his suit. Plaintiff filed his complaint, and defendants filed their answer, in which they set up a counterclaim to plaintiff's action. At fall term, 1891, plaintiff recovered judgment against defendants for the sum of \$2,445 and costs of action. But this trial did not dispose of defendant's counterclaim, and the case was retained on the docket until that could be disposed of, and execution of plaintiff's judgment was stayed until that was done. Afterwards (but it does not appear at what time) plaintiff and defendants agreed to refer the matters involved in defendants' counterclaim to Mr. Newby. But it does not appear that he ever took the account. Some time after this, plaintiff and defendants agreed upon terms of compromise as to defendants' counterclaim, in which defendants were to pay into court the sum of \$1,650, and to release any further claim they might have on account of said counterclaim, and plaintiff agreed to accept the \$1,650 in full satisfaction of his said judgment, and plaintiff also agreed in this compromise to pay all unpaid cost. It appears from the findings of the judge at fall term, 1894, that there remains \$29.20 due Jenkins and Franks, as witnesses, and \$25 allowed Mr. Newby as referee, still unpaid. The sum agreed upon—\$1,650—was

paid into court, but at what time this was done does not appear. The matter stood this way until fall term, 1894, when defendants made a motion to retax the costs that had been taxed against defendants under the judgment of 1891, and to tax them against the plaintiff and the said R. L. Cooper, his surety on the prosecution bond. This motion was resisted by Cooper, but allowed by the court, and, judgment being so entered against said Cooper, he appealed to this court. Then, leaving out of view the question of time (the motion being made more than one year after the judgment at fall term, 1891), can the judgment of the court appealed from be sustained?

Section 209 of the Code requires that, before a clerk shall issue a summons, he shall take from the plaintiff a bond in the sum of \$200, upon condition "that the same shall be void, if the plaintiff shall pay the defendant all such cost as the defendant shall recover of him, in the action." In contemplation of law, the parties pay the cost of litigation as the action proceeds, and this bond is given, it is true, entirely for the benefit of defendants. *Brittain v. Howell*, 2 Dev. & B. 108. The surety is not bound for plaintiff's cost. *Hallman v. Dellinger*, 84 N. C. 1. But the condition of the bond is to pay the defendants such cost as they shall recover of plaintiff "in the action." Then, if defendants did not recover of plaintiff any cost "in the action," the surety is not bound. And we see that in this case the plaintiff recovered of defendants \$2,445 and the cost of action. This amount, it is true, was reduced to \$1,650 by way of compromise and agreement of the parties, in which agreement the plaintiff agreed to pay certain cost. And, as he agreed to do so, he ought to pay it. But this agreement to pay this cost does not bind Cooper. He was no party to this agreement. The defendant did not recover this cost in the action, and Cooper is not bound for any cost except such as defendants "recovered in this action," and he recovered none.

Attorneys for defendants contend in their brief that this is a matter of discretion in the court below, from which there is no appeal, and cite as authority for this position the case of *State v. Massey*, 104 N. C. 877, 10 S. E. 608. But that case is under section 733 of the Code, and has no application to this case, and can in no way be authority for the position taken. It is also contended in the brief that no notice of appeal was given, and that the case on appeal was not served within 10 days. But the facts as they appear from the record are otherwise. It is also contended in the brief that we are bound by the facts found by the court below. We recognise this as the law, and decide the law of the case upon the facts as we find them in the record. Cooper, though not a party to the original action, was made a party to this proceeding, and had a right

to appeal. We therefore hold that Cooper is not liable for this cost, and that the judgment appealed from is erroneous. Error.

(116 N. C. 165)

**KIRBY v. BOYETTE et al.**

(Supreme Court of North Carolina. May 7, 1895.)

**TRUST FOR MARRIED WOMAN—POWER OF DISPOSITION.**

Where land is deeded to one on the express trust that he hold it for a married woman as a feme sole, free from any debts of her husband, she cannot, in the absence of express power in the deed, convey it without the joinder of the trustee; at least, where it was deeded to the trustee prior to the adoption of Const. 1868, art. 10, providing that the separate property of a married woman may, with the assent of her husband, be conveyed by her as if she were unmarried, as, even if that presents the imposition of restrictions, in a deed of trust for a married woman, on her power of alienation, it does not affect a prior trust.

Appeal from superior court, Wilson county; Hoke, Judge.

Action by Henry Kirby against Alexander Boyette and others to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Reversed.

H. G. Connor and E. W. Pou, for appellants. Shepherd & Busbee, for appellee.

EVERY, J. Isaac Boyette, intending to provide for his son's wife, on the 4th day of May, 1837, conveyed a tract of land to Henry Kirby (to use the language of the instrument itself), "upon the express trust and undertaking, however, that he shall hold the said land and improvements for the sole and separate use of Louisa V. Boyette, a married woman, and her heirs, as a feme sole, free from any debts or contracts of her present husband or any future husband she may hereafter marry." On the 8th day of December, 1880, the cestui que trust, Louisa, and her husband, executed, with privy examination and all of the usual legal formalities, a deed conveying the same land to Rountree, Barnes & Co. to secure the payment of the note of the husband, Nathan Boyette, for \$702.84, and advances for agricultural purposes made to him. The trustee, Henry Kirby, did not join in the mortgagee deed to Rountree, Barnes & Co., but has since become, by assignment, the owner of the note, and has brought an action against the heirs of Louisa, the cestui que trust, who are her children by the marriage with Nathan Boyette, to foreclose for default in the payment of the said note of Nathan, whose administrator is also a party defendant. The question presented is whether the deed of husband and wife without the joinder of the trustee passed the wife's interest.

It is settled by repeated rulings of this court that the power of a married woman to dispose of land held by her under a deed of settlement is "not absolute, but limited to the mode and manner pointed out in the instrument." She "is to be deemed a feme sole only to the

extent of the power expressly given her in the deed of settlement." *Hardy v. Holly*, 84 N. C. 608; *Kemp v. Kemp*, 85 N. C. 496; *Mayo v. Farrar*, 112 N. C. 68, 16 S. E. 910; *Monroe v. Trenholm*, 112 N. C. 634, 17 S. E. 439; *Broughton v. Lane*, 113 N. C. 161, 18 S. E. 85. This court has acted upon the theory that the wife derives her power of disposition of the property solely from a strict construction of the permissive provisions of the instrument creating the estate. *Mayo v. Farrar*, supra; 3 Pom. Eq. Jur. § 1105. It is apparent that it was the intention of the grantor that the trustee should hold the land for the sole and separate use of the married woman, and that it should be as free from liability for any debt or contract of the husband as it would have been had she been a feme sole. In the case at bar the trustee, claiming in his individual right by assignment, seeks to subject the land by foreclosure of a deed which was executed without his assent, signified by joining as a grantor. It is manifest that, if the court should lend its sanction to the validity of this conveyance, the result would be, not only to subject the land to the payment of the husband's debt, contrary to the express intent of the grantor in the deed of assignment, but without the assent of, and at the instance of, the trustee, standing in the antagonistic attitude of holder of the husband's note. In *Clayton v. Rose*, 87 N. C. 110, the court said: "The argument which seeks to deduce from adjudicated cases elsewhere a capacity in a feme covert to dispose of her equitable estate in land, when not restricted by the provisions of the instrument creating it, as if she were sole and unmarried, overlooks the case of *Hardy v. Holly*, 84 N. C. 681. \* \* \* We must take it to be the settled law of this state, at least, that a married woman, as to her separate property, is to be deemed a feme sole only to the extent of the power expressly given her in the deed of settlement." We find, therefore, in the opinion in that case, no support for the theory of the learned counsel for the plaintiff that the rule which the court intended to lay down in *Hardy v. Holly* was that a feme covert, where a mode of alienation was pointed out in the deed of settlement, was subject to its express provisions, but, in the absence of such restrictions, was under no restraint as to her power of disposition, except such as are imposed by article 10 of the constitution. It must be conceded that the headnote in *Norris v. Luther*, 101 N. C. 198, 8 S. E. 95, is misleading, but a critical examination of the case will disclose the fact that a decree of sale was vacated, a sale set aside, and a deed canceled because the decree had been rendered without proper service on a feme covert, and that ultimately some doubt was expressed by the court as to the title that would pass by the sale under the later decree. At all events, if the opinion is susceptible of the construction placed upon it by counsel, it is in conflict with the older as well as the later cases which we have cited. We are not prepared to admit

that the provisions of article 10 of the constitution shall be construed, not only as an enabling act as to the power of disposition of a feme sole over her separate real estate, but as a restriction upon the power of the person who transmits it to her by deed or devise to place any limit upon her authority to alien in the manner therein prescribed. Before the constitution of 1868 was adopted, the right to devise or convey land to a trustee for the sole and separate use of a married woman, and to restrict the power of alienation to a particular mode, as we have seen, existed, and was often exercised to protect females against the improvidence or extravagance of their husbands. We would be taking a long stride in a new direction were we to admit that the power of disposition of real estate, with all of the incidental rights to impose limitations, was taken away by implication in conferring a restricted right of alienation upon married women. *Hughes v. Hodges*, 102 N. C. 239, 9 S. E. 437; *Bruce v. Strickland*, 81 N. C. 267. It would seem more reasonable to hold that the constitution should not be construed, when it fails to expressly so provide, as operating in derogation of common right, and that the power conferred upon married women should be deemed subject both to the restrictions (as to privy examination and consent of the husband) prescribed in article 10 and to such limitations as it is lawful for a grantor or deviser to prescribe in a deed or will. But we mention this question merely to prevent any misapprehension, and will not further discuss or decide it here, since it is not directly raised in this case. The deed of settlement was executed on the 4th of May, 1837,—not in contemplation of the provision of the constitution of 1868,—and according to its terms was intended to protect the land against liability for the husband's debt. It is needless to cite authorities to sustain the proposition that the power subsequently conferred upon married women by the constitution was, at all events, subject to the constitutional right of disposition which had theretofore been exercised as inherent in the ownership. For the reasons given, we think that the judgment of the court below was erroneous. The court should have held, upon the case agreed, that the deed of Nathan Boyette and wife, Louisa, was ineffectual to convey the land without the joinder of the trustee. There was error. Let this opinion be certified, to the end that the proper judgment may be entered below. Error.

(116 N. C. 937)

**TILLET V. LYNCHBURG & D. R. CO. et al.**  
(Supreme Court of North Carolina. May 7, 1895.)

**ACTION AGAINST JOINT DEFENDANTS—MOTION FOR NEW TRIAL—ERROR IN OMITTING ONE DEFENDANT'S NAME.**

In an action against the lessor and lessee of a railroad, both defendants were sued jointly, and made a common fight by the same counsel, and a new trial was granted for an error ex-

cepted to by both. The lessor defendant moved separately for judgment on the verdict, and the lessee defendant for a new trial. The motion for a new trial and the exception to the overruling of the motion were signed by counsel for both defendants, and the appeal was taken by both defendants. *Held*, that mere inadvertence in entitling the motion for a new trial in behalf of the lessee only was immaterial, and a new trial granted to the lessee inured to both defendants.

On rehearing. Dismissed.

For opinion on appeal, see 20 S. E. 480.

R. O. Burton, Jones & Tillett, and W. W. Kitchin, for petitioner. Wm. A. Guthrie, for defendants.

**CLARK, J.** A new trial was granted to both defendants. 115 N. C. 602, 20 S. E. 480. This is a petition to rehear the case, and leave in force the judgment below as to the lessor company. As the case would still go back for a new trial as to the lessee company, we might have this anomalous state of things if the petition were granted: On a new trial below the jury might find either that there was no negligence, or that the plaintiff was guilty of contributory negligence, and there would be a judgment standing against the lessor for \$9,000 and costs for a wrong sustained by the plaintiff through the agency of the lessee, and a verdict and judgment in the same action that the lessee company had done him no wrong, but was entitled to recover costs against him for his false clamor. The court will be slow to so rule as to make possible such a condition. It must clearly appear that the lessor has been guilty of such neglect or failure to except as to put it beyond its power to claim the benefit of the new trial equally with its codefendant. In this case both defendants were represented by the same counsel, and, while separate answers were filed, the lessor company adopted the answer of the lessee, and "relied upon all the defenses therein pleaded." Both defendants excepted to the verdict and judgment. The lessor moved for a judgment in its favor on the verdict, and the lessee for a new trial upon certain grounds assigned in the motion,—among them, the ground on which this court declared there was error below, and which was an exception recited in the motion as having been made by the appellants (in the plural). This motion was signed, "W. A. Guthrie, Attorney for Defendants" (both defendants). The court refused both motions, and the entry states that "the motion for a new trial was overruled, to which the defendants [both defendants] excepted." The court rendered judgment against both defendants for \$9,000 damages and costs; and the record states, "From which judgment both defendants appealed to the supreme court." The defendants were sued jointly. They made a common fight. They had the same counsel. The ground on which this court granted a new trial was an error in the charge which could be excepted to after verdict (*Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 333), and which was

excepted to by both appellants. The lessor company thought it had an additional defense not open to the lessee, and moved separately for judgment on the verdict, but it is clear that it did not abandon the grounds for a new trial which it possessed in common with its codefendant. The motion for a new trial was signed by counsel as attorney for defendants (in the plural), the exception for overruling the motion was made by him in behalf of the defendants (in the plural), and the appeal was taken by him for both defendants. The mere inadvertence of counsel in entitling the motion for a new trial in behalf of the lessee will not overrule the fact that he signed such motion in behalf of both, excepted for its refusal, and to the error in the charge, in behalf of both, and appealed for both. In fact, the charge (in this particular, on which this court found there was error) having been excepted to by both defendants, and both having appealed, it would have been immaterial if the lessor had not joined in the motion below for a new trial. In *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513, it is said it would be "the better practice to assign errors in the charge on a motion for a new trial" below, but that it is not necessary. That the defendant joined in the exception to the charge, and in the appeal, and set out the exception in the statement of the case, was sufficient, even if it had not joined in the motion for a new trial. *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266. Petition dismissed.

(116 N. C. 843)

## MOORE v. ANGEL.

(Supreme Court of North Carolina. May 7, 1895.)

## RENT TO COSTS.

Code, § 525, provides that the plaintiff, upon recovery, shall be allowed costs when a claim of title to real property arises on the pleadings. *Held*, in trespass, where the defendant failed to disclaim title to all the land declared for, but recovered, according to the boundaries set up in his answer, with a greater amount for damages on his counterclaim than was allowed plaintiff, that plaintiff, is, notwithstanding, entitled to costs.

Appeal from superior court, Macon county; Shuford, Judge.

Action of trespass by B. W. Moore against J. P. Angel, and counterclaim by defendant. From a judgment for each of the parties for a portion of land and against the defendant for costs, defendant appeals. Affirmed.

J. F. Ray, for appellant.

AVERY, J. In his complaint the plaintiff alleged that he held title and possession of a certain tract of land, which he described by metes and bounds, and charged that the defendant had trespassed upon it. The defendant denied all these allegations, and set up, by way of counterclaim, that he was the owner and was in possession of a specified tract of land, a part of which was embraced

in the boundaries of that described in the complaint. In order to support an action for simple trespass, a plaintiff must show, where any person is holding adversely, actual possession; but, in the absence of adverse occupation, the constructive possession, which proof of title draws to him, is sufficient. *Harris v. Sneed*, 104 N. C. 377, 10 S. E. 127; *Cohoon v. Simmons*, 7 Ired. 189; *Carson v. Mills*, 1 Dev. & B. 546. If the defendant had disclaimed title to all of the boundary declared for in the complaint, to which he did not ultimately show a better right than the plaintiff, the burden would have rested upon the latter only to prove the amount of damage that he was entitled to recover. But, the issue of title to the whole tract being raised, the plaintiff proved to the satisfaction of the jury that he was the owner, and in contemplation of law in possession of a portion, of the land declared for, on which the defendant had trespassed. The title being put in issue, whether by trespass in ejectment or trespass *quare clausum*, it was proper that the findings of the jury as to the portions of the land to which each of the parties had shown title should be specific, and the necessity for such findings was only intensified by the fact that a counterclaim for trespass on the part of the plaintiff had been set up in the answer. But, leaving out of view every other aspect of the case, the findings that he was the owner of certain land, and that the defendant was a trespasser, entitled the plaintiff, by virtue of his having sustained the original allegations of his own right and the defendant's wrong, as the prevailing party, to judgment that he was the owner of the portion to which he had shown title, with at least nominal damages and costs. While the failure of the defendant to enter a disclaimer neither in trespass, in ejectment, nor in trespass *quare clausum fregit* deprives him of the benefit of proving a better title to a part of the land in dispute in himself, or out of the plaintiff, he must nevertheless submit to a judgment declaratory of the right of his adversary to the land, as to which the plaintiff has been compelled to show the title and prove the trespass. *Cowles v. Ferguson*, 90 N. C. 308; *Harris v. Sneed*, *supra*; *Murray v. Spencer*, 92 N. C. 264. This was a case within the meaning of section 525 of the Code, wherein "a claim of title to real property arose in the pleadings," and the plaintiff, if the issue based thereon was found in his favor, was entitled to judgment declaratory of his title, and for nominal damages, if none had been assessed, with costs. The statute in this respect is in affirmance of the principle established before its enactment. It is true that where an action is brought to enforce a contract, and the jury find that the plaintiff is indebted to the defendant in a sum exceeding what is due from him to the plaintiff, judgment may be given for the excess, and carries with it

the incidental right to recover costs. *Garrett v. Love*, 89 N. C. 206; *Hurst v. Everett*, 91 N. C. 399. But the rule established in such cases does not abrogate the other express provisions of the statute applicable where the title to real estate is put in issue. The ruling of the court was in accordance with law, as we have stated it to be. If the defendant had disclaimed title to all the land declared for, except that for which he proved his right, no issue as to the plaintiff's title would have been raised, and the findings that the defendant's title, disputed by plaintiff, was good, and that the defendant had sustained greater damage than had his adversary, upon both necessarily, perhaps on either, the defendant would have recovered costs. Whether this is a case in which the question of costs is the main point, as in *Futrell v. Deans* (at this term) 20 S. E. 1013, or is merely incidental to an appeal which involves the validity of the judgment, as in *Hobson v. Buchanan*, 96 N. C. 444, 2 S. E. 180, the practical result would be the same. Whether the judgment be affirmed or the appeal dismissed, the defendant would be liable for costs here. We adjudge that the plaintiff recover costs of the appeal. Judgment against the appellant for costs.

(116 N. C. 387)

#### STATE v. CHAMPION.

(Supreme Court of North Carolina. May 7, 1895.)

#### PERJURY—INDICTMENT—CERTIFIED COPY OF RECORD.

1. Indictment for perjury, charging the defendant with "knowing the said statement or statements to be false, or being ignorant whether or not said statement was true," is sufficient, being in the exact words of the form prescribed for such indictments by the act of 1889, c. 83.

2. Code, § 1342, provides that copies of all official recorded documents in any court or public office shall be as competent evidence as the original when certified by the keeper of such records. *Held*, that a statement by the register of deeds as to how much property was listed for taxation by the defendant, but not a copy of such list, was incompetent.

Appeal from superior court, Franklin county; Coble, Judge.

J. I. Champion was convicted of perjury, and appeals. Reversed.

Case: There was a motion to quash the bill of indictment, in that it charged the offense in the alternative, i. e. that the defendant made the statement knowing it to be false, or being ignorant whether or not said statement was true. The bill of indictment was as follows: "The jurors for the state, upon their oath, present that James I. Champion, late of Franklin county, on the 19th day of October, A. D. 1891, at and in the county aforesaid, did unlawfully and feloniously commit perjury upon a justification on a certain undertaking before S. G. Davis, a notary public in and for the state of North Carolina, which said undertaking was filed in a certain civil action pending in the su-

perior court of Nash county, wherein S. B. Ricks was plaintiff, and James Strother, Ed. Strother, and Lucius Strother were defendants, by falsely asserting on oath that he, the said James I. Champion, was worth, over and above his liabilities and exemptions allowed by law, one thousand and seventy dollars, knowing the said statement or statements to be false, or being ignorant whether or not said statement was true, against the form of the statute in such case made and provided, and against the peace and dignity of the state." Motion to quash was overruled, and the defendant excepted. The paper which contained the alleged false oath was introduced in evidence, and also certain other paper writings referred to in this opinion. There was a verdict of guilty. Motion to set the verdict aside, and for a new trial, by the defendant, upon the ground that the verdict was against the weight of the evidence, and on the further ground of the exceptions taken by the defendant in the course of the trial. Motion denied. Judgment, and appeal by the defendant.

W. M. Person and Argo & Snow, for appellant. The Attorney General, for the State.

MONTGOMERY, J. There was no error in his honor's refusal to quash the indictment. The motion to quash was based on the alternative form of that part of the indictment charging the defendant with knowledge of the falsity of the oath: "Knowing the said statement or statements to be false, or being ignorant whether or not said statement was true." The indictment in the respect complained of is in the exact words of the form prescribed for indictments for perjury by the act of 1889, c. 83, and approved in the case of *State v. Peters*, 107 N. C. 876, 12 S. E. 74.

The state offered as evidence a certificate of the register of deeds of Granville county, which is as follows: "I, Jas. A. Norwood, register of deeds for the county of Granville and state aforesaid, do certify that W. H. and J. I. Champion listed for taxation for the year 1891, as appears from the tax books on file in my office, 414 acres of land, valued at \$2,300; and I further certify that J. I. Champion listed for taxation the following personal property for said year (1891): 1 horse, \$75; 1 mule, \$75; 5 cattle, \$25; 4 hogs, \$10; farming utensils, \$50; household furniture, \$100,—total, \$335. Witness my hand and official seal, this the 5th day of January, 1894. J. A. Norwood, Register of Deeds," etc. This certificate was offered as some evidence to show that the defendant was not worth as much as he justified for on the 19th October, 1891. The defendant objected to its introduction, because it did not purport to be a copy of the tax record certified as required by law to be received in evidence. We think the objection was well taken, and that his honor ought not to



have overruled it. Section 1342 of the Code provides that "copies of all official bonds, writings, papers or documents recorded or filed as records in any court or public office \* \* \* shall be as competent evidence as the original when certified by the keeper of such records or writings under the seal of his office, when there is such seal, or under his hand, when there is no such seal, unless the court shall order the production of the original." A copy is a transcript of the original,—a writing exactly like another writing. The certificate used in evidence did not purport to be a copy in this sense. If such statements as this certificate were allowed to be used as evidence in courts of law, as copies, there would be danger that the interpretations and conclusions of the officers in charge of records would often be used in evidence, instead of the exact words and figures of the original entries. The record is the evidence, and must speak for itself, and the certificate of the register's office is only evidence of the correctness of the record. There is error, and there must be a new trial.

(116 N. C. 1046)

## STATE v. ROBINSON.

(Supreme Court of North Carolina. May 7, 1895.)

CRIMINAL LAW—FORMER JEOPARDY — APPEAL BY STATE.

1. A conviction of assault with a deadly weapon will not support a plea of former conviction in a trial for carrying a concealed weapon.

2. Where the jury returns a special verdict on the facts, and the court enters a verdict thereon of not guilty, the state may appeal.

Appeal from superior court, Brunswick county; Norwood, Judge.

Julius Robinson was indicted for carrying a concealed weapon, and from a verdict of acquittal the state appeals. Reversed.

The Attorney General, for the State.

CLARK, J. In *State v. Stevens*, 114 N. C. 873, 19 S. E. 861, it is said: "A single act may be an offense against two statutes, and if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Accordingly it was there held that the same act of selling a single glass of liquor might be separately punishable by the United States, by the state, and by the city, if sold without a license from each. While the act is one, the offenses are different. *State v. Yancy*, 4 N. C. 133; *State v. Reid*, 115 N. C. 741, 20 S. E. 468, 469. Here, however, the acts in fact are separate,—“assaulting” and “carrying a concealed weapon.” The assault is an entirely separate and distinct offense from that of carrying a concealed weapon, and it does not alter the case that the assault was made with a weapon illegally concealed. The assault with a deadly weapon is a complete offense, whether the weapon is carried concealed or openly.

The offense of carrying a concealed weapon is complete, irrespective of the fact that an assault is or is not committed with it. Therefore the conviction for an assault with a deadly weapon will not sustain a plea of former conviction in a subsequent trial for carrying a concealed weapon. *State v. Nash*, 86 N. C. 652; *State v. Morgan*, 95 N. C. 641. It was sufficient upon the special verdict for the court to have adjudged that the defendant was or was not guilty, but the entry upon such opinion of a verdict of not guilty worked no harm, and did not prevent the appeal by the state. *State v. Ewing*, 108 N. C. 755, 13 S. E. 10; *State v. Spray*, 113 N. C. 686, 18 S. E. 700; *State v. Gillikin*, 114 N. C. 832, 19 S. E. 152. Upon the facts found by the special verdict, a judgment of guilty should have been entered. The case will be remanded, that it may be so entered, and sentence passed on the defendant in accordance therewith. *State v. Cody*, 111 N. C. 725, 16 S. E. 408.

Reversed.

(94 Ga. 306)

McTIGHE et al. v. MACON CONST. CO.  
et al.

(Supreme Court of Georgia. Aug. 20, 1894.)

RAILROAD MORTGAGES—VALIDITY—DE FACTO CORPORATION—JURISDICTION OF FORECLOSURE—USURY.

1. There being in force a general law for the incorporation of railroad companies, if the subsequent special charters of the two railroad companies involved in this litigation were unconstitutional, and therefore wholly void, each of said companies was, nevertheless, a corporation de facto, and, as such, could acquire and own property, and would be bound to its creditors by all acts which would have bound it had it been duly incorporated under the general law. Bonds issued by it, and deeds or mortgages made to secure the same, are enforceable to the same extent as they would be if no special charter had been granted, and the company had been organized as a corporation in the method prescribed by the general law, and such bonds, deeds, and mortgages had been thereafter executed; and any person making claim upon the assets of one of these corporations de facto, whether as its own creditor directly, or as a creditor of such creditor or of a stockholder, sustains the same relation to it in respect to such claim as would be sustained under like circumstances were it a corporation de jure.

2. A corporation created under the general law of this state for incorporating railroad companies can bind by mortgage or trust deed, executed to secure bonds issued by it to provide funds for constructing its railroad, future acquired property, as well as property owned by it at the time of the execution of the instrument. This being so, a corporation de facto can do the like.

3. A loan of \$850 for the term of 40 years is not rendered usurious by the lender taking from the borrower his bond for \$1,000, bearing interest on that principal at the rate of 6 per cent. per annum, payable semiannually, although the bond contained a stipulation that, after 90 days' default upon any one of the installments of interest, the whole of the principal should then become due and payable; it not being stipulated that in this event the lender was not to account for any interest received, whether by discount or payment, over and above 8 per cent. per annum on the principal actually loaned, and it not appearing that there was any device or contrivance to cover up usury, or any intent or expectation

that default would be made in the payment of interest before the expiration of the full term of 40 years. Nor would it matter that the bonds were not, in fact, delivered and the money received thereon till after a lapse of 39 days or less from the date when the bonds began to bear interest at the 6 per cent. rate.

4. Where a railroad forming a continuous line, and located partly in this state and partly in an adjoining state, is mortgaged by a corporation (whether de facto or de jure) of which the courts of this state have jurisdiction, the mortgage consisting of a trust deed made to secure bonds issued by the corporation, the superior court of the county in this state having jurisdiction over the corporation may, in the exercise of its equitable powers, make a decree foreclosing the mortgage as to the corporate property embraced in it situate in both states, and may effectuate the decree by directing a sale of the whole property and the execution of a proper conveyance to the purchaser by the receiver, the trustee, and the mortgagor. And if the fact be that the adjoining state has incorporated a company which has been consolidated under the forms of law with a corporation (de facto or de jure) of this state, and that this consolidated company executed the mortgage, and is really the party before the court as the mortgagor, the truth of the case in this respect is admissible in evidence, and the jurisdiction is the same in all respects over the consolidated company as it would be over a corporation created exclusively under the laws of this state.

(Syllabus by the Court.)

Error from superior court, Bibb county; R. L. Gamble, Judge.

Creditors' bill by J. S. McTighe & Co. against the Georgia Southern & Florida Railroad Company and others. From a judgment rendered, the railroad company and others bring error. Affirmed.

The following is the official report:

This litigation was begun by petition in the nature of a creditors' bill filed by J. S. McTighe & Co. against the Georgia Southern & Florida Railroad Company, the Macon Construction Company, and others, under which petition a receiver of the defendant companies was appointed. Numerous interventions were filed, among them that of the Mercantile Trust & Deposit Company of Baltimore, trustee for the bondholders of the Georgia Southern & Florida Railroad Company, asking for foreclosure of the mortgages given to secure the bonds. It was agreed that this intervention was to be segregated from the main case and from the other interventions, and be tried separately. Said railroad and construction companies filed several pleas, which were stricken on demurrer by the intervener. McTighe & Co. filed an amendment to their petition, attacking the charter of the railroad company, on the ground that it was a special enactment of the legislature after the passage of the general act for the incorporation of railroads, and was void, and that the bonds and mortgages to secure them, made by the railroad company, and held by the Mercantile Trust & Deposit Company, were likewise void. It was alleged that the construction company was the real owner of the railroad and its property; and that McTighe & Co. had never dealt with the railroad company, but all their

dealings had been with the construction company, as owner of the road, etc. This amendment was disallowed. The pleas of the construction company were similar to those of the railroad company, with the additional allegation that the former was the owner of all the stock and property of the latter. These pleas will be set forth, in substance, in the order of the headnotes ruling upon them:

(1) The bonds held by intervener as trustee, or by the persons represented by it, and the mortgages sought to be foreclosed, are null and void, and were made without authority of law, the railroad company never having been properly and legally incorporated. The pretended charter of the railroad company was granted by act of the general assembly approved September 28, 1881, amended by subsequent special act; such act of incorporation being unconstitutional and void, the general assembly, prior to its passage, having passed a general law, having uniform operation throughout the state, providing for the incorporation of any and all railroad companies. All the acts of the railroad company under said special law, including the borrowing of money and the execution of said bonds and mortgages, are void, and not binding upon it.

(2) The mortgage sought to be foreclosed was executed when the railroad had been completed for only the first 20 miles from Macon, in the direction of Florida, and had obtained the right of way for the further construction of the road to Valdosta, Ga., and no further. All the property of defendant from Valdosta to the line of the state of Florida, together with the rolling stock belonging to it, was acquired by it after the execution of the mortgage; and defendant pleads that all said after-acquired property, and all property acquired after the execution of the mortgage, is free from the lien of the mortgage, and not covered thereby.

(3) The bonds held by intervener, or the persons represented by it, and the mortgages given to secure them, are infected with usury. The bonds were issued by the railroad company to the holders thereof on July 1, 1887, in the aggregate sum of \$3,420,000, payable July 1, 1927, with interest at 7 per cent. per annum from date, semiannually, on the 1st days of January and July, the principal indebtedness to become due, at the option of said trustee, upon the failure of the railroad company to promptly pay any interest installment at maturity, after 90 days from such default; while, in point of fact, the holders of the bonds loaned only \$2,907,000, but charged and received interest on the entire \$3,420,000 at the rate of 7 per cent. per annum; it being stipulated in each of the bonds that said interest should be reserved and paid on the face or par value thereof, instead of the amount so actually lent by the holders of the bonds. The mortgages now sought to be foreclosed were given to secure the usurious interest so contracted to be paid, as well as

the face or par value of said bonds. Therefore, \$513,000 of the aggregate amount called for by the bonds, and secured by the mortgages, together with the interest on the \$513,000 from the date of the bonds, which interest is also included in the bonds and mortgages, is usury; and plaintiff's demand should be reduced by the \$513,000, together with the interest thereon, and the interest paid on the \$513,000 in the past amounted to \$139,550. The instruments executed by the railroad company for the purpose of securing the bonds, and in the petition to foreclose termed "mortgages" or "deeds of trust," are in fact deeds attempting to convey to the intervener, as trustee, the absolute title to the property therein described, for securing the payment of the bonds; and, by reason of the above recited facts, the bonds being infected with usury, said deeds or instruments given to secure the payment thereof are absolutely void. Of the bonds held by the intervener, or by persons represented by it, 360, for \$1,000 principal each, were dated and executed July 1, 1887, and 3,060, for \$1,000 principal each, on July 24, 1888; the aggregate principal of all these bonds being \$3,420,000. Though these bonds were dated and executed as aforesaid, they were not in fact issued or delivered on said date. The 360 bonds first mentioned were delivered January 19, 1888; and the parties to whom they were so delivered, and who now hold and own them, loaned this defendant on them, and on the deed of trust executed contemporaneously with them, to secure their payment, \$306,000; said loan having been made to this defendant on January 19, 1888, and the interest on the bonds being payable on the 1st days of January and July in each of the years during which they were to run, which interest was represented by coupons attached to the bonds. Interest for 19 days had accrued on the bonds, according to the tenor thereof, since the maturity of the coupons falling due January 1, 1888, and before said loan was made this defendant. The interest coupons which matured on July 1, 1888, represented the interest on the bonds from January 1, 1888, to July 1, 1888, and included the interest for the 19 days from January 1 to January 19, 1888. These coupons were paid by this defendant in full, and no deduction was made for the 19 days; nor was credit for the 19-days interest allowed or contemplated at the time of the loan on January 19, 1888. This defendant only had the use of the money from January 19, 1888, and paid interest thereon and contracted to pay such interest from January 1, 1888. Defendant contends that the interest for the 19 days was improperly required of it, as well as the \$54,000 taken and reserved as discount in advance, both said sums being interest charged and paid for the first year of each loan, and was usury. The amount of this interest so overcharged was \$1,320. The plea then proceeded. Similar claim is made as to the 3,060 bonds of the second issue above

mentioned, the amount of interest or discount in advance claimed to have been taken as to these being \$459,000, and the amount of interest overcharged, for the time between the date of issue and the date of delivery, being \$19,880.

(4) The mortgages or deeds of trust in question, dated January 3 and July 24, 1888, were in evidence. The only material portions of them are the recitals that the Georgia Southern & Florida Railroad Company, a railway corporation under the laws of Georgia, was authorized by act of the legislature to consolidate with any railroad in Florida; that the Macon & Florida Air-Line Company, a railway corporation under the laws of Florida, had like authority to consolidate with any railroad company in or out of Florida; that in pursuance of the unanimous vote of the stockholders of the two railroads, respectively, a consolidation thereof was effected; and that the mortgage or deed of trust was executed by the consolidated company known as the Georgia Southern & Florida Railroad Company in favor of the trustee. There are further recitals as to resolutions of the board of directors, thereafter adopted and confirmed by the stockholders, authorizing the issuance of the coupon bonds of \$1,000 each, secured by the mortgage or deed of trust covering the railroad from Macon to Palatka, Fla., with all its properties enumerated, etc., and the provision, among others, that, in default of the payment of interest upon any of the bonds for a certain period, the whole principal sum secured by the deed should become due and payable, with the right in the trustee to sell the property under certain regulations, or apply to any court of competent jurisdiction to foreclose the mortgage, etc. The intervener proved, over defendant's objections, that the Macon & Florida Air Line was duly incorporated under the laws of Florida, and that said company and the Georgia Southern & Florida Railroad Company were duly consolidated as one railroad company, operating a railroad from Macon, Ga., to Palatka, Fla.; the objections being that such evidence was irrelevant and illegal, because the court had no jurisdiction over the railroad and other property in Florida, or authority to make any judgment concerning the same. The same ground of error was assigned upon the charge of the court, and upon the decree entered on the verdict finding that the mortgages of deed of trust should be foreclosed on the property in both states, and making directions for sale of the same.

Anderson & Anderson, for plaintiffs in error. Hoke Smith, Steed & Wimberly, Hardeman, Davis & Turner, Bacon & Miller, S. A. Reid, Gustin, Guerry & Hall, Hill, Harris & Birch, Washington Dessau, and O. L. Bartlett, for defendants in error.

LUMPKIN, J. The controlling questions presented in these cases are indicated in the

headnotes. How these questions arose will appear from an examination of the reporter's statement. We have not decided, and will not discuss, whether or not a special charter granted by the general assembly to a railroad company after the passage of the general law for the incorporation of railroad companies is unconstitutional, and therefore void. Among many good reasons which might be stated for pursuing this course, and which would, doubtless, be accepted as satisfactory, we deem it sufficient to say it is not now necessary to pass upon this question, it not being essential to a proper disposition of the present cases. We wish it distinctly understood, however, that we do not intend in anything which follows to intimate any opinion whatever upon this question; and, if any expression we may use should seem to do so, it must not be so construed.

1. If such a charter is unconstitutional, is not a company organized under it, at least, a *de facto* corporation, and, as such, capable of making contracts, acquiring and owning property, and of becoming bound to its creditors by all acts which would have been binding upon it had it been duly incorporated under the general law? We entertain no doubt at all, and will presently endeavor to show, that this question should be answered in the affirmative; and, if so, it will follow that bonds, deeds, and mortgages executed by the *de facto* corporation are valid, not only as against the corporation itself, but also as against any one making a claim upon its assets, whether as a creditor directly of the corporation, or as a creditor of its creditors or stockholders. It is too well settled, both upon principle and authority, to require argument, that neither a *de facto* corporation nor those who recognize and deal directly with it as a corporation will be heard to deny its rightful corporate existence; and there is no good reason for applying a different rule to one claiming assets of a *de facto* corporation acquired solely in the exercise of corporate functions, but for the assumption of which there would have been no company of any kind, and, of course, no assets. Nor is it at all material whether the claim be made directly or indirectly. Whatever may be the manner in which it is presented, if the assets sought to be reached were in fact assets of a *de facto* corporation, the very act of making the claim puts the claimant in the same legal attitude as a direct creditor of the corporation; for such claimant has no better rights in the premises than his debtor of whose rights he seeks to get the benefit, and consequently can no more dispute the existence of the corporation than could the latter. So far, therefore, as the parties to this record are concerned, we have only to show that railroad companies operating in Georgia under special legislative charters granted after the passage of the general law referred to are at least corporations *de facto*.

The fact that this very law was in force at

the time the railroad companies involved in the present litigation obtained their special charters makes it absolutely certain that, even if these charters are mere nullities, lawful and valid charters might have been obtained for just such companies. In other words, there was, beyond doubt, legal authority in this state for incorporating railroad companies with substantially the same rights, powers, duties, and liabilities as those specified in the special charters. This is a most important fact; for, where there cannot lawfully be a corporation *de jure*, there cannot be one *de facto*. This was distinctly ruled in *Evenson v. Ellingson*, 87 Wis. 634, 31 N. W. 342. "If an organization is completed when there is no law, or an unconstitutional law, authorizing such organization as a corporation," one who contracted with the organization is not estopped from denying its corporate existence. *Heaston v. Railroad Co.*, 16 Ind. 276. See, also, *Snyder v. Studebaker*, 19 Ind. 462, and cases there cited. In *Association v. Hennessy*, 11 Mo. App. 555, it was held that one who had subscribed for stock in a supposed corporation prohibited by the state constitution was not estopped from denying its lawful existence. "Corporations cannot exist except by force of express law: A society that cannot be incorporated because organized to resist the enforcement of laws cannot sue in its society name for the collection of a debt." *Schuetzen Bund v. Agitations Verein*, 44 Mich. 313, 6 N. W. 675. "A corporation organized under a void law cannot enforce a mortgage made to it; but, if not organized for an unlawful purpose, a receiver for it can demand in equity an accounting for the debt purporting to be secured thereby." *Barton v. Schildbach*, 45 Mich. 504, 8 N. W. 497. "A corporation *de facto* cannot exist in the absence of a law authorizing its organization; and in such a case the carrying on of the business in the corporate name is no evidence of user which can be considered in aid of corporate existence." *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638. In this connection, see, also, *Scovill v. Thayer*, 105 U. S. 143, and *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121. One of the headnotes in the latter case is as follows: "An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it had never been passed." And, accordingly, it was held that the acts of a person assuming to perform the duties of an office which was created by an unconstitutional law, and therefore having no *de jure* existence, were utterly void.

We may assume, without further citation of authorities, and without attempting any argument on the subject, that where the existence of a corporation of a given kind is positively forbidden by law, or where there is no valid, constitutional law authorizing the creation of such a corporation, it cannot exist, even as a corporation *de facto*. The rule thus stated

does not by any means, however, negative the soundness of the proposition that an organization assuming to be a corporation de jure, but for sufficient reasons not so in fact, may be a corporation de facto when it is of such a character that it could, under existing laws, have full and complete corporate being and powers. The doctrine is thus broadly stated in *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658: "A corporation de facto exists when, from irregularity or defect in the organization or constitution, or from some omission to comply with conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might lawfully be incorporated for the purpose and with the powers assumed, and a user of the rights claimed to be conferred by the law; that is, when there is an organization with color of law, and the exercise of corporate franchises and functions." In *Stout v. Zulick*, 48 N. J. Law, 601, 7 Atl. 362, it is said: "Where it is shown that there is a charter or a law under which a corporation, with the powers assumed, might lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights claimed under the charter or law, the existence of a corporation de facto is established." The supreme court of Illinois, in *McCarthy v. Lavasche*, 89 Ill. 270, held, in substance, that, even where a corporation has been formed under a charter which is unconstitutional and void, the stockholders would be estopped from urging this fact in order to defeat the collection of a bona fide debt against the corporation which a creditor is seeking to enforce under a provision of the charter making the stockholders liable individually. And see *Hudson v. Seminary Corp.*, 113 Ill. 618, as to what will constitute proof of the existence of a de facto corporation. "A de facto corporation that, by regularity of proceeding, might be one de jure, can sue and be sued; and a party who contracts with such corporation while it is acting under its de facto organization is estopped, in a suit on such contract, from denying such organization at the date of the contract." *Heaston's Case*, supra. The case of *East Norway Lake Church v. Frohlie*, 37 Minn. 447, 35 N. W. 260, is strongly in support of the proposition that there may be a de facto corporation where there is a law under which a corporation of the particular kind might be formed; and the decision seems to have been made irrespective of the question whether, in organizing the corporation, there was an attempt to comply with the requisite legal forms or not. This case also holds that no private person will be allowed to attack collaterally the regularity of the organization of such a corporation. "A party is estopped to deny the existence of a corporation at the time he contracted with it as such, if the corporation could constitutionally exist." *Turnpike Co. v. McCarty*, 8 Ind. 392. In *Missouri*

it has been held that even where a corporation is organized under a special charter, void because of a constitutional provision for incorporation by general law, a private party cannot question its rightful existence when it is recognized by the state, the latter alone being allowed to raise the question. *City of St. Louis v. Shields*, 62 Mo. 247. We find the following in *Central Ag. & M. Ass'n v. Alabama Gold Life Ins. Co.*, 70 Ala. 120: "When an association of persons is found in the exercise and user of corporate franchises, under color of legal organization, their existence as a corporation cannot be inquired into collaterally. If the state acquiesces in the usurpation, individuals cannot complain." The general rule that private persons will not be allowed to attack collaterally the validity of a de facto corporation is supported by many authorities, among which may be mentioned 7 Atl., supra, and cases there cited in note; *Duggan v. Investment Co.*, 11 Colo. 113, 17 Pac. 105, and cases cited; *Navigation Co. v. Neal*, 3 Hawks, 520; *Hasselman v. Mortgage Co.*, 97 Ind. 365, and authorities cited.

In addition to the numerous cases above noticed, we have examined a very large number of others, decided in states other than our own, many of which are more or less pertinent to the question in hand. In some, there are expressions and rulings not entirely in harmony with the conclusion we have reached, but we think we have settled upon and announced the true law. Before concluding this division of the present opinion, we will briefly refer to a few of our own cases which support the doctrine here laid down. *McDougald v. Bellamy*, 18 Ga. 411, recognizes the rule that a corporation, though unlawfully organized, is so far a valid corporation as to make it liable to creditors for its own acts. See, also, *Ice Co. v. Porter*, 70 Ga. 637. In *Bank v. Padgett*, 69 Ga. 159, it was held that, although a charter granted by the superior court to a manufacturing company was void, one who dealt with the company as a corporation could not deny its corporate existence. Where one corporation has dealt with another company as a corporation, recognizing it as such, the first corporation is estopped from denying the existence of the second. *Imboden v. Mining Co.*, 70 Ga. 86. On page 107, Chief Justice Jackson says: "This court, as, indeed, all civilized courts, has ruled that such recognition of a being—even of an artificial being—will stop the mouth of any other being, natural or artificial, from denying, in a case growing out of such recognition, that the being thus recognized ever had being." See, in this connection, *Lester v. Railway Co.*, 90 Ga. 802, 17 S. E. 113.

Our decision is not based upon the idea that the organization of these railroad companies under unconstitutional charters would make them de facto corporations, but upon the idea that the purposes for which they were organized being lawful and proper, if

they had obtained charters under the general law, and organized under them, which they might have done, they would, in substance, have done what they actually did; that is, they would have observed about the same forms and requirements in the one case as in the other. They undoubtedly attempted to organize according to some law, and did not set up to be corporations without pretense of legal authority. If the laws under which they proceeded were not good, they may, in our judgment, avail themselves of the existence of the general law on our statute book, and of its terms at least so far as to enable them to be regarded as *de facto* corporations, because they have done practically what that general law required, though not actually following it nor professing to do so.

2. No question was raised as to the power of either of the railroad companies, under its special charter, to embrace in a mortgage property acquired after the execution of the mortgage. The right to mortgage "future acquired property" was denied solely on the ground that these companies, being without legal charters, had no charter power for so doing, and that there was no other source from which such right could be lawfully derived. While it is true that section 1954 of the Code in effect restricts (except as to stocks of goods or other things in bulk, but changing in specifics) the property which a mortgage may embrace to that "in possession, or to which the mortgagor has the right of possession," it is also true that the general law of this state for incorporating railroad companies expressly provides that a company created thereunder may, by mortgage or trust deed executed to secure bonds issued to provide funds for constructing its railroad, bind property acquired after the execution of the instrument. If we have succeeded in showing that these railroad companies, supposing their special charters to be void, are *de facto* corporations, because of the existence of the general law, it would seem that they could make any contracts authorized by that law, and become bound by such contracts to those with whom the same were made. As a practical proposition, it is well known that most, if not all, of the railroads of any length in the United States which have been built for years past, have been constructed by issuing in advance bonds upon their entire lines, including the unbuilt portions, as well as those already constructed, with mortgages to secure the bonds covering the whole. If a *de facto* railroad company is a corporation for any purpose at all, it ought, on general principles, to have the power to mortgage "future acquired property"; and this seems to be the doctrine very generally recognized by the courts. Upon this question, see *Wright v. Bircher*, 72 Mo. 179; *City of Quincy v. Chicago, B. & Q. R. R. Co.*, 94 Ill. 537; *Wade v. Railroad Co.*, 149 U. S. 327, 13 Sup. Ct. 892; *Williams v. Winsor*, 12 R. L. 9; *Branch*

*v. Railroad Co.*, 3 Woods, 481, Fed. Cas. No. 1,807; *Seymour v. Railroad Co.*, 25 Barb. 281; *Holroyd v. Marshall*, 10 H. L. Cas. 191. And these citations might be indefinitely multiplied.

3. The third headnote expresses the views we entertain of the usury question presented. A calculation will show that if the bonds ran to full maturity, as contemplated, the lender of the money would not receive, in the aggregate, as much as 8 per cent. per annum for the use of the money, although at the beginning he put out on each bond only \$850, and at the end received \$1,000. The \$150 added to the 6 per cent. interest annually received would not amount to as much as 8 per cent. per annum on \$850 for the full term. That the bonds, by their terms, bore interest from a date previous to their delivery, makes no difference, because, notwithstanding this fact, the gross amount of interest for the full term would not have been equal to 8 per cent. per annum. So the original contract, if the bonds ran 40 years, was not usurious; and it does not appear that they contained any stipulation which would prevent a fair and legal adjustment of the interest between the parties in case the bonds became due earlier, because of a default in paying interest. Nor does it appear that, in providing for the maturity of the bonds in case of such default, there was any device or contrivance to cover up usury. The above is applicable if the railroad company issued the bonds and borrowed money directly on them. If that company delivered the bonds to the construction company under a contract with it, the latter, of course, had a right to sell them at any discount it pleased, and there would be no usury in such a transaction.

4. Had the decree foreclosing the mortgage on the Georgia Southern & Florida Railroad Company, and directing a sale of all its property in both states, been made by a court of the United States, its validity could hardly be doubted. The following federal cases are conclusive upon this question, and we are confident there are others to the same effect: *Randolph v. Railroad Co.*, 11 Phila. 502, Fed. Cas. No. 11,563; *Blackburn v. Railroad Co.*, 2 Flip. 525, Fed. Cas. No. 1,467; *Wilmer v. Railway Co.*, 2 Woods, 409, Fed. Cas. No. 17,775; *Id.*, 2 Woods, 447, Fed. Cas. No. 17,776; *Muller v. Dows*, 94 U. S. 444. The opinion of Mr. Justice Strong in the case last cited is so clear and pertinent that we feel justified in making copious extracts from it: "If such a foreclosure and sale cannot be made of a railroad which crosses a state line, and is within two states, when the entire line is subject to one mortgage, it is certainly to be regretted; and to hold that it cannot be would be disastrous, not only to the companies that own the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges span navigable streams in the United States, streams that are boundaries of two

states. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors? A vast number of railroads, partly in one state and partly in an adjoining state, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than one hundred millions of dollars have been invested on the faith of such mortgages. In many cases these investments are sufficiently insecure, at the best. But if the railroad, under legal process, can be sold only in fragments,—if, as in this case, where the mortgage is upon the whole line, and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale can reach only the part of the road which is within the state,—it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from the ownership of another part. And the franchise of the company is not capable of division." The learned justice further says that it is "undoubtedly a recognized doctrine that a court of equity, sitting in a state, and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant. True, it cannot send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees, when they are complainants. In *McElrath v. Railroad Co.*, 55 Pa. St. 189 (a bill for foreclosure of a mortgage), in which it appeared that a railroad company, whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the state of West Virginia as that in Pennsylvania. This case is directly in point, and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance; and the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot therefore declare void the decree which was made."

The remaining question is, can a state court, in a case of the kind now under con-

sideration, with all the parties at interest before it, and having jurisdiction of the corporation, decree a foreclosure, and direct a sale of the entire railroad and the assets of the company in both states? We think that, taking the precautions and following the course indicated in the headnote, it can. The leading case in support of this proposition is that of *McElrath v. Railroad Co.*, 55 Pa. St. 189, mentioned by Mr. Justice Strong. It is, for our purpose, squarely in point; and the fact that it was cited approvingly in a case decided by the supreme court of the United States makes it a very strong authority. It would therefore seem immaterial whether the jurisdiction in question is exercised by a state or a federal court. We deem it unnecessary to say more on this subject, except to cite the following authorities, which, to a greater or less extent, sustain the conclusion we have reached: *Mead v. Railroad Co.*, 45 Conn. 199; *Hand v. Railroad Co.*, 12 S. C. 314; *Wood v. Goodwin*, 49 Me. 260; 3 Wood, Ry. Law, § 474; *Jones*, R. R. §§ 413, 414.

If the foregoing views are sound, it follows, of course, that in admitting the evidence referred to in the headnote no error was committed by our gifted Brother Gamble, of the circuit bench, who handled with great skill these important and somewhat complicated cases. Judgment affirmed.

(94 Ga. 229)

#### ROME ST. R. CO. v. MCGINNIS.

(Supreme Court of Georgia. July 30, 1894.)

ACCIDENT AT STREET CROSSING—LIABILITIES OF STREET-RAILWAY COMPANY.

Where, without the knowledge of the conductor or the engineer, some unauthorized person applied a brake to the car attached to a dummy engine on a street railway while the engine and car were ascending a steep grade, and thus the progress of the engine was arrested, whereupon the conductor, in order to enable the engineer to go forward, had the brake taken off, and the engineer, not knowing that the brake would be taken off, and intending to go backward down the grade, reversed the engine at about the same moment when the brake was taken off, and in consequence of this inharmonious action of two minds under pressure of the emergency, each intending a proper object, and neither knowing of the intention of the other, the train backed too rapidly, and consequently collided with a wagon which was not expected to be on the track, and not known to be on it until it was too late to stop, and which would not have been there but for the mules drawing it having become suddenly frightened by the backward movement of the train, the calamity was a pure accident, and the driver of the mules, who sustained a personal injury in consequence of the collision, cannot recover.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Harvey McGinnis, by his next friend, against the Rome Street-Railroad Company. There was a verdict for plaintiff, and a new trial denied. Defendant brings error. Reversed.

The following is the official report:



McGinnis, by his next friend, sued the street-railroad company in an action for damages from personal injuries alleged to have been caused by a collision between the dummy train of defendant and a team which McGinnis was driving, because of the gross carelessness of defendant in running its train, in loosening the brakes and turning the train loose at or near the top of an incline, without any one to control the same; in having no rear brakeman, nor any person to give the engineer notice that there was any person in the street and on the track; in having no light at the rear end of the train, it being run at a dangerous rate of speed backward upon a public street of the city; in giving no warning of any kind of the approach of the train; in running the train upon a public street without its being properly manned; and in undertaking to ascend the incline without the brakes being released. There was a verdict for the plaintiff, the amount of which does not appear in the record. Defendant's motion for new trial was overruled, and to this ruling it excepted. The motion contained the grounds: That the verdict was contrary to law, evidence, etc. Also, because the court erred in charging: "A railroad company is not liable, and this railroad company was not liable, if anything of that kind appears to you, for the act of a passenger, one of the passengers traveling on its railroad car, unless some agent of the company permitted such an act when it could have been prevented, or unless you find that the railroad company ought to have had more men upon that car. You will look at the evidence, and see how that is. I say, unless there is some circumstance of that kind which makes the act of the passenger negligence on the part of the railroad company, then the railroad company is not liable for the act of the passenger, unless the railroad company could have foreseen and prevented it, or ought to have been so supplied with men as to have prevented it. That is to say, the railroad company is not bound to guard every point on its train to prevent a passenger from doing an improper or unnecessary or unreasonable thing. They are not bound, for instance, to guard their brakes, as a matter of law. I charge you that, but you will see under the facts of this case what was done, and under these instructions you will see whether anything of that kind is proven, and, if so, whether it is negligence on the part of the defendant railroad company here." Movant insists that this charge was error, in that there was no evidence to authorize the charge, "unless some agent of the company permitted such an act when it could have been prevented"; nor does the court explain to what extent the agents of the company should exercise care, and under what circumstances, to prevent injurious acts by passengers. Movant further insists that it was error for the court to charge, "or unless you find that the railroad company ought to

have had more men upon that car." This was error, unless the court had explained further that the shortage of men must have contributed to the wrongful act of the passenger. The shortage of men and the wrongful act of the passenger must in some way be connected with each other, and jointly have contributed to the injury. Movant insists that there is no evidence to authorize the court in submitting to the jury the question of negligence set forth in the full charge quoted in this ground. Error in charging: "If the plaintiff was injured by a collision on the street, and if the collision was caused by the negligence of the defendant, or any of its agents or servants, he would be entitled to recover." Movant insists that this charge is error, in that the court failed to charge that, if the plaintiff could have avoided the consequence of defendant's negligence by the exercise of ordinary care, he could not recover. Error in charging: "Where engines and cars are operating along the streets of a city, they must be so run as that they can be stopped in time to avoid collision with other vehicles using the streets. Yes, gentlemen, to make the running of a car and engine at any point proper, you would take into consideration all the surroundings, the character of the track, whether it was level or whether it was steep, and the situation of the parties, and under the circumstances say whether the conduct on that particular occasion was negligent, or whether it was in accordance with the exercise of ordinary care." Movant insists that this charge is error, in that it is not the law that engines and cars operated along the streets of a city must, at all times and under all circumstances, be so run as that they can stop in time to avoid collision with other vehicles using the streets. Movant contends that the law is that other vehicles using the streets should exercise care in avoiding collisions, as well as engines and cars operated on the streets, and the matter of avoiding collisions is one of mutual care and diligence, and is not exclusively confined to the engines and cars. Movant insists, further, that the remainder of the charge in no way relieves the error contained in the first paragraph, for it is not explanatory of, nor does it in any way elucidate, the first paragraph, nor explain what care was necessary and incumbent on the part of the plaintiff also. Error in charging: "You do not want to find for the plaintiff the full amount he would have earned in those years, but you want to find to-day such an amount as it would be worth to-day,—with accruing interest, the total amount that you would find. That is to say, you would want to find for to-day an amount for each of those years which, put at interest for seven per cent., would produce at the particular year that you are considering an amount equal to what he would have earned that year." Movant insists this charge is error, in that it does not state a correct rule or basis of computation whereby the



present value of plaintiff's lost capacity can be ascertained.

Dean & Smith and J. E. Dean, for plaintiff in error. Geo. & Walter Harris and Fouché & Fouché, for defendant in error.

LUMPKIN, J. Under the evidence in this case, the material portions of which appear in the reporter's statement, the injury to the plaintiff below was the result of a pure accident, and the defendant was not liable. The headnote sets forth the view we entertain of the case about as fully and as accurately as we would be able to do in an elaborate opinion. In order to test the correctness of the conclusion we have reached, nothing is essential except an examination of the evidence, to do which would not be materially aided by further comment on our part. Judgment reversed.

(91 Ga. 530)

**NUSSBAUM et al. v. CONNOR.**

(Supreme Court of Georgia. Aug. 20, 1894.)  
EXECUTION AGAINST FIRM—VARIANCE FROM JUDGMENT.

This case is ruled by *Waxelbaum v. Connor* (decided April 23, 1894) 19 S. E. 805. (Syllabus by the Court.)

Error from superior court, Pulaski county; W. H. Fish, Judge.

To property levied on under execution, Missouri Connor interposes a claim of ownership, and from a judgment dismissing the levy M. Nussbaum brought error. Plaintiff in error died while the case was pending in the supreme court, and Henrietta Nussbaum, administratrix, was substituted as plaintiff in error. Reversed.

The following is the official report:

M. Nussbaum & Co. filed a suit in Pulaski superior court against "W. B. Fitzgerald & Co., a firm composed of W. B. Fitzgerald, of Wilcox county, and Charles Fitzgerald and J. W. Connor, of Pulaski county, as copartners under said firm name and style," on two promissory notes. Each one of said copartners was legally served personally. At the trial term, judgment by default was taken "against the defendant W. B. Fitzgerald & Co., W. B. Fitzgerald, Charles Fitzgerald, and J. W. Connor." Execution was issued upon said judgment, and against the goods, etc., "of W. B. Fitzgerald & Co., W. B. Fitzgerald, Charles Fitzgerald, and J. W. Connor." It was levied on a certain town lot, as the property of J. W. Connor, and claim interposed by Missouri Connor. Upon the hearing, claimant moved to dismiss the levy because "the declaration was against W. B. Fitzgerald & Co., a firm composed of W. B. Fitzgerald, of Wilcox county, and Charles Fitzgerald and J. W. Connor, of Pulaski, as copartners under said firm name and style. The judgment was against W. B. Fitzgerald & Co., W. B. Fitzgerald, Charles Fitzgerald, and J. W. Connor. The

execution was against W. B. Fitzgerald & Co., W. B. Fitzgerald, Charles Fitzgerald, and J. W. Connor,"—wherefore claimant alleged there was a fatal variance "between the judgment and declaration, and the execution being against W. B. Fitzgerald & Co., and, in addition, being against W. B. Fitzgerald, Charles Fitzgerald, and J. W. Connor, that the execution is not authorized by the pleadings in said case, and, for said reasons, that the levy in said case should be dismissed." The motion was sustained, and plaintiff excepted.

J. H. Martin, for plaintiff in error. L. C. Ryan, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 689)

**IVEY v. GRIFFIN et al.**

(Supreme Court of Georgia. Aug. 20, 1894.)

REDEMPTION FROM TAX SALE—EFFECT OF.

One who, as owner, redeems land sold for taxes within the time limited by law, acquires no title to the land by reason of the act of redemption, or of a conveyance made to him, founded upon and recognizing his right to redeem. In contests with strangers to such conveyance, he cannot establish the fact of ownership merely by introducing this conveyance together with evidence of the tax sale and the authority to sell.

(Syllabus by the Court.)

Error from superior court, Wilcox county; W. H. Fish, Judge.

Action by F. C. Ivey, administrator, against T. L. Griffin and others. From a judgment of nonsuit, plaintiff brings error. Affirmed.

The following is the official report:

The case of Ivey, as administrator of Horne, against Griffin and Allison & McConnell, being a petition for damages to the timber on lot of land 128 in the First district of Wilcox county by defendants, and to enjoin them from further trespassing thereon, and to cancel their deed to the same as a cloud upon plaintiff's title, was tried. After plaintiff had closed his evidence, a motion for nonsuit was made by defendants, which was granted, and to this decision plaintiff excepted. The evidence for plaintiff showed that the lot in question was regularly sold by the sheriff of Wilcox county under a *fi. fa.* legally issued against the lot as wild land; the *fi. fa.* having been issued October 1, 1877, levied April 13, 1878, and the sale made June 4, 1878. The *fi. fa.* was issued for state and county taxes on the lot for 1876. The sheriff conveyed the lot by deed to Reid and Tomberlin, as purchasers at the sale. This deed contained the proper recitals and was duly recorded. On this deed was a transfer of it, for value received, by the grantors, to Daniel A. Horne, dated May 19, 1879. Plaintiff also introduced a deed to the land, properly witnessed, and executed by Reid and Tomberlin to Horne. This deed recited the purchase by Reid and Tomberlin at the sheriff's sale under the tax *fi. fa.*; that Horne, the owner of the lot,

"comes within twelve months, as provided by law," and paid to Reid and Tomberlin the amount for which they bought at the sheriff's sale, with interest thereon at 20 per cent. per annum, together with the costs of the sale; and that, therefore, in consideration of the premises, Reid and Tomberlin remised and relinquished unto Horne, his heirs, etc., all the right, title, and interest they might have had under said sheriff's deed, had not the same been redeemed under the law as aforesaid. Also letters of administration to Ivey on the estate of Horne. Also a lease of all the round timber on the lot in question, made February 1, 1888, by Griffin to Allison & McConnell, for a consideration of part cash and part to be paid thereafter, and which lease recited that Griffin agreed to warrant and defend the timber for a term of three years from January, 1889. Plaintiff then showed by several witnesses that Griffin had cut and hauled from the lot a certain number of pieces of raft timber, of a certain value, which timber was cut in 1886 and 1887; that Allison & McConnell had cut and boxed said lot for turpentine purposes, commencing in January, 1888, and continuing to use and dip the turpentine therefrom for three years; that the value of the trees on the lot, for turpentine purposes as used by Allison & McConnell, was \$500; and that the land was a wild lot. The motion for nonsuit was on the grounds that plaintiff had shown no title to the lot, because the deed by Reid and Tomberlin to Horne showed that the latter was the claimant of the land before it was sold for taxes, and that Horne was not a purchaser thereof, but merely redeemed the land from them within the statutory period, and acquired no title from them, but was simply relegated, by his transaction with them, to the title he possessed before the tax sale, and, as no title had been shown in him prior to the tax sale, plaintiff has shown no title on which he could recover the land, or for damages done to the timber of the land, and because plaintiff had shown no joint cause of action against defendants, and especially as to timber that was cut by Griffin before he leased the land for turpentine purposes to Allison & McConnell; defendants insisting that, as it was a joint action against them, it was incumbent upon plaintiff to show a joint liability.

Hinton & Cutts, Hal Lawson, and J. H. Martin, for plaintiff in error. D. M. Roberts and E. H. Williams, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 717)

**CARTERSVILLE LAND CO. v. PRATT et al.**

(Supreme Court of Georgia. July 30, 1894.)

This case falls within the general rule that the first grant of a new trial will not be reversed.

(Syllabus by the Court.)

Error from superior court, Bartow county; W. M. Henry, Judge.

Action by the Cartersville Land Company against Crawford & Field and others. There was a verdict for plaintiff, and a new trial granted. Plaintiff brings error. Affirmed.

John W. Akin and Neel & Swain, for plaintiff in error. R. J. McCamy, J. H. Wilke, and W. I. Heyward, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 662)

**OUTEN v. NORTH & SOUTH ST. R. CO.**  
(Supreme Court of Georgia. July 30, 1894.)

**INJURY TO STREET-CAR PASSENGER—CONTRIBUTORY NEGLIGENCE.**

The plaintiff showing by his own evidence that although he had requested the driver of the street car to stop at a designated place, and had received a rude and profane answer, yet, upon failure of the driver to stop, plaintiff had jumped from the car while it was in motion, and without again requesting the driver to stop, or notifying him of his purpose then to alight, and it not appearing that the driver, when he struck the team, knew that the plaintiff was attempting to alight, or that there was any such emergency as would justify the plaintiff in alighting from the moving car, the court committed no error in granting a nonsuit.

(Syllabus by the Court.)

Error from city court of Floyd; W. T. Turnbull, Judge.

Action by Robert Outen against the North & South Street-Railroad Company for personal injuries. From a judgment of nonsuit, plaintiff brings error. Affirmed.

The following is the official report:

Outen sued the street-railroad company for damages, and was nonsuited. His testimony was: He boarded defendant's horse car to go to a point near Chambers' mill, and paid his fare into the box. Driver told him he would put him off wherever he desired. His object was to get off at a point between Kane's store, on upper Broad street, and Johnson's store, in Forestville. Between those stores no streets cross the one the car was on. It is a distance of half a mile. Before he arrived at his destination, he told the driver he desired to alight at the telegraph post, where there is a large sign, which was about 50 yards ahead. On approaching that point he again told the driver he wanted to get off there. Driver replied: "I will stop; but if I don't, by G— jump off." He was standing at this time on the front platform with the driver. Three other persons were also on the front platform and the car was crowded inside. His elbow or right arm was pressing up against the driver. The driver did not stop at the designated point, but, about 50 feet beyond, slacked up to a slow gait, his horses walking, and the car moving about as fast as a man would in a "peart" walk. Plaintiff went upon the steps to get off, placed his hand upon the iron rail-

ing of the car, his left foot on lower step, and raised his right foot, and stepped out straight from the car, "a little in this direction" (indicating to the rear of the car). Just while in this effort, the driver hit the horses, and the car gave a sudden jerk, which threw plaintiff flat on the pike road, a little on his left side, inflicting bruises on his hip joints, abdomen, right shoulder, under his right arm, and on the calf of his right leg. While lying there, he heard a great deal of laughing and hollowing on the car; some one said, "There lay a dead negro." The car never stopped, but moved rapidly on. Plaintiff got up, and hobbled down town to his wagon; then went home, several miles in the country, but suffering so all night, from the fall, he came to town next day, and got Dr. Harris to examine him. He was then carried home, remained in bed 8 or 10 days, and was confined to his room about 18 days from the fall, and during that time suffered much in his hip, shoulder, and right arm. He still has pain under his right arm, and is not able to work more than half his accustomed time. He is 71 years old. Before he was hurt he cut and hauled wood to town, and made \$1.25 per day. Now he cannot earn one-half that, for when he cuts wood any length of time that pain returns under the arm. This was the first time he ever rode on a street car, but he had traveled all over the world, and had been on steam cars. Dr. Harris testified: It had been so long since he examined plaintiff, he could not remember what he found was hurt, but remembered there was an abrasion somewhere. He had frequent occasion to ride over that portion of the street-car line on which plaintiff undertook to travel. It is about half a mile from Kane's store, in Rome, to Johnson's store, in Forestville. No streets cross the road over which the car runs between those points, but there is a dim road near Chambers' gin, coming into it, and one street just this side of said gin, coming into it. Where said street comes into it there is a fall off, or precipice, about three feet high, but he could get off on that side if the car would stop. He did not know the custom of the company about stopping out there. He was a doctor, and they always stopped at any point he desired, between Kane's and Johnson's stores, to let him get off. He never got off a car without their first stopping. He was 62 years old, and did not consider it safe.

Hal Wright, for plaintiff in error. Reece & Denny, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 670)

#### FORMBY v. SHACKLEFORD.

(Supreme Court of Georgia. Aug. 6, 1894.)  
REVIVAL OF JUDGMENT—INDORSEMENT OF EXECUTION—LEVY IN ANOTHER COUNTY.

Until an execution issuing from a justice's court has been properly "backed," a constable of

a county, other than that in which the writ was issued, has no authority to make any levy or return by virtue thereof. Consequently, an entry of "No property to be found," made by such a constable on an execution before it was "backed," will not suffice to keep the judgment on which the execution was founded from becoming dormant. Under section 2914 of the Code, the entry must be made by an officer authorized to execute and return.

(Syllabus by the Court.)

Error from superior court, Heard county; S. W. Harris, Judge.

To property levied on under execution in favor of W. T. Formby against G. W. Formby, Joseph Shackleford interposed a claim of ownership. The levy was dismissed, and plaintiff brings error. Affirmed.

Code, § 2914, referred to in the syllabus, reads as follows: "No judgment hereafter obtained in the courts of this state shall be enforced after the expiration of seven years from the time of its rendition, when no execution has been issued upon it; or when execution has been issued, and seven years have expired from the time of the last entry upon the execution, made by an officer authorized to execute and return the same: such judgments may be revived by *scire facias*, or be sued on within three years from the time they become dormant."

The following is the official report:

A justice court *fi. fa.* issued in the county of Troup, November 21, 1862, upon a judgment rendered November 15, 1862, in favor of W. T. Formby against G. W. Formby, was on April 29, 1892, "backed" by a justice of the peace of Heard county, and on the next day levied on certain land in Heard county. A claim was interposed by Shackleford. The case coming on to be heard claimant moved to dismiss the levy, on the ground that the *fi. fa.* was dormant because the entries of *nulla bona* were made by constables of Heard county, where defendant then resided, before the *fi. fa.* was backed by a justice of the peace of Heard county, and no entries were made by a constable of Troup county, from which the *fi. fa.* issued. The court sustained the motion, to which ruling plaintiff excepted. The following entries appeared on the *fi. fa.*, in addition to the backing by the justice of the peace of Heard county and the levy on realty above mentioned: "Cost paid by defendant, December 3, 1863." "Nulla bona, Dec. 17, 1868." "Receipt for return of no property, January 5, 1869." And entries of *nulla bona*, November 8, 1875, December 1, 1880, and February 24, 1887. It was admitted that the constables who made the entries resided, at the time of making them, in Heard county, where the defendant resided.

Frank S. Loftin, for plaintiff in error. W. H. Daniel, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 675)

**REDDICK et al. v. HUTCHINSON.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**LANDLORD AND TENANT—WHEN RELATION EXISTS  
—LIEN FOR RENT—PRIORITY.**

Where the owner of land puts another in possession thereof under a parol contract to allow the latter to purchase it at a given price, and pay for it in annual installments, but on condition that if he was not able to pay for the land he should pay as rent for the same, each year he occupied it, 10 per cent. of the price agreed upon, and the taxes on the land, and the occupant of the land failed for two years to make any payment to the owner, either as purchase money or as rent, the relation of landlord and tenant existed between the parties as to the second year's occupation; and a distress warrant sued out by the landlord for the rent due under the contract for that year had, as to the tenant's crop of that year, priority over a general judgment, of older date, against the tenant.

(Syllabus by the Court.)

Error from superior court, Putnam county; W. F. Jenkins, Judge.

To property levied on under execution in favor of Reddick & Webster against J. W. Rivers, R. W. Hutchinson interposed a claim. From a judgment sustaining the claim, plaintiffs bring error. Affirmed.

The following is the official report:

An execution in favor of Reddick & Webster, issued from a judgment obtained in 1888 by them against J. W. Rivers, was levied upon certain farm products raised during 1892 by Rivers on land which R. W. Hutchinson claimed to own, and which he claimed was occupied by Rivers as his tenant. The property levied upon was sold, and the proceeds claimed by Reddick & Webster under their execution, and by Hutchinson under distress warrant for rent. The cause was tried in the county court of Putnam county. Hutchinson was the only witness. He testified: He bought the land occupied by Rivers, and upon which the crops were raised, in 1890, at Rivers' request, paying therefor \$700. He then made this parol contract with Rivers: To allow Rivers to buy the land from him at \$700, paying him in installments each year. If Rivers were not able to pay him for the land, he (Rivers) was to pay witness each year that he occupied it, as rent, 10 per cent. on \$700, and the taxes on the land. Witness does not hold Rivers' note for purchase money, and Rivers has no bond for titles. Rivers gave the land in for taxation, and occupied it in 1891 and 1892, and has paid witness neither purchase money nor rent. Witness did not foreclose his lien in 1891. Rivers has put some improvements on the land, the nature and value thereof being unknown to witness. The judge presiding held that the relation of vendor and vendee, and not landlord and tenant, existed between petitioner and Rivers, and ordered the money applied to the execution of Reddick & Webster. Hutchinson took the case by certiorari to the superior court, alleging that the decision was erroneous: Because the relation of landlord and tenant did exist between Hutchinson and

Rivers, and the lien of the former for rent was better than the lien of the common-law judgment. Because Rivers having recognized such relation as existing between him and Hutchinson, by an acquiescence in the foreclosure of petitioner's lien, and the claim of priority over the common-law judgment, Reddick & Webster could not set up and claim for him another and different relation; their judgment having been obtained prior to the contract between Rivers and petitioner, and no faith or credit having been given by them to Rivers on the strength of such relation. The certiorari was sustained, and Reddick & Webster excepted.

S. T. Wingfield, for plaintiff in error. Jos. S. Turner, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(94 Ga. 685)

**FLANNAGAN v. FORREST, Sheriff, et al.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**PRINCIPAL AND SURETY—RIGHT OF SURETY TO  
ENFORCE SECURITY.**

A mortgage made by a principal in a promissory note to his surety, to indemnify the latter against loss on account of his suretyship, may be foreclosed after maturity of the note, and payment thereof by the surety to the creditor, though the payment be made, not in money or property, but by executing a several promissory note, which the creditor accepts in full payment of the joint note. Although the surety, if he so elected, might, under Code, §§ 2176, 2177, have the right to be subrogated to the creditor's status on the joint note, yet a foreclosure by him of the mortgage is a renunciation of that right; and the joint note is thus wholly extinguished, not only as to the surety, but as to his principal.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

To the proceeds of sale under a mortgage given by P. B. Williford to B. F. Matthews, several persons interposed claims. From a judgment rendered on the trial, W. W. Flannagan, trustee, brings error. Reversed.

The following is the official report:

On July 5, 1892, P. B. Williford and B. F. Matthews gave a promissory note to the Bank of Americus for \$2,136.58, interest, and attorney's fee. The note was due November 4, 1892. Also a similar note for \$1,060.90. On July 11, 1892, Williford executed to Matthews a mortgage on all his stock of goods, in a certain storehouse in Americus, to indemnify Matthews against loss on account of Matthews having signed these two notes as surety for Williford. Matthews foreclosed this mortgage, alleging, among other things, in his affidavit of foreclosure, that since the notes became due he has fully paid and settled the same, paying the amount due upon them to the bank; that Williford failed and refused to pay them, was totally insolvent, and could not pay the notes when they became due; and that the property described in the mortgage is all the property of Williford. A mortgage

*fi. fa.* was issued upon this foreclosure. Matthews transferred it to the Bank of Americus four days after the foreclosure, and the bank transferred it to Flannagan, trustee. Various mortgage *fi. fas.* were levied on the property, and the money, being in the hands of the sheriff for distribution, was claimed by W. J. Matthews and others, mortgage creditors of Williford, by attachment creditors, and by interventions of unsecured creditors, as well as by Flannagan, trustee, as transferee of B. F. Matthews. The validity of the lien claimed in favor of Flannagan was attacked upon the ground that the mortgage was an indemnity mortgage to B. F. Matthews; that B. F. Matthews had sustained no loss, and had not paid the notes for which the indemnity mortgage was given, and had no lien on the fund. In addition to the facts above stated, the following appears on this issue: The Bank of Americus sued Williford and Matthews on the notes. After this suit was brought, Matthews gave his notes to the bank in payment, which were accepted by the bank in payment, and the notes marked "Paid in full." The mortgage was transferred as above stated, and an order was taken in the suit on the notes reciting that Matthews, the security, had paid them, and transferred them to the Bank of Americus, which had transferred them to Flannagan, trustee, to whom the claim belonged; and it was ordered that the suit proceed in the name of the bank, for the use of Flannagan, trustee, against Williford. Judgment was taken by default in the action against Williford. When Matthews gave his individual note to the bank, he thought he was solvent, and gave the note with the understanding that the bank was to take bank stock as collateral, and he only transferred the mortgage as collateral. He transferred the mortgage which he gave after he gave the note. Nothing was said about transferring the mortgage at the time he gave his note, which note was accepted by the bank in settlement. Subsequent events proved that he was not solvent, and he is now insolvent. He gave no security or collateral to his individual note. At the time he gave the note, he intended to give bank stock as collateral, but never did, and transferred his indemnifying mortgage. He had not been sued on the notes of Williford, and no judgment has been rendered against him. He has never paid the individual note he gave in payment of the Williford note, and has never sustained any loss on account of his suretyship on the Williford note. He has never been sued on his individual note. Although it was recited in the order above mentioned that the note made by Williford, on which Matthews was security, was paid off by Matthews, and transferred to the bank, it appears from the testimony of Matthews that when he paid the Williford note by giving his individual note the Williford note was transferred to him (Matthews). The court below held that

the mortgage of Flannagan, trustee, transferee, had no lien on the funds, and could not participate in the distribution, and instructed the jury to so find, which they did. To this ruling by the court, and to the directing the verdict, Flannagan, trustee, excepted.

Jas. Dodson & Son, for plaintiff in error.  
Fort & Watson, Guerry & Son, W. M. Hawkes, R. L. Maynard, E. A. Hawkins, J. A. Ansley, and Clarke & Hooper, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 683)

FRICK et al. v. TAYLOR.

(Supreme Court of Georgia. Aug. 14, 1891.)

TRUSTS—DEED WITHOUT CONSIDERATION — MORTGAGE LIEN—PRIORITY—CLAIM OF THIRD PERSON—EVIDENCE.

1. One who, by fraud and deception and without paying or promising any consideration therefor, obtains from an illiterate person a conveyance of land, the latter thinking he was conveying personal property, holds the title, not for himself, but as trustee; and a subsequent mortgagee, to whom he mortgages the land as security for a pre-existing debt takes in subordination to the trust, whether he had notice of the fraud or not.

2. On the trial of a claim case the claimant, without other pleading than the ordinary issue in claim cases, may give in evidence the fraud to defeat the enforcement of the mortgage *fi. fa.*, and maintain his equitable title to the premises, although the deed procured from him by the mortgagor is still outstanding, and the jury may find the property not subject by reason of the perpetration of the fraud.

3. A joint note given by two persons for the rent of land, not otherwise described than as "on Buck creek," is not admissible in evidence to show that one of the makers severally was the payee's tenant of the lands now in controversy, it not appearing that these lands were on Buck creek, or where the Buck creek land was situate.

4. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Macon county; C. C. Smith, Judge.

To property levied on under execution in favor of the Frick Company against C. A. Taylor, John Taylor interposed a claim. There was a judgment for claimant, and plaintiffs bring error. Affirmed.

The following is the official report:

A mortgage *fi. fa.* in favor of Frick Company against C. A. Taylor and north half of lot number 191 and lot 194, in the Second district of Macon county, was levied on said land. A claim was interposed by John Taylor to the north half of lot 191, and 50 acres off the north side of lot 194. The property was found not subject. Plaintiffs moved for a new trial, which motion being overruled, they excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and because the verdict was contrary to the entire charge. Further, because the jury erred in not finding the property subject, as, after the evidence had all been submitted, argument had,

and pending the charge of the court, claimant's counsel withdrew the issue of forgery made on the deed from John Taylor to C. A. Taylor, dated February 29, 1876, to the north half of lot 191, and one-fourth of lot 194, and, there being no plea of fraud before the jury, the jury should have found the property subject. The mortgage in question was dated January 23, 1889. Error in refusing to admit evidence offered by plaintiff, to wit, the original suit of Malsby & Avera against John Taylor and Bob Cooke, with the entry thereon of personal service on Taylor, the original judgment on said suit, and the note on which the suit was founded. This suit alleged that Taylor and Cooke were indebted to Malsby & Avera for four bales of middling lint cotton, each weighing 500 pounds, worth \$160, on a note given for rent of land, dated March 3, 1891, payable to C. A. Taylor or bearer, and due October 1, 1891. A copy of the note was attached. Its contents are sufficiently stated above, except, as stated therein, that it was given for land on Buck creek. There was personal service on defendants, and judgment by the court in favor of plaintiffs. The evidence on the trial of the claim case, as to whether claimant had rented the land in question from defendant in execution, was conflicting. Error in charging: "A bona fide purchaser for value is one who parts with something of value at the time he takes his title; one who takes a mortgage to secure a pre-existing debt is not a bona fide purchaser for value. The equity of one who had paid value would be superior to such mortgage." Error in charging: "If you believe from the evidence that John Taylor paid full value for this land, and that C. A. Taylor, by fraud or otherwise, procured a title from him without paying him therefor, and afterwards mortgaged it to Frick & Co. to secure a debt which was already in existence, then Frick & Co. would not be a bona fide purchaser for value, and John Taylor's title to the land would be superior to such mortgage, and it would be your duty to find the property not subject,"—there being no plea of fraud before the jury. Error in charging: "If you find this title was procured by fraud, then no title could pass, yet Frick & Co., who took the mortgage, unless they had notice of the fraud, would be protected, unless you should find that they had notice of the fraud, or that this mortgage was given to secure a pre-existing debt, then in that event, they would not be protected,"—there being no plea of fraud before the jury. Error in the following: Mr. Turner, of counsel for claimant, stated as follows: "I want to request your honor to charge a matter I think you have inadvertently omitted. You instructed the jury that if he attorned to the landlord he would be estopped. I want to ask you to charge, on the converse of that proposition, that if he did not attorn to him, or if the lands he rented were other lands, or if the

fraud was perpetrated upon him, he would not be estopped by having attorned to C. A. Taylor as landlord. By the Court: Well, I give that in charge to you, gentlemen of the jury. While I have charged you, if you believe he paid rents and attorned to Charles Taylor as his landlord, he would be estopped, upon the other hand, if you believe he did not, or that he was procured by fraud to do that, and it was the fraud of Taylor, then he would not be estopped; or if you believe, though he may have paid him rent, it was the rent for other land, and not the land now in question, the rent he paid in order to amount to an estoppel must have been the rent for this land now in question,"—there being no plea of fraud before the jury. After claimant's counsel had withdrawn the issue of forgery, counsel for plaintiffs requested the court to charge "that if John Taylor made title to this land to C. A. Taylor, and subsequently, while title was under that deed in C. A. Taylor, a mortgage was made by C. A. Taylor to Frick & Co., without any notice upon the part of Frick & Co. of any fraud or any irregularity in the deed, the presumption would be that Taylor had a right to make the mortgage, and the mortgage would be good. By the Court: Well, I charge you that. I give you that statement in charge, but at the same time presumption may be overcome by proof; that would not be prima facie true if there was proof to overcome it." Plaintiffs claim that the request to charge should have been given without qualification, or that the qualification as given by the court did not fully present the case to the jury. Error in charging: "Or, if fraud was perpetrated upon him, he would not be estopped by having attorned to C. A. Taylor as landlord,"—there being no plea of fraud before the jury. Error in charging at all on the subject of fraud. Error in admitting the following testimony of claimant, over objections of plaintiffs: "C. A. Taylor told him it was a deed to some cows; that if he would sign it, and send the cow up to his house, that he (C. A. Taylor) would protect him against some debts that some Jews claimed witness owed him, but which he had paid; that C. A. Taylor took him out on the piazza, and told him this; that he never signed any deed except that he thought it was for cows; that he drove the cows up to C. A. Taylor's; that C. A. Taylor carried the finest one to Americus; that he thought the deed to C. A. Taylor was for cows; that he never made any deed to the land." Plaintiffs objected, on the ground that there was no plea of fraud, and that it was not proper evidence on an issue of forgery; and claimed that the court erred in admitting the evidence for the above reasons, and because it was illegal and irrelevant.

J. A. Ansley and Edwards & Greer for plaintiffs in error. J. W. Haygood and

Hardeman, Davis & Turner, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 687)

SLATER et al. v. DEMOREST SPOKE & HANDLE CO. et al.

(Supreme Court of Georgia. Aug. 20, 1894.)

PAROL EVIDENCE—EXPLAINING WRITTEN GUARANTY.

Where a letter of defendant was relied upon by the plaintiff, and is now sought to be enforced, as a promise by the former to pay a debt owing to the latter by a third person, the evidence of the writer of the letter as to what he meant or intended in writing it is inadmissible. In such case, ambiguity may be explained by surrounding facts, but not by undisclosed intention. (Syllabus by the Court.)

Error from superior court, Habersham county; C. J. Wellborn, Judge.

Action by Slater, Myers & Co. against the Demorest Spoke & Handle Company and another. Defendants had judgment, and plaintiffs bring error. Reversed.

The following is the official report:

Slater, Myers & Co. brought their petition alleging that the Demorest Spoke & Handle Company and W. B. Frazell were indebted to them \$114.91, besides interest, on the following instrument: "Demorest, Ga., August 13, 1892. Messrs Slater, Myers & Co., Richmond, Va.—Gentlemen: Replying to yours of the 11th, would say, in purchasing Mr. Robinson's stock of goods we assumed \$1,000 indebtedness on the goods. We were to pay \$100 of it monthly. Before he left the store I had him give me a list of the firms he desired me to pay first, and the amounts to each one. Your firm's name was on the list, and the amount \$25. We have lived up to our contract with him; and when he tells us who and the amount we are to pay September 9th, to the amount of 100, will do so. Be assured you will get your pay. Your man must have misunderstood me about paying the full amount of his by the 9th of Aug. I did say we would pay the entire amount, but not at one time. We have, by making a sale of a car load of our handles, paid to one of his creditors \$400; so we have paid, during the first month since we bought the store, \$500 of his indebtedness. \* \* \* Yours, truly, The Demorest Spoke and Handle Co., W. B. Frazell." The plaintiffs alleged that the promise contained in the foregoing instrument was made under the following circumstances: W. F. Robinson was indebted to plaintiffs on and before August 13, 1892, \$114.91, on an account; and the defendants had before that date become indebted to Robinson by the purchase of a stock of merchandise, and were still so indebted, and plaintiffs had been notified by Robinson of said indebtedness. Robinson informed plaintiffs that defendants had assumed that account. Be-

fore the date named, defendants had verbally promised plaintiffs' agent to pay the sum named, and so promised in writing on August 13, 1892. Relying on said promises, plaintiffs failed and were prevented from bringing suit against Robinson until he became insolvent, and had removed beyond the limits of the state. At the trial the instrument declared on was put in evidence, and an agent of plaintiffs testified: "I called at the store of W. F. Robinson, and there found W. B. Frazell, who told me that the Demorest Spoke & Handle Company had bought out Robinson. Afterwards I called on Frazell, and presented Robinson's account to him; and he said the account would be paid, that they had assumed certain liabilities, and that the account of plaintiffs was among the liabilities assumed. Frazell said the Demorest Spoke & Handle Company owed Robinson about \$1,000 as balance on stock of goods at that time, and that he said to me the account would be paid as stipulated, and I so wrote plaintiffs." One of plaintiffs testified: "The Demorest Spoke & Handle Company made us several payments on the account of Robinson. We relied on promises of defendants. I would have commenced suit, but for these promises." Frazell testified: "I am, and was in 1892, secretary and treasurer of the Demorest Spoke & Handle Company. I wrote the letter introduced by plaintiffs, but meant that I would pay plaintiffs' claim against Robinson if Robinson told us to do so. Did not mean to pay it unless he did so instruct. At the time the letter was written the Demorest Spoke & Handle Company owed Robinson about \$500. I paid plaintiffs on the account of Robinson \$25. Do not remember the date, but it might have been about August 10, 1892. Never made them any other payment. Soon after that time, Robinson left the state, and is still out of it. The Demorest Spoke & Handle Company has paid Robinson all they owed him, and the \$25 I paid plaintiffs was all Robinson ever told me to pay that firm." Plaintiffs objected to Frazell testifying in contradiction or explanation or construction of the letter, and the overruling of this objection is assigned as error.

J. C. Edwards, for plaintiffs in error. J. J. Bowden, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 672)

PERRYMAN v. POPE.

(Supreme Court of Georgia. Aug. 6, 1894.)

DURESS—THREATS TO LEVY ON PROPERTY—ATTACHMENT—TRIAL OF TRAVERSE.

1. It was not error to charge the jury in addition to section 2637 of the Code, or as preliminary to giving that section in charge, that a threat on the part of the creditor (to whom the note in suit was made payable), or his attorney, to resort to law would not amount to duress, the

only threat disclosed by the evidence being one to levy on the debtor's property.

2. When an attachment case comes on for trial, and there is a pending traverse of the ground of attachment, not previously disposed of for the term by continuance or otherwise, the whole case should be tried together; and it is error for the court to exclude legal and competent evidence offered by the defendant to establish the truth of his traverse, the exclusion being rested on the theory that the ground of attachment was not open to traverse after the property attached had been replevied. As was ruled in *Brumby v. Rickoff* (this term) 21 S. E. 232, the right of traverse is not lost or affected by replevy.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Action in attachment by J. N. Pope against J. D. Perryman, administrator. From a judgment for plaintiff, defendant brings error. Reversed.

The following is the official report:

Attachment was sued out on the ground that defendant was about to remove without the limits of the county. At the return term he filed a traverse of this ground, having previously given a replevy bond. At the trial he offered to introduce evidence in support of his traverse; but the court excluded all evidence touching the question of the traverse, holding that by the giving of the replevy bond the attachment was dissolved, and no issue could be raised as to the ground of attachment. The bill of exceptions recites: "No action was taken as to the traverse, the same being still on the docket for trial;" and that on the trial the evidence was confined by the court to the issue on the declaration, being the issue of duress in obtaining the notes sued on. The jury found for the plaintiff, and defendant's motion for a new trial was overruled, which is the ruling excepted to. The grounds of the motion are that the verdict is contrary to law and evidence; that the court erred in excluding all testimony in reference to the traverse of the ground of attachment, holding that the giving of the replevy bond dissolved the attachment, and no issue could be raised as to the ground thereof; and that the court erred in charging the jury "that a threat to resort to law on the part of plaintiff would not amount to duress," without adding that the jury had a right to take this circumstance, coupled with the other testimony, on the question of duress. The court did charge the law as contained in section 2637 of the Code,<sup>1</sup> and directed the jury that if, applying these principles to the evidence, they found that the notes were obtained by duress, they should find for the defendant. In the judgment overruling the motion it is stated that the question arising on the traverse of the

ground of attachment can be disposed of on the trial of same, it still being on the docket undisposed of.

Reese & Grow and Reid & Stewart, for plaintiff in error. Adamson & Jackson, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 683)

MIXON v WARREN et al.

(Supreme Court of Georgia. Aug. 20, 1894.)

ACTION ON NOTE—PAYMENT AS A DEFENSE—NON-SUIT.

Although the evidence in behalf of the defendant's theory of payment was slight, it was sufficient to carry the case to the jury, and the court erred in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by John Warren and another, administrators of Thomas Warren, deceased, against W. J. Mixon, on a note. Plaintiffs had judgment, and defendant brings error. Reversed.

The following is the official report:

The administrators of Thomas Warren, deceased, sued W. J. Mixon on a promissory note for \$137.50, dated October 23, 1887, and due January 1, 1892. The note recites that it is for the purchase money of "130 acres of lot of land number eight in the First district of Wilcox county." Defendant pleaded as follows: Making the note fall due at the time stated was a mutual mistake, and was the clerical error of James M. Mixon, who drew the note for himself and Thomas Warren. The time the note should be due was January 1, 1890. Further, defendant has paid off the note sued on in full to Thomas Warren, on or about January 16, 1891, the facts being as follows: On October 23, 1887, he purchased of Warren about 130 acres of land in Wilcox county for \$600, paying Warren \$50 cash, and giving his four promissory notes of that date for \$137.50 each, due on the 1st of January of each of the years 1888, 1889, 1890, and 1891; and this suit is filed upon the note due January 1, 1890. Defendant has paid in full, and has in his possession, all of said notes, except the one due January 1, 1890. In April, after the note sued on became due, he paid to Thomas Warren \$15, but the same was not then credited on the note, for the reason that Warren represented to defendant that the note was lost or mislaid. Afterwards, on or about January 16, 1891, defendant made a payment of \$210 or thereabout, with direction to Warren to settle in full the note sued on, and to place the balance on the note which became due January 1, 1891. The credit was made on said last note on January 30, 1891, for \$72.92, and the balance of it has been paid by defendant to the administrators of Warren. The reason defendant did not take up and get into his possession the note sued on was that Warren, at the time of the payment

<sup>1</sup> The section reads: "Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will."



in full of this note, represented to defendant that said note was lost or mislaid, and assured defendant that he would never be put to any trouble about it. No one was present at the time said payment in full was made; and defendant will be compelled to rely upon the circumstances to establish the facts, not being permitted himself to testify. During his life, and shortly before his death, Thomas Warren stated to James M. Mixon, who has drawn all the papers for Warren and defendant, that defendant had paid nearly all the money due on these notes. At the trial, after the introduction of the note sued on, defendant introduced the other three notes referred to in his plea. Each of these three is for the same amount as the one sued on, and bears the same date. They are due, respectively, on January 1, 1888, 1889, and 1891. The first recites that it is for the purchase money of "lot of land No. eighty, containing 180," in the First district of Wilcox county. Each of the other two recites that it is for the purchase money of "one hundred and thirty acres of lot of land No. eight," in said district and county. On the back of the last was: "73.92. Rec'd on the within note seventy-three dollars and ninety-two cents, this Jany. 24th, 1891." James M. Mixon testified that he wrote the note sued on, and was present when the contract between Thomas Warren and W. J. Mixon was made, no one else being present but himself and the parties to the contract. The consideration of the note sued was land purchased by defendant from Warren, for which defendant gave \$50 in cash and his notes for the balance. Witness did not remember the amount of the notes. Thought three notes were given, but was not sure. Being shown the three notes above mentioned, he testified that he wrote them, and they were a part of the same transaction. Defendant did not give more than these three notes, together with the one sued on. According to the recollection of witness, these notes so given were to fall due one each year, and the first one fell due in 1888; so that they should have fallen due in 1888, 1889, 1890, and 1891, and the note sued was to be due in 1890. Warren died in November, 1891. Not more than six months before his death he stated, in conversation with witness, that defendant was an honest, hard-working man; that defendant did not then owe him very much; and that defendant had paid him nearly all that he had been due for the purchase money of the land Warren had sold him. John Warren testified that he made the entry of credit on the note due in 1891, by authority of Thomas Warren. Did not remember the circumstances of making the entry. Did not know how many notes were given to Thomas Warren by defendant. There must have been five, but did not know. Was not present when notes were given, and never heard Thomas Warren or any one say how many notes there were. The court directed a verdict for the plaintiffs, which ruling is ex-

cepted to, because the evidence was sufficient to have been passed on by the jury as upholding the plea. Counsel for plaintiffs took the verdict for attorney's fees in addition to principal and interest; and defendant assigns error, because the note contained no agreement to pay such fees. The judge certifies that he only directed the verdict for principal and interest, and did not know the fees had been included therein until this bill of exceptions was presented to him, and that it was surely a mistake of counsel, unknown to the court, which can be cured by directing the fees written off. A further assignment of error is that plaintiffs sued in the capacity of administrators, and there was no evidence that they were the administrators of Thomas Warren. As to this the court certifies that no objection was made at the trial that plaintiffs were not such administrators. The question was not raised in any manner. There was no plea to that effect, nor motion for nonsuit.

Hal Lawson, for plaintiff in error. Littlejohn, Thomson & Nicholson, for defendants in error.

PER CURIAM. Judgment reversed.

(95 Ga. 277)

BAILIE v. AUGUSTA SAVINGS BANK.

(Supreme Court of Georgia. Jan. 14, 1895.)

BANKING—DEPOSIT OF CHECK—LIABILITY OF BANK FOR FAILURE TO COLLECT.

1. Where a check upon a bank in North Carolina, payable to the order of a named person, was, by his indorsement, made payable to the order of another person, described as "trustee," who resided in Georgia, and the latter, after indorsing the check in blank, delivered it to his *cestui que trust*, who deposited it in a bank in the city of her residence, of which she was a regular customer, and with which she kept an account, and her account was thereupon credited with the check as such, and not as cash, and it was not the intention of the parties that the title to the check should pass to the bank as absolute owner, but that the latter should undertake its collection for the benefit of the depositor, the bank was not liable for the value of the check as a purchaser of the same.

2. Where, under the circumstances above indicated, a bank received for collection from a customer a check which, by the exercise of proper diligence, might have been collected, it became, in the absence of any express or implied contract to the contrary, liable for any neglect of duty whereby the collection of the check was defeated, whether such neglect arose from the default of its own officers, or from that of its correspondent or agent, to whom it may have sent the check for collection; and in such case it would be immaterial whether such correspondent or agent was the bank upon which the check was drawn or another.

(Syllabus by the Court.)

Error from city of Richmond; W. F. Eve, Judge.

Action by Sarah R. Bailie against the Augusta Savings Bank. There was judgment for defendant, and plaintiff brings error. Reversed.

The following is the official report:

Suit was brought by Sarah R. Bailie

against the Augusta Savings Bank for \$1,000 and interest, claimed to be due on account of the nonpayment by the bank of the principal sum on demand, which sum was claimed to have been deposited with the bank for her by her trustee. The jury found for the bank, and the plaintiff excepted to the refusal of a new trial.

Among other evidence introduced was the following statement of facts agreed to by both sides: Prior to November 21, 1891, plaintiff had been a depositor with defendant, having a regular pass book. On that day a deposit was made by her, and the following entry was made on the pass book: "Check on First National Bank of Wilmington, \$1,000." This check was: "No. 86. Wilmington, North Carolina, Nov. 19, 1891. First National Bank of Wilmington, pay to the order of E. S. Tennant, secretary, one thousand dollars, \$1,000. Carolina Interstate B. & L. Per C. E. Borden, Treasurer." It was indorsed: "Pay to the order of George A. Bailie, trustee. E. S. Tennant, Secretary." Also: "George A. Bailie, trustee for Sarah R. Bailie and children." Defendant indorsed it thus: "Pay to the order First National Bank, for account Augusta Savings Bank, Augusta, Ga. W. B. Young, Cashier." On the same day defendant forwarded the check to the First National Bank of Wilmington, with a letter, stating that the check is inclosed "for collection and return"; and further, "Protest all unpaid papers at once, unless otherwise instructed." The check was received by the First National Bank of Wilmington on Monday, November 23, 1891, and such receipt acknowledged in a letter written to defendant on that day. The First National Bank of Wilmington charged the same to the account of C. E. Borden, treasurer, who had to his credit that day \$1,596.71, leaving a balance to his credit of \$596.71. The Interstate Building & Loan Association had no account in its corporate name on the books, though C. E. Borden was its treasurer, and the money of said corporation was credited to his account as such. On Wednesday morning, November 25, 1891, the First National Bank of Wilmington announced that it had suspended payment. It received deposits and paid checks on the 24th up to 2 o'clock p. m., the regular hour for closing the bank. The name of the Augusta Savings Bank does not appear upon the books of the First National Bank of Wilmington in any way except upon the collection book. Upon the appointment of a receiver for the last-named bank, he found therein a letter addressed to the Augusta Savings Bank, inclosing a check on New York for the amount of this collection of \$1,000, less 10 cents. Defendant wrote to said receiver, requesting him to return the check which had been so forwarded for collection; but he refused to surrender it, claiming that it was a voucher. He has since returned it to the drawer of it, and

admitted the claim of the drawer for the balance to his credit. The first information of the failure of the Wilmington bank was received by George A. Bailie, plaintiff's husband, from the president of the National Bank of Augusta. On the day after the failure, Percy May, the teller of the August Savings Bank, called upon Bailie, and told him the bank had failed, and that his check was drawn up. Neither plaintiff nor her husband had, previously to the failure, heard a word affecting the solvency of the bank; nor, at the time of the deposit and the transmission of the check, had the defendant any notice or knowledge of any insolvency of the Wilmington bank. Upon information of the failure, defendant charged off on plaintiff's deposit book the amount of said deposit. She notified the Carolina Interstate Building & Loan Association of the fact, but the association refused to recognize any liability on its part. This association was, and still is, in good standing financially, being a corporation of North Carolina. H. M. Borden, the cashier of the First National Bank of Wilmington at the time of the drawing of the check and up to the failure of the bank, was vice president and a director of the building and loan association. George A. Bailie, plaintiff's husband, was an officer of the Augusta branch of said association during the time referred to, and had negotiated, for the trust estate of his wife and children, a loan on real estate in the city of Augusta, upon which improvements were being erected; and it was upon this property that this money was to be expended for the purpose of paying for the improvements. At the time of the transmission of the check for collection there was, and still is, in the city of Wilmington, another bank which was and is in good standing credit, to wit, the Bank of Hanover.

Frank H. Miller and Wm. K. Miller, for plaintiff in error. J. R. Lamar, for defendant in error.

SIMMONS, C. J. 1. In the absence of anything indicating a different understanding, a bank which, in the ordinary course of business, receives from a depositor a check upon another bank, and credits it on his deposit book, not as cash, but as a check, will not be held to be an absolute purchaser of the check. "If a bank does not wish to assume the relation of a debtor for the paper to the depositor, this intention may be manifested in a very explicit manner by crediting the paper as paper." *Railway Co. v. Johnston*, 23 Blatchf. 492, 27 Fed. 243; *Thompson v. Giles*, 2 Barn. & C. 422; 2 Morse, Banks, § 583. This the bank did in the present instance, the entry on the depositor's pass book being: "Check on First National Bank of Wilmington, \$1,000." Nor will the mere fact that the depositor is allowed to check against the credit change the import of the transac-

tion so as to preclude the bank from charging back the amount of the credit if the check is not paid. See, on this subject, 2 Morse, Banks, §§ 583-587, and authorities cited.

2. The court instructed the jury that, "if the Augusta Savings Bank, in the ordinary course of business, selected the First National Bank of Wilmington to collect the check, and the Bank of Wilmington negligently failed to collect the same, or if it collected the money and failed to remit, the savings bank is not liable to the plaintiff for such negligence or failure." Error was assigned upon this instruction and others to the same effect, and it was contended that, in the absence of any agreement to the contrary, a bank which receives a check from a check customer for collection is liable to the customer for any negligence whereby the collection of the check is defeated, whether such negligence is that of its own officers or that of an agent or correspondent to whom it sends the check for collection. In support of the holding of the court below, various decisions are relied on, which hold that, if the check is not payable in the place where the bank which receives it for collection is situated, but has to be sent to a distant place to be collected, the bank receiving the check from the customer is not liable for the default of the agent to whom it sends the check for collection, if it has exercised due care in the selection of such agent. These decisions are based upon the view that in such case the customer, knowing that the check cannot be collected by the ordinary officers or servants of the bank, but that this service must be performed by a subagent at the place where the check is payable, impliedly authorizes the selection of such subagent, and thereby assumes the risk of any failure of duty on the part of the latter; and that the benefit which may accrue to the bank, where no specific compensation is received for the service, is not a sufficient consideration from which to imply an undertaking on the part of the bank to assume that risk itself. *Dorchester & Milton Bank v. New England Bank*, 1 Cush. 177; *Jackson v. Bank*, 6 Har. & J. 146; *Stacy v. Bank*, 12 Wis. 629; *Aetna Ins. Co. v. Alton City Bank*, 25 Ill. 243; *Bank v. Scovill*, 12 Conn. 303; *Daly v. Bank*, 56 Mo. 94; *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. 101; *Guelich v. Bank*, 56 Iowa, 434, 9 N. W. 328; *Third Nat. Bank of Louisville v. Vicksburg Bank*, 61 Miss. 112; *Bank v. Sprague (Neb.)* 51 N. W. 846. And see 1 Morse, Banks, § 268 et seq. On the other hand, there are numerous decisions upholding the rule of liability contended for by the plaintiff in error. This is the rule laid down by the supreme court of the United States. See *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, in which the question is elaborately discussed. The decision in that case was unanimous, and the case of *Bank v. Triplett*, 1

Pet. 25, which was relied on in some of the cases above cited as authority for the contrary view, is there explained and distinguished. This is also the rule in England. See decision of the house of lords in *Mackersy v. Ramsays*, 9 Clark & F. 818, 3 English Ruling Cas. 762; also *Van Wart v. Woolley*, 3 Barn. & C. 439; 5 Dowl. & R. 374. And the same rule has been adopted in the states of New York, New Jersey, Indiana, Ohio, Michigan, Minnesota, and Montana. *Allen v. Bank*, 22 Wend. 215; *St. Nicholas Bank v. States Nat. Bank*, 128 N. Y. 26, 27 N. E. 849; *Titus v. Bank*, 35 N. J. Law, 588; *Tyson v. Bank*, 6 Blackf. 225; *Express Co. v. Haire*, 21 Ind. 4; *Reeves v. Bank*, 8 Ohio St. 465; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; *Streissguth v. Bank*, 43 Minn. 50, 44 N. W. 797; *Power v. Bank*, 6 Mont. 270, 12 Pac. 597. See, also, *Kent v. Bank*, 13 Blatchf. 237, Fed. Cas. No. 7,714; *Taber v. Perrott*, 2 Gall. 565, Fed. Cas. No. 13,721. The question has not been dealt with in any prior decision of this court. In our opinion, the sounder doctrine is that which holds the bank liable. The collection of checks, drafts, and other commercial paper constitutes an important feature of the business of banking as generally conducted, and for the transaction of this branch of their business banks have their regular correspondents in different parts of the country. In the selection of the correspondent the customer for whom the collection is to be made is not consulted. As a rule, he does not know the name or the financial standing of the correspondent, and it is not contemplated that they will have any communication with each other. Under these circumstances, we think a customer from whom a bank receives paper for collection has a right to assume, in the absence of any agreement to the contrary, that the undertaking of the bank comprehends the whole service to be performed, and that the agent employed by the bank in this service is its own agent, and not the agent of the customer. So treating the undertaking, the case falls within the general rule of agency that by the employment of under-agents to perform a part of the work which he has contracted to do the employer becomes responsible to those with whom he contracts or deals in his business, and will be held liable for the negligence or omission of duty of his agent in the course of his employment. There seems to us to be no good reason why a different understanding should be inferred, and a different rule of liability applied, because the bank cannot make the collection itself, but must employ an agent for that purpose. "The general rule of law that an agent is liable for a subagent employed by him is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself without employing a subagent." *Lord Campbell, in Mackersy v. Ramsays*, supra. This rule is applied to ordinary collecting agencies receiving claims

for collection at distant places (Whart. Ag. § 544, and cases cited; *Hoover v. Wise*, 91 U. S. 308; *Bradstreet v. Everson*, 72 Pa. St. 124), and we do not see any substantial difference between the case of such an agency and that of a bank which receives such claims for collection.

It makes no difference that the bank does not charge anything for the collection. The benefits which the bank derives generally in the making of such collections, from the use of the funds while in its custody, the advantages which may arise from business associations and the profits on exchange, are held to be, and we think may properly be regarded as, a valuable consideration for the undertaking, and as sufficient to uphold the liability incident thereto. See *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 238, 5 Sup. Ct. 141; *Titus v. Bank*, 35 N. J. Law, 588, and other cases cited *supra*. What was said in the case of *Bank v. Gullmartin*, 88 Ga. 797, 15 S. E. 831, as to the insufficiency of casual or incidental benefits to constitute the bank a bailee for hire, has no application in a case like this. That was the case of a special deposit of bonds, and the bank, of course, had no right to make use of the deposit. The doctrine that a bank is responsible for the acts of its subagents in cases of this kind is not only, it seems to us, in accord with the principles governing the law of agency, but there are considerations affecting the general welfare of the commercial community which commend it to us as a wise rule of commercial law. "Any other rule," as is said by Mr. Daniel in his work on Negotiable Instruments, "opens the door to carelessness in the conduct of banking business, which should be conducted with every safeguard to the customer who intrusts his business to the keeping of such agents. If they are averse to dealing with distant and unknown parties, they should decline undertaking the collection or handling of the paper; and, if they assume it, they should do so for sufficient compensation, and be held responsible." Volume 1, § 342. Under the agreed facts in this case, there can be no question as to the negligence of the Wilmington bank. It received the check on Monday, November 23d, with a letter stating that the paper was inclosed "for collection and return," and directing that all unpaid papers be protested at once, unless otherwise instructed. Up to the close of banking hours on the following day it received deposits and paid checks, and on Wednesday, the 25th, suspended payment, having made no remittance for this check. It then had to the credit of the drawer an amount considerably in excess of the amount of the check. It was contended that the bank was not bound to pay the check, because it had no account upon its books in a name corresponding to the signature on the paper. There is no merit in this contention. Although the check was drawn by C. E. Borden as treasurer of the "Carolina Interstate B. &

L.," and there was no account upon the books of the bank in the name of the "Carolina Interstate B. & L.," and none in which he was designated as treasurer of such a concern, the bank did have an account in the name of "C. E. Borden, treasurer." The money of the corporation referred to—the Carolina Building & Loan Association—was credited upon that account, and the bank recognized the check as drawn thereon by charging it accordingly. There are decisions sustaining the contention of the plaintiff in error that the defendant was negligent in sending the check directly to the bank upon which it was drawn, there being at that time in Wilmington another bank, which was in good standing and credit. See *Bank v. Goodman*, 109 Pa. St. 422, 2 Atl. 687; *Drovers' Nat. Bank v. Anglo-American Packing Provision Co.*, 117 Ill. 100, 7 N. E. 601; *Bank v. Burns*, 21 Pac. 714, 12 Colo. 539; *Anderson v. Rodgers*, (Kan.) 36 Pac. 1069; *First Nat. Bank v. Fourth Nat. Bank* (Sixth Circuit) 6 C. C. A. 183, 56 Fed. 967; *Farwell v. Curtis*, 7 Biss. 160, Fed. Cas. No. 4,690. And see 1 Daniel, Neg. Inst. (4th Ed.) § 328a; 1 Morse, Banks (3d Ed.) § 236. The view we take of the liability of the defendant for the negligence of the Wilmington bank, however, renders it unnecessary to pass upon this question. It is not likely that this question, or others presented by the record, will arise again in this case. Judgment reversed.

(94 Ga. 678)

#### ISELL v. BLANCHARD.

(Supreme Court of Georgia. Aug. 14, 1894.)

APPEAL—AMENDMENT—ACTION BY ADMINISTRATOR—PARTIES.

1. Where a plaintiff, suing as administrator in an action pending in the superior court, makes a joint motion with another to substitute the latter as party plaintiff in the case, on the ground that the former has been dismissed from his trust as administrator and the latter has been appointed and qualified as his successor, and this motion was denied, a writ of error brought by the former to reverse the judgment may be amended in the supreme court by adding the latter as a coparty plaintiff in error.

2. On review of the case of *Jones v. Lamar*, 77 Ga. 149, holding that an administrator *de bonis non* appointed in another state cannot be made a party plaintiff in an action brought by his predecessor in the trust, it is affirmed, inasmuch as it is not absolutely clear that the ruling in that case was incorrect, and the legislature having acquiesced in the same from the year 1886 up to the present time.

3. There is no provision by statute for making a domestic administrator a party to a suit brought by an administrator appointed in another state.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by James K. Isbell, administrator, against Thomas E. Blanchard, surviving partner. From the judgment rendered, plaintiff brings error. Affirmed.

The following is the official report:

On August 1, 1891, James K. Isbell, as ad-

ministrator of Annie S. Orr, brought an action against T. E. Blanchard, surviving partner of Blanchard & Burrus. In his declaration plaintiff alleges that he is a resident of Russell county, Ala.; that letters of administration on the estate of Annie S. Orr have been regularly granted to him by the probate court in said county and state, a properly authenticated exemplification of which letters is shown to the court and filed with the clerk; that Annie S. Orr died in Russell county, Ala., on June 16, 1884, and was then domiciled in that county, and no administration has been had on her estate until the appointment of plaintiff; and that at the time of her death Blanchard & Burrus were indebted to her \$3,000 and interest on a written promise to pay, dated March 20, 1883, and due on demand, and defendant, as surviving partner, is indebted to plaintiff that sum for so much money had and received for his use. Upon the call of the case for trial, January 19, 1894, both parties announced ready; whereupon plaintiff's counsel stated that on November 9, 1893, James K. Isbell resigned his office as administrator, and that on December 12, 1893, M. L. Patterson was appointed administrator de bonis non of the estate of Annie S. Orr, and moved that the court order the name of Isbell, administrator, to be stricken, and the name of Patterson, administrator, be substituted in place thereof, and that the case proceed in the name of the latter as party plaintiff. Defendant's counsel admitted legal notice of the proceeding to make Patterson a party plaintiff, but objected thereto, on the ground that under the statute law of Georgia the administrator de bonis non cannot revive a suit brought by a foreign administrator. It was admitted on both sides that no letters of administration had ever been taken out on the estate of Annie S. Orr in Georgia. It was shown to the court, by duly-authenticated transcript of the record from the probate court of Russell county, Ala., that Annie S. Orr died on June 16, 1884, in that county, of which she was a resident, and in which she was domiciled, leaving one child, about 16 years of age at the time this suit was brought; that on June 24, 1891, Isbell was duly and regularly appointed administrator on the estate of Annie S. Orr by said probate court; that on November 9, 1893, he resigned that office, stating in his resignation that he had moved to Florida, and on the same day his letters of administration were revoked by said probate court; and that on December 12, 1893, Patterson was appointed administrator de bonis non of the estate of Annie S. Orr by said probate court. The court refused to allow Patterson to be made a party. Counsel for plaintiff then moved to continue the case to the next term, for the purpose of allowing administration to be taken on said estate in Georgia, in order that a Georgia administrator, when appointed, might be made a party plaintiff in

the place of Isbell. The court overruled the motion, and rendered judgment that the case had abated. To each of these rulings the plaintiff excepted.

L. F. Garrard, for plaintiff in error. Peabody, Brannon, Hatcher & Martin and Little & Wimblish, for defendant in error.

PER CURIAM. Judgment affirmed.

(40 W. Va. 268)

### STATE v. WILLIAMS.

(Supreme Court of Appeals of West Virginia.  
March 27, 1895.)

BURGLARY—WHAT CONSTITUTES—CAPACITY OF DEFENDANT—REASONABLE DOUBT—VERDICT AND SENTENCE.

1. The twelfth syllabus in the case of *State v. Robinson*, 20 W. Va. 714, is approved.

2. Capacity to commit crime is a question to be determined by the jury from the age, appearance, and conduct of the accused both at the time of the commission of the offense and at the time of the trial.

3. The criminal law of this state includes all buildings, as either a dwelling house, or out-house adjoining thereto or occupied therewith, or as an office, shop, warehouse, banking house, or building other than a dwelling house. The use of the building at the time of the offense determines its character.

4. The third and fourth syllabi in the case of the *State v. McClung*, 13 S. E. 654, 35 W. Va. 280, are approved.

(Syllabus by the Court.)

Error to circuit court, Braxton county.

Abner Williams was convicted of burglary, and brings error. Affirmed.

Dulin & Hall, for plaintiff in error. T. S. Riley, Atty. Gen., for the State.

DENT, J. At the September term, 1894, of the circuit court of Braxton county, Abner Williams, a boy 13 years of age, was found guilty of a felony, and sentenced to the reform school of this state. He obtained a writ of error of this court, and relies on the following assignment, to wit: "First, it was error to give the five instructions, and each of them, asked by the state, and given by the court to the jury, as set out in bill of exceptions No. 1; second, it was error to overrule the motion of petitioner to set aside the verdict and grant him a new trial on the grounds stated in the record, as shown by bill of exceptions No. 2, and render the judgment against him complained of herein." The instructions objected to are as follows, to wit: No. 1: "If the jury believe from the evidence that the house mentioned in the indictment was in the actual or constructive possession of John B. Morrison, then the ownership is properly laid in the said Morrison, although they believe from the evidence that the title to said property was at the time in W. F. Morrison, John Byrne, and D. A. Berry's heirs." No. 2: "If the jury believe from the evidence that John B. Morrison held the possession of said house at the time alleged in the indictment, and that he

used and occupied said house as a dwelling, then, in contemplation of law, said house was the dwelling house of John B. Morrison, although he may have absented himself therefrom for several months, and although he may have had another dwelling house during the same time." No. 3: "The jury is instructed that although they should believe that no dwelling house was broken or entered, as alleged in the indictment, yet if they believe from the evidence that the defendant stole and carried away any of the goods of John B. Morrison, as alleged in the indictment, then they should find him guilty of the larceny of said goods." No. 4: "To establish capacity to commit crime in a person over 7 and under 14 years, it is not necessary that any witness shall state that he has such capacity, but the same may be shown to exist by the appearance and general conduct of the accused, and by his testimony as a witness before the jury." No. 5: "A person is amenable to punishment for crime if he be of sufficient understanding to be able to distinguish right from wrong."

The first, second, and third instructions are objected to for failure to use the words "beyond a reasonable doubt," although the court had instructed the jury, at the instance of the prisoner, that they must believe him guilty beyond a reasonable doubt, or acquit him. This objection is completely answered by the twelfth syllabus in the case of *State v. Robinson*, 20 W. Va. 714. The objection to the second instruction is that it fails to inform the jury that they must believe from the evidence that John B. Morrison left the house with the intention of returning to make it his dwelling house. The instruction does inform the jury that they must believe from the evidence that John B. Morrison used and occupied said house as a dwelling. This is certainly a sufficient answer to the objection raised. The objection to the fourth instruction is equally untenable, as the jury, in passing on the capacity of the accused to commit crime, have the right to take into consideration his appearance and conduct at the time of the trial, as well as at the time the offense was committed. The fifth instruction is very general in its terms, but the jury could not possibly be misled thereby, especially in the light of the various instructions given for the accused.

The principal reason alleged to support the second assignment of error is that the evidence fails to establish the house in question to be a dwelling house at the time of the offence. Sections 11, 12, c. 145, of the Code, include all buildings, as either a dwelling house, or "office, shop, store-house, banking-house, or any house or building other than a dwelling house or out house adjoining thereto or occupied therewith." The house in question was built and used for a dwelling house, and would ordinarily be designated as such to distinguish it from a building of a different kind. Up until the time of the

offense charged, it had been occupied by John B. Morrison with his goods and furniture, and he occasionally slept in it. And it would be drawing the distinction exceedingly fine, and with simply technical precision, to hold that a dwelling house was a building other than a dwelling house for the reason that some one was not staying in it just at the time it was broken into and the occupants' goods were stolen therefrom. If it had been described as any other kind of building, the accused, no doubt, would have recognized it to be a dwelling house, for the reason that the occupant still had his goods, and was sometimes sleeping, therein. But it changes character according to the standpoint from which it is viewed.

The indictment charging both burglary and larceny, the jury could find the accused guilty of either, and a general finding is considered to cover the burglary, but not the larceny, according to the holding of this court in the case of *State v. McClung*, 35 W. Va. 280, 13 S. E. 654, to which the counsel are referred. No error appearing in the record prejudicial to the accused, the judgment is affirmed.

(40 W. Va. 590)

ROLLINS v. NATIONAL CASKET CO. et al.  
(Supreme Court of Appeals of West Virginia.  
April 13, 1895.)

#### EQUITY—CANCELING JUDGMENT.

Where a bill in chancery presents no substantial grounds for equitable interference, it is properly dismissed, as no errors committed by the court can be considered prejudicial to the plaintiff.

(Syllabus by the Court.)

Appeal from circuit court, Mason county.

Bill by A. W. Rollins against the National Casket Company and others. There was decree dismissing the bill, and plaintiff appeals. Affirmed.

J. B. Menager, for appellant. H. R. Howard and C. C. Somerville, for appellees.

DENT, J. On the 19th day of September, 1893, the circuit court of Mason county entered an order dissolving an injunction theretofore granted, and dismissing the bill in chancery filed by A. W. Rollins against the National Casket Company and others, from which order plaintiff appeals, and assigns the following errors, to wit: "(1) The court erred in rendering a final decree in the case, after the death of Jerry O'Connor had been suggested on the record, without reviving in the name of the personal representative of said decedent. (2) The court erred in entering a decree dissolving the injunction and dismissing the bill on the answer of E. J. Tippet, who, as appears from her own answer, was not a member of the firm of O'Connor & Tippet, and hence could know nothing of the matters involved in this suit; and, as no other defendants answered the bill, the same was taken for confessed as to the real and true de-

defendants. (3) The court erred in overruling the objections to the answer of E. J. Tippet. (4) The court erred in overruling the plaintiff's motion for a continuance. (5) The court erred in not sustaining the plaintiff's exceptions to the reading of defendant's depositions taken during the sitting of the court. (6) The court erred in not perpetuating plaintiff's injunction, as none of the real parties in interest answered the bill, the answer of E. J. Tippet showing of itself that she was no such party in interest as to be able to deny the allegations of plaintiff's bill; and, if she were, her denial is too general to put the plaintiff on proof of his bill, as such general denial was excepted to."

The facts are as follows: E. Beller purchased a bill of goods of a firm known as O'Connor & Tippet, consisting of household and kitchen furniture, for the price of which he executed a note to said firm, calling for the sum of \$150, and a deed of trust on the furniture to G. W. Tippet, trustee, to secure the payment of the note. That to prevent a sale of this property, already advertised, under said deed of trust, the said Beller executed a note negotiable and payable at the Merchants' National Bank of West Virginia, at Point Pleasant, for the sum of \$126, being the balance due on the first note aforesaid, and the plaintiff, by indorsement thereon, transferred the same to O'Connor & Tippet to be used as collateral security for the first note. O'Connor & Tippet transferred the \$126 note to the National Casket Company. After it became due, it was presented, and protested for nonpayment.

The bill alleges as grounds of equitable interference that, the National Casket Company being about to enter suit against the plaintiff and said Beller on said note, said company and the firm of O'Connor & Tippet agreed that, if plaintiff would waive service of summons and suffer judgment to be taken on said note, they would turn over and deliver to him the \$150 note, and the benefits of the trust deed; that by reason of such agreement plaintiff suffered judgment to be taken for \$128.19, principal, interest, and protest, and \$2.60 costs; that, after said judgment was taken, said parties refused to comply with their agreement, and deliver up said note, and permitted the property included in the trust deed to be sold, lost, and wasted,—all which he alleges was done to deceive and defraud him; and therefore he prays that said judgment may be set aside, and held for naught, and that the defendants may be perpetually enjoined from collecting the same.

The first question that presents itself is whether the bill presents any true grounds for equitable interference as against the judgment and the defendants O'Connor & Tippet or the National Casket Company. If it does not, then the errors committed, if any, are not prejudicial to the plaintiff, and he has suffered no injury thereby. The refusal to deliver the note in compliance with the con-

tract furnishes no good reason for setting aside or enjoining the judgment, as equity always considers that done which ought to be done, and that the note, by the agreement to transfer, became the property of the plaintiff, and that the defendants had it simply as trustees for his benefit. As to the property, there is no pretense that the plaintiff ever directed the trustee to sell or take possession thereof, or that the defendants in any manner prevented or hindered him from doing so. If the note was his, as he claims, it became his duty to take possession of and sell the property; and the mere fact that the defendants O'Connor & Tippet and the National Casket Company remained quiet about the matter without request on his part gives him no grounds of equity against them on the judgment. The bill does not charge that they were guilty of overt acts of unjustifiable interference, but that they permitted the property to be sold, lost, and wasted. So did the plaintiff; at least he does not pretend that he made any effort to prevent it. If the note had been the property of the National Casket Company, and they had refused to enforce the trust as a security for it, but had granted time to the principal debtor, with permission to dispose of the trust property without the consent of the plaintiff, then, by reason of his being merely a surety, he would have been released from the payment of the debt. But, so far as the case shows, the National Casket Company was an innocent holder for value of the negotiable note on which the judgment was taken, and had nothing to do in any way with the loss of the trust property. Hence the plaintiff's clamor is wholly without foundation, and the decree of the circuit court is affirmed.

(40 W. Va. 224)

#### FRAZIER v. KANAWHA & M. RY. CO.

(Supreme Court of Appeals of West Virginia.  
March 27, 1895.)

##### SERVICE OF PROCESS ON CORPORATION.

Process emanating from the circuit court against a corporation may be served upon any person appointed pursuant to law to accept service for it; but such service must be in the county in which such person resides, and the return must show this, and state on whom and when the service was, otherwise the service shall not be valid.

(Syllabus by the Court.)

Error to circuit court, Kanawha county.

Action by J. E. Frazier, administrator, against the Kanawha & Michigan Railway Company, for the death of decedent. Plaintiff had judgment, and defendant brings error. Reversed.

Couch, Flournoy & Price, for plaintiff in error. Simms, Enslow & Chilton and W. E. Chilton, for defendant in error.

ENGLISH, J. On the 4th day of July, 1801, William E. Fife was traveling as a passen-

ger on the Kanawha & Michigan Railway, and was killed by a wreck occasioned by the falling of a bridge on the line of said railroad in Kanawha county. On the 16th day of July, 1891, C. T. Fife was appointed administrator of his estate, and on the 21st day of June, 1893, the clerk of the county court of Putnam county, in which county said W. E. Fife resided at the time of his death, made an order in vacation, reciting the facts as to the appointment of C. T. Fife as administrator of said W. E. Fife, and his subsequent death, and upon the motion of J. L. Bowyer appointed J. E. Frazier, "sheriff of this county," administrator de bonis non of the personal estate of said W. E. Fife, deceased. On the 1st day of July, 1893, an action of trespass on the case was brought in the circuit court of Kanawha county in the name of J. E. Frazier, sheriff, and administrator de bonis non of the estate of W. E. Fife, deceased, against the Kanawha & Michigan Railway Company, claiming \$10,000 damage on account of the death of his intestate. On the 12th day of December, 1893, when the case was called for trial, the defendant, by counsel, appeared for the purpose of moving to quash the plaintiff's writ and return thereon, which motion, having been made and considered by the court, was overruled, and the defendant excepted, and thereupon the defendant, by its attorneys, craved oyer of the plaintiff's letters testamentary, which were produced, and read to it, whereupon said defendant demurred to the plaintiff's declaration, and each count thereof, in which demurrer the plaintiff joined, which demurrer was overruled, and the defendant again excepted. The defendant then tendered six special pleas in writing, numbered from 1 to 6, inclusive, to the ming of which, and each of them, the plaintiff objected, which objections were overruled, and said pleas were filed, and the plaintiff excepted; and the defendant also pleaded not guilty, and issue was thereon joined. The plaintiff replied generally to special pleas Nos. 1 and 4, and issue was joined thereon. Issue was also joined on special pleas Nos. 2 and 3, and the plaintiff replied generally to special plea No. 5, and issue was joined thereon and on plea No. 6. Said special pleas are in the words and figures following: No. 1: "And for further plea in this behalf said defendant says that the plaintiff, J. E. Frazier, was not, at the time of the institution of this suit, nor ever hath been since said time, and is not now, the administrator de bonis non of W. E. Fife, deceased, and this it is ready to verify." No. 2: "And for further plea in this behalf the said defendant says that the plaintiff, J. E. Frazier, was not at the time of the institution of this suit, nor ever hath been since said time, and is not now, the administrator de bonis non of W. E. Fife, deceased, and of this it puts itself upon the country." No. 3: "And for further plea in this behalf the said defendant says that the plaintiff, J. E. Fra-

this suit the administrator de bonis non of W. E. Fife, deceased, and of this it puts itself upon the country." No. 4: "And for further plea in this behalf the said defendant says that the plaintiff, J. E. Frazier, was not at the time of the institution of this suit the administrator de bonis non of W. E. Fife, deceased, and this it is ready to verify." No. 5: "And for further plea in this behalf the defendant says that the plaintiff, J. E. Frazier, is not now the administrator de bonis non of W. E. Fife, deceased, and this the said defendant is ready to verify." No. 6: "And for further plea in this behalf the defendant says that the said J. E. Frazier is not now the administrator de bonis non of W. E. Fife, deceased, and of this it puts itself upon the country." On the 13th day of December, 1893, the case was submitted to a jury, which resulted in a verdict for the plaintiff, assessing the damages at \$4,500. During the progress of the trial, and after all of the evidence was put before the jury, the court, at the instance of the plaintiff, gave to the jury the following instructions, marked 1, 2, 3, and 5. No. 1: "The court instructs the jury that the law, in tenderness of human life, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When a railroad company undertakes to carry passengers by the agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such cases makes such carrier liable in damages under the statute." No. 2: "The jury are instructed that the defendant railway company is held by the law to the utmost care, not only in the management of its train and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers." No. 3: "The jury are instructed that while they must assess the damages with reference to the pecuniary injuries sustained by the distributees in consequence of the death of W. E. Fife, they are not limited to the losses actually sustained at the precise period of his death, but may include all prospective losses, provided they are such as the jury believe from the evidence will actually and fairly and justly result to the distributees as the proximate damages arising from the wrongful death." No. 5: "The court instructs the jury that in the record exhibited in this case the plaintiff, J. E. Frazier, is the administrator de bonis non of W. E. Fife, deceased, and as such can maintain this action." The defendant moved the court in arrest of judgment, and to set aside the verdict of the jury rendered in the case, and award it a new trial, upon the ground that the said verdict was contrary to the law and the evidence, was excessive and exorbitant, and upon the further grounds that the court misinstructed the jury, and for other errors apparent upon the record, which motions were overruled,



and the defendant excepted. The court rendered judgment upon said verdict, and the defendant applied for and obtained this writ of error.

The first error assigned and relied upon by the plaintiff in error is claimed to be in the action of the circuit court in overruling the defendant's motion to quash the return on the writ,—that said return does not show that George S. Couch, the attorney upon whom it was served, resided in Kanawha county when it was served. The return on said summons is as follows: "Executed the within summons the first day of July, 1893, by delivering an office copy thereof to Geo. S. Couch, the attorney of record appointed by the Kanawha & Michigan Railway Company on whom process can be served, this day, in the county of Kanawha, state of West Virginia. Given under my hand this 1st day of July, 1893. J. G. Wilson, Deputy for Peter Silman, S. K. C." Did the circuit court err in overruling this motion? In determining this question we must look to the statute which prescribes the mode in which process shall be served upon a corporation. Section 6 of chapter 41 of the Code, among other things, provides that "the service of process when person or property is not to be taken into custody, or it is not otherwise specially provided, shall be subject to the regulations contained in the several sections from thirty-two to thirty-nine inclusive of chapter fifty of the Code." Section 34 of chapter 50 provides that: "Unless otherwise specially provided such process or order and any notice against a corporation may be served upon the president, cashier, treasurer or chief officer thereof, or if there be no such officer, or if he be absent, on any officer, director, trustee or agent of the corporation at its principal office or place of business, or in any county in which a director or other officer or any agent of said corporation may reside. But service at any time may be made upon any corporation in the manner prescribed for similar proceedings in the circuit court." And section 38 provides that "service on any person under either of the last four sections shall be in the county in which he resides; and the return must show this, and state on whom and when the service was, otherwise the service shall not be valid." The ninth clause of section 17, c. 14, p. 124, of the Code, under the heading of "Statutes and Rules of Construction," provides that "the word 'person' includes corporations if not restricted by the context." It is true that section 7 of chapter 124, under the head of "Process Commencing Suit," etc., provides that "it shall be sufficient to serve any process against or notice to a corporation on its mayor, president or other chief officer, or any person appointed pursuant to law to accept service of process for it," etc., but when we wish to ascertain how process is to be served upon these persons the information is obtained by turning to the

statutes which have been quoted above, which prescribe the manner in which such process shall be executed and returned, which statutes, being in *pari materia*, are to be construed together. Now, the words with which section 38 of chapter 50 commence, to wit, "Service on any person under either of the last four sections shall be in the county in which he resides," includes "service upon any corporation in the manner prescribed for similar proceedings in the circuit court"; that is, as we find it provided in section 7 of chapter 124, "by serving the process *inter alia* on any person appointed pursuant to law to accept service of process for it," and, such service being under one of the last four sections, as contemplated by section 38 of chapter 50, must be in the county in which the person resides upon whom it is executed, and the return must show this, and state on whom and when the service was, otherwise the service shall not be valid. In the case of *Railway Co. v. Ryan*, 31 W. Va. 366, 6 S. E. 924, Snyder, J., in delivering the opinion of the court, says: "And sections 34-37 of chapter 50 of the Code provide the manner in which service may be made on corporations for the commencement of actions in a justice's court. The next section is as follows: '38. Service on any person under either of the last four sections [that is, sections 34-37 of chapter 50 of the Code, which includes service on the attorney appointed under chapter 54, as aforesaid] shall be in the county in which he resides, and the return must show this, and state on whom the service was, otherwise the service shall not be valid.' Comparing the return with the provisions of this statute, it is apparent that the service on the corporation was invalid, because it fails to show that it was served on the attorney in the county of his residence. The statute expressly commands that the return shall state that the service was in the county in which the person served resides, and declares that, unless this is done, the service shall be invalid. The service being thus invalid, and there having been no appearance by the corporation before the justice, the judgment, under such circumstances, is an absolute nullity. An invalid service is the same as no service whatever, and the law is well settled that a judgment rendered without an appearance by or service upon the defendant is void for want of jurisdiction in the court to pronounce judgment." *Freem. Judgm.* §§ 495, 521." Now, when we refer again to section 6 of chapter 41 under the head of "The Execution and Return of Process," we find that when person or property is not to be taken into custody, or it is not otherwise specially provided, such service shall be subject to the regulations contained in the several sections from 32 to 39, inclusive, of chapter 50 of the Code, which includes section 38, which provides that service under said sections shall be in the county in which the person resides, and the return must show this, and state on

whom and when the service was, otherwise the service shall not be valid. There can be no question but that this process should have been served subject to the regulations contained in the several sections from 32 to 39, inclusive, of chapter 50 of the Code, because neither person nor property was to be taken into custody, and it is not otherwise specially provided. Section 7 of chapter 124 provides on whom the process may be served, to wit, "any person appointed pursuant to law to accept service of process for it," but is silent as to the manner in which such service may be made; and when the officer executing the process wishes information as to the regulations respecting such service and his return thereon, he finds it alone in the last paragraph of section 6 of chapter 41 of the Code, and in sections from 32 to 39, inclusive, in chapter 50 of the Code. The case of *Railway Co. v. Ryan*, supra, holds that a return of service of a summons issued by a justice against a corporation on the attorney appointed under chapter 54 to accept service, etc., must show that such service was in the county in which he resides, to support its validity; the last clause of section 34 of chapter 50 of the Code providing that service may be made on any corporation in the manner prescribed for similar proceedings in the circuit court, one of which modes is by service on such attorney; and when we inquire how it is to be served the answer is found in said section 38, which provides that such service shall be in the county in which such attorney resides, and the return must show this, and state on whom the service was, otherwise the service shall not be valid. Service on such attorney is to be made precisely as it is upon the president of such corporation, and this court has held, in the case of *Taylor v. Railroad Co.*, 35 W. Va. 328, 13 S. E. 1000, that service of a summons in an action before a justice against a domestic railroad corporation upon its president must be in the county in which he resides, and the return must show that fact, else it is invalid, and that a judgment based on a return of service not showing that fact, there being no appearance, is void. In the case under consideration, there having been no appearance by the defendant previous to the motion to quash, and the service of the process being invalid, my conclusion is that the judgment complained of is void, being a judgment without service of process, and without jurisdiction of the person. See 1 Black, Judgm. § 229; Freem. Judgm. §§ 495, 521.

Having reached this conclusion, it might be unnecessary to allude to any of the other questions raised by the assignment of error, but, as a question is raised as to the validity of the appointment of J. E. Frazier, sheriff of Putnam county, administrator de bonis non of the personal estate of W. E. Fife, deceased, without discussing or passing upon the question raised as to whether a demurrer

was the proper mode of suggesting that question, or whether a plea in abatement would have been the only way of bringing the question before the court, as the case must be remanded, I regard it proper to say that, where an administrator is properly appointed by the clerk of the county court, he need not wait until the confirmation of such appointment by the county court before he proceeds to institute such suits as may be necessary in properly administering the estate of his intestate; otherwise one of the principal objects contemplated in allowing the clerk to appoint personal representatives would be defeated. But while it is true the clerk of the county court may appoint personal representatives in vacation, such appointments, in order to be effectual, must conform to the requirements of the statute. Now, section 10 of chapter 85 of the Code provides that: "If at any time three months elapse without there being an executor or administrator of the estate of the deceased (except during a contest about the decedent's will or during the infancy or absence of the executor) the court before whom the will was admitted to probate, or having jurisdiction to grant administration, shall on the motion of any person order the sheriff or other officer of the county to take into his possession the estate of such decedent and administer the same, whereupon such sheriff or other officer without taking any other oath of office or giving any other bond or security than he may have before taken or given shall be the administrator," etc. The order made by the clerk of the county court of Putnam county on the 21st day of June, 1893, reads as follows: "It appearing that C. T. Fife, who was on the 16th day of July, 1891, by the clerk of this court, in vacation, appointed administrator of the personal estate of W. E. Fife, deceased, has since that time departed this life, now, therefore, I, R. A. Salmons, clerk of the county court of Putnam county, upon the motion of J. T. Bowyer, do appoint J. E. Frazier, sheriff of this county, administrator de bonis non of the personal estate of the said W. E. Fife, deceased." Now, it does not appear on the face of the order that three months had elapsed without there being an administrator of the deceased; neither does the order direct said Frazier, as sheriff of the county, to take into his possession the estate of the deceased, and administer the same, and it seems from the language of the statute that such an order is required before such sheriff should be constituted the administrator. The order, therefore, appears to be defective in form and substance. But as I have reached the conclusion that the judgment complained of is void for want of jurisdiction, the process never having been served upon the defendant, it is useless to discuss the other questions presented by the record. The judgment must be reversed, the verdict set aside, and the cause remanded, with costs to the plaintiff in error.

(40 W. Va. 583)

## ROBINSON v. WEST VIRGINIA &amp; P. R. CO.

(Supreme Court of Appeals of West Virginia.  
April 13, 1895.)

## DEATH OF EMPLOYE—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

1. An engineer runs his train on a 16° curve, at a high rate of speed for such a curve, and against the express orders to him of the railroad company, requiring him at that place to go slow. The engine, with four cars, leaves the track, whereby the engineer is killed. There is some evidence tending to show that the outer rail of the curve is not higher than the inner one. Outside of mere conjecture, this is all that is known of the cause of the accident. There can be no recovery against the company for negligently causing his death; for it thus appears that, if the lowness of the outer rail was a cause of the accident, his own want of due care and his violation of orders contributed to cause the same.

2. A verdict based alone on mere conjecture, without evidence to support it, where the rule as to the burden of proof requires some reliable affirmative evidence, should not be permitted to stand.

3. Contributory negligence is a bar to the right of recovery.

(Syllabus by the Court.)

Error to circuit court, Lewis county.

Action by Lilly M. Robinson, administratrix, against the West Virginia & Pittsburgh Railroad Company, to recover for the death of decedent. Plaintiff had judgment, and defendant brings error. Reversed.

John Brannon and W. Mollohan, for plaintiff in error. W. B. McGary, for defendant in error.

HOLT, P. William Robinson, plaintiff's intestate, was a locomotive engineer on defendant's railroad, running from Weston south to Braxton O. H., and had been for three years next preceding the lamentable accident which caused his death, on the 10th day of December, 1892. On that day he started to run engine No. 1 and 12 empty freight cars from Weston to Sutton. At the Bendale 16° curve, 1½ miles from the starting point, while running at the forbidden rate of speed of about 20 miles an hour, the train and four cars left the track, killing the engineer Robinson, and crippling badly his fireman, William Byers. There was evidence tending to show that on this curve, at or near where the train ran off on the outer side, the rail on that side was not higher than the inner rail. There was a verdict for the plaintiff for \$4,000. A motion for a new trial was overruled, judgment rendered on the verdict, and from that this writ of error was awarded.

It is the personal duty of the railroad company, no matter by whom it may be or is to be directly performed, to provide a reasonably proper and safe railroad track, machinery, and other suitable means and appliances, and maintain and keep them thus reasonably safe, and also reasonably fit and proper fellow servants. The servant takes upon himself the risks incident to the em-

ployment. A servant having knowledge of danger about him must use diligence and care in protecting himself from harm, and not willfully encounter dangers which are known to him. Neither can he recover if his injury was the direct result of his own disobedience of orders. In the case given, the mere fact of the accident creates no presumption of negligence on the part of the company. That must be done by affirmative testimony, and the burden of such proof is on the plaintiff; and, if it thereby also is made to appear that the fault of the decedent contributed directly to the result, the right to recover does not arise, but otherwise the contributory fault and negligence of the plaintiff's intestate is matter of defense, and proof thereof must come from the defendant. Mere conjecture alone cannot supply the place of the proof required. To believe on conjecture and to conjecture without evidence will not do. If there is no evidence of negligence in any fairly appreciable degree tending to prove defendant's negligence, then the court, on motion, should instruct the jury to find for the defendant; and the court must decide when the case calls for such instruction, for to that extent it is a question of law arising out of the testimony; but if, in the opinion of the court, the evidence tends in a fairly appreciable degree, not by a mere scintilla, to prove negligence on the part of the defendant, then the question should be submitted to the jury. If the verdict be for the plaintiff, and it is without evidence, in the above sense, on some essential point, or it manifestly appears that there is a clear and decided preponderance of evidence thereof against the finding of the jury, then the verdict should be set aside, and a new trial awarded; for, under our present statute, all the evidence must be considered.

The contention of the plaintiff is that the verdict is justified because it was made to appear that the railroad company failed to provide the decedent with a reasonably safe and proper engine, or a reasonably safe and proper track, at the Bendale curve. The defendant contends that plaintiff fails to make out his case on either ground, or to show by evidence, in any fairly appreciable degree of convincing effect, that defendant was negligent in any respect, or to put the cause of the accident or how it occurred on any ground higher than mere conjecture; and that, conceding this to be the proven cause, then it appears, by the uncontradicted testimony of his fellow servants who were on the train, that he ran it on this sharp curve, which he well knew, at a speed of 20 miles an hour, whereas he was warned of the character, and expressly told by those whose duty it was to command to be careful and not run the Bendale curve at a higher speed than about 8 miles an hour.

1. Was the engine a reasonably safe and proper one? The machinist in the shop who

brought out engine No. 1 for the trip, and inspected it and carefully examined it at the time and for the occasion, says it was in good condition. So, also, the pony truck under the engine which leads it. The lead wheels of the truck were new and unworn, not having seen more than two months' service, at the longest, and presumably had not lost their flare. He appears to be a capable man of experience in such matters. Another engineer, who knew No. 1 well, saw it that day. Says No. 1 was the best of the three engines at that point, and had nothing wrong with it that day. In fact, just after the accident, it seems to have been in working order, except a flange of a wheel was partly broken off by what appeared to be a fresh, bright break. To this nothing in contradiction is shown, except that No. 1 was an old engine, which at some former time had been in a wreck, whereby the pilot had been broken off; but it had undergone many repairs and substitution of parts, and was at the time in question a good engine, in good running order, "and, if properly managed, could have handled the train of empties safely," using the language of one of the brakemen on the train at the time of the accident.

2. Was the accident caused by an unsafe track at Bendale curve? It is a 16° curve; that is, one with a radius of 358 feet. Is such a curve, on such a road, at an exceptionally sharp degree, negligence per se? We are not so informed by any testimony in the cause; and it is not matter of general knowledge, especially when the company, as in this case, puts its finger on the very place, telling the engineer: "Run slow here; do not exceed the rate of eight miles." So the rules of the company prescribed. The decedent was an engineer on the road of two or three years' standing, and knew the curve well, and it was his duty to use diligence and care to protect himself from harm.

But it is said the outer rail was not five inches higher than the inner one, as it should be, and this, in so sharp a curve, caused the accident. On this point plaintiff introduced the testimony of a civil engineer of some railroad experience during several years, who had occasion to pass along close to the curve once or twice a week for some six weeks, who noticed the track during the week preceding the accident. He says that the rail on the outside of the track was too low; that he noticed a place where the wheels were climbing and cutting off the fish-bar bolts; that these bolts had the appearance of having been partially cut by the flanges of the engine, and had been taken out and replaced two or three times; that the outer rail he supposed to be five inches too low, and he considered it to be in such condition that an accident was liable to occur at any time, from the fact that the outside rail was too low, and he made that remark to another witness, who was passing

the place with him some two or three weeks before the accident. But this is met on the other side by the testimony of Rehook, the supervisor of the road, who had been engaged in laying and repairing track on that road and the Baltimore & Ohio for 17 years. Had worked as a section hand, section boss, and on up to the position he now held as supervisor of the road from Weston to Sutton, and to Camden, on the Gauley, the southern terminus. Had laid the track in question. Had that day, not more than two hours ahead of this train, examined the track on the Bendale curve, and found it then all right, in good repair, and safe condition, and was on the road 600 yards south of the place of the accident when it occurred. "The track was then in fairly good condition. I examined it. That was a part of my duties." In comparing the testimony of these two witnesses on this point, Mr. Gibson does not locate the low place in the outer rail as the place where the engine left the track, but as some point on this curve, and it was two or three days before the accident. Rehook says the outer rail was given an elevation of five inches at that place. Has been kept up to just about that ever since, and to see that that was done was a particular part of his business, and on the day of the accident, at the place of derailment, it had about that elevation. He says: "On that day the track was perfectly safe to run at any rate of speed that the curve would admit of. Of course, it was a sharp curve, and you could not make any great rate of speed over it."

Here the question occurs, what was the safe and proper rate of speed? Rehook says that he requested Mr. Lane, the assistant superintendent, to notify all trainmen to run there at a rate not to exceed six miles an hour. He did not himself mention any particular speed to Engineer Robinson. He simply told him to be careful. He cautioned Robinson twice in regard to running round this Bendale curve, and several others. "I told him it was a very sharp curve, and a dangerous place, and he ought to be very careful in running round it." Robinson had run engines on this road as engineer during a period of two or three years. He was a good engineer, but was inclined to run too fast, as all who knew him and speak on the subject testify. But what was the direct, proximate causes or cause, is a matter of inference or matter of conjecture? A. W. Marsh, a brakeman who was on the train at the time, says: "We were running over the maximum speed when we went off. It would have run without steam, being down grade, just before the curve was reached; but he used steam on the down grade, and was running anyhow between 18 and 20 miles an hour when she jumped the track." J. P. Fox was the conductor on the train. He says that, up to a point within 400 or 500 or 600 feet of the place of the accident,

he was making 10 or 12 miles an hour. When he started down grade, he seemed to be still pulling the throttle open more, and gathering more speed as he went down the grade. "As near as I can judge, he was running 20 miles an hour when the engine jumped the track." William Byers, the fireman, who was badly hurt in the accident, says that at the time the speed was about 15 miles an hour. Rehook was within 500 or 600 yards of the train, and in sight until it turned into the curve where the accident happened, and could tell that the train was running the down grade with steam on. That he was not running at this forbidden and dangerous rate of speed at the time there is nothing in this record that proves or tends to prove, but, on the contrary, the inferences tend to confirm these uncontradicted witnesses. An elevation of the outer rail of  $1\frac{1}{4}$  inches, not observable by one measuring with his eye, might have been enough for a speed of 10 miles an hour, and just as safe perhaps, at that speed, as an elevation of  $4\frac{1}{4}$  inches would have been at a speed of 20 miles an hour. There can be no escape, as it appears to me, from the conclusion, under this evidence, that, if the lowness of the outer rail was one of the causes, the fast speed, in violation of explicit orders, at least contributed directly to bringing about the accident, and that would be a bar to the right of recovery. The experts who went upon the ground at once for the purpose of examining and remedying the condition of affairs, and ascertaining the cause of the accident, testify. The assistant superintendent, a man of 18 years' experience in such matters, was on the ground as soon as he could get there; about the first one from Weston on the ground. He says: "I examined everything connected with it, so as to form an opinion as to the cause of the accident. The broken parts of the wheels were some 10 or 12 feet from where the wheels left the track, so that the flanges seemed to have broken after the wheels were off the rails. There were no flaws in the wheels. The engine was all right. She had gone through a severe test. Had run nearly 100 yards against the rocks. My theory was that the train had left the track on account of something being on it, or that the engineer had been running at a very rapid rate of speed, and the momentum caused the train to run too fast. It was regarded as being a severe curve, and on that account we prescribed extra rules on slow running there, and considered it necessary that a train should run slowly there, not only on account of the curve, but also on account of the county road. Engineers were cautioned to run very slowly, and the instruction at one time was not to exceed eight miles per hour round that curve." After putting all the facts together as best he could, upon the ground, he gives the above as his probable inference, founded

on evidence too defective to enable him to give us anything beyond his conjecture as to the probable cause or causes of the accident; and the case seems to be left by the evidence in that condition. There is certainly nothing to fix upon the defendant any liability for the accident; for, if the lowness of the outer rail was a cause, the rapid and forbidden rate of speed of the engineer contributed to bring it about. No reasonable theory of the evidence will support the verdict. Therefore, if we cannot say that a  $16^\circ$  curve is negligence per se, we must say that this verdict, tried by this record, is either wholly without evidence on that essential point, or that the fast running against orders contributed to the result; and if it is our place to see that even-handed justice be meted out as near as may be, according to the very truth of the matter before us, a new trial must be granted; and it is so ordered.

(40 W. Va. 239)

## BRADY v. STILTNER.

(Supreme Court of Appeals of West Virginia.  
March 30, 1895.)

## MALICIOUS PROSECUTION—EVIDENCE AS TO PROBABLE CAUSE.

1. The waiver of a preliminary examination by a person charged with crime is prima facie evidence of probable cause.

2. "The discharge by a justice of the plaintiff of one who has been arrested and brought before him for examination or the refusal of the grand jury to indict him is prima facie evidence of want of probable cause but it is liable to be rebutted by proof." When the refusal of the grand jury to indict is opposed to the refusal of the justice to discharge, one rebuts the other, so as to render neither prima facie evidence of the existence or want of probable cause; and, if the plaintiff manages in any way to have the evidence for his defense considered by the grand jury, their finding is tantamount to an acquittal by a petit jury, and is not prima facie evidence of the want of probable cause on the part of the prosecutor.

(Syllabus by the Court.)

Error to circuit court, Webster county.

Action by G. L. Brady against F. P. Stiltner for malicious prosecution. Plaintiff had judgment, and defendant brings error. Reversed.

W. E. R. Byrne, for plaintiff in error.

DENT, J. This is a case of malicious prosecution of G. L. Brady, plaintiff, against F. P. Stiltner, defendant, from the circuit court of Webster county. The facts are as follows, to wit:

In a certain suit between the plaintiff and the defendant the matter in dispute appears to have been whether said defendant agreed to charge 25 cents or 50 cents for the effectual services of a certain animal, each time such animal was used. The plaintiff testified that the defendant agreed with him only to charge him 25 cents. Thereupon the defendant made the necessary affidavit that the plaintiff had sworn falsely, and caused a war-

rant to issue, on which the plaintiff was arrested, and, being brought before the justice, waived examination on the charge, and gave a recognizance for his appearance before the circuit court to answer an indictment. When the grand jury met to inquire of the charge, after the defendant's evidence had been heard, plaintiff had his two sons and attorney sworn and sent before the grand jury to testify regarding the charge. The grand jury failed to find an indictment, and plaintiff was discharged. He then sued the defendant for malicious prosecution, and obtained a judgment for \$600. From this judgment a writ of error was granted the defendant, who here relies on the following errors, to wit:

"(1) That the court erred in giving the following three instructions for the plaintiff: 'No. 4. The court instructs the jury that if they believe from the evidence that F. P. Stiltner made a complaint before J. A. Howell, justice, accusing defendant, G. L. Brady, with committing perjury, and if the said Brady waived an examination before the justice, and was required to enter into a recognizance to appear before the circuit court to answer an indictment to be preferred against him by the grand jury, and if the said Stiltner appeared before the grand jury as a witness against said Brady, and if the grand jury refused or failed to find an indictment against said Brady for the alleged offense, and he was discharged by the court, it is prima facie evidence of want of probable cause on the part of said Stiltner in making the accusation against said Brady and procuring his arrest, and it throws the burden of proof upon said Stiltner to show that he had probable cause in making the accusation aforesaid, and the jury have the right to infer malice on the part of said Stiltner if it appears that there was want of probable cause.' 'No. 7. The court instructs the jury that what will or will not amount to probable cause will depend upon the circumstances of the case, and the discharge of the plaintiff, Brady, by the grand jury is prima facie evidence of the want of probable cause, and sufficient to throw upon the defendant, Stiltner, the burden of proving the contrary. No. 8. The court instructs the jury that it is the duty of a grand jury to indict a person who is charged with an offense, and recognized to appear before the circuit court to answer an indictment to be preferred against him; and if it appears by the testimony before the grand jury that there is probable cause of the guilt of the person it is the duty of the grand jury to indict him, and, if they fail or refuse to indict, it is prima facie evidence that there was want of probable cause.'

"(2) The court erred in refusing to give the following instructions for the defendant: 'No. 1. The jury is instructed that if they believe from the evidence that the defendant believed, either from facts within his own knowledge or from information derived from others, that the plaintiff made the false state-

ment on oath as stated in the complaint upon which the warrant of arrest was issued by the justice, then the defendant had probable cause upon which to base such complaint, and the jury should find for the defendant. No. 2. The jury is instructed that if they believe from the evidence that the plaintiff was arrested upon a warrant issued upon a complaint made by the defendant, and taken before a justice for examination, and that the plaintiff waived such examination, and entered into a recognizance to answer an indictment upon the matter charged in said complaint, then such waiver is prima facie evidence that there was at least probable cause sufficient to justify the defendant in making the said complaint.' 'No. 4. The jury is instructed that if they believe from the evidence in this case that there was probable cause sufficient to warrant the justice in holding the plaintiff to answer an indictment, then it is immaterial whether the grand jury found such indictment or not, or whether or not there was evidence sufficient to warrant the grand jury in finding such indictment.' 'No. 8. If the jury believe from the evidence that the plaintiff or his attorney went before the grand jury, or sent any witness or witnesses before the grand jury, to prevent the finding of an indictment against the plaintiff upon the charge set forth in the declaration, that is a circumstance bearing upon the question of probable cause proper to be considered by the jury.' "

The real question involved is whether the defendant had probable cause to justify him in his prosecution of the plaintiff for perjury. "Probable cause" is a question of law, to be determined from the facts proven, and is defined, in the case of *Vinal v. Core*, 18 W. Va. 2, to be "a state of facts actually existing known to the prosecutor personally, or by information derived from others," "which, in the judgment of the court, would lead a reasonable man of ordinary caution, acting conscientiously upon these facts, to believe the party guilty." The proof of want of probable cause is with the plaintiff, but any evidence sufficient to raise a prima facie case is all that is required to overcome the weak presumption of its existence, and to cast the burden of proof on the defendant. In the case of *Vinal v. Core*, supra, it was held in the sixteenth syllabus that "the discharge by a justice of the plaintiff who has been arrested and brought before him for examination, or the refusal of the grand jury to indict him, is prima facie evidence of a want of probable cause, but it is liable to be rebutted by proof." The reason given for this rule in Judge Green's opinion is, in effect, that the only question presented to either the justice or the grand jury is whether there is probable cause of the guilt of the accused, and a discharge of the accused is a negative determination of this question in his favor sufficient to raise a presumption of its nonexistence. And the converse of the

proposition has also been held, that the refusal to discharge raises the presumption that probable cause does exist. *Maddox v. Jackson*, 4 Munt. 462; *Grant v. Deuel*, 38 Am. Dec. 228; *Womack v. Circle*, 29 Grat. 192. And it has also been held that where, on examination, the justice commits, and the grand jury fail to find an indictment, the action of one merely offsets, neutralizes, or destroys the other, so as to render both or either of them valueless to establish a *prima facie* case either for or against the plaintiff, and thus leaves the want of probable cause to be established by other testimony. *Miller v. Railway Co.*, 41 Fed. 898. It has also been held that the waiver by the accused of a preliminary examination was *prima facie* evidence of probable cause. *Vansickle v. Brown*, 68 Mo. 627. In determining whether the prosecution was founded on probable cause, the existing state of facts must be viewed from the standpoint of the prosecutor, and not from that of the accused. For this reason trial and acquittal do not raise the presumption of the want of probable cause. *Griffin v. Chubb*, 7 Tex. 603; *Griffs v. Sellars*, 2 Dev. & B. 492; *Bitting v. Ten Eyck*, 82 Ind. 421; *Heldt v. Webster*, 60 Tex. 207; *Williams v. Van Meter*, 8 Mo. 339; *Stone v. Crocker*, 24 Pick. 81; *Thompson v. Rubber Co.* (Conn.) 16 Atl. 554. Verdict of acquittal may be given notwithstanding probable cause, because there is not proof of guilt beyond a reasonable doubt. But the magistrate and grand jury have the very question of probable cause to try, and the evidence on the part of the prosecution is alone examined, and the proceeding is entirely *ex parte*, at least so far as the grand jury is concerned. In *Wharton's Criminal Pleading and Practice* (section 360) the law is stated to be: "The question before the grand jury being whether a bill is to be found, the general rule is that they should hear no other evidence but that adduced by the prosecution." And in section 362, quoting from *McKean, O. J.*, of Pennsylvania: "It is the duty of the grand jury to inquire into the nature and probable grounds of the charge; but it is the exclusive province of the petit jury to hear and determine, with the assistance and under the direction of the court, upon points of law, whether the defendant is or is not guilty on the whole evidence for and against him. You will therefore readily perceive that, if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must consequently be tantamount to a verdict of acquittal or condemnation." Therefore, if the grand jury, by reason of misconduct or procurement of any one, hears the evidence both against and for the accused, their examination ceases to be confined to the question of probable cause, and their return, as quoted above, is "tantamount to a verdict

of acquittal or condemnation," and, in case of acquittal, should not be held to be *prima facie* evidence of probable cause. Such is the rule in California, where the accused is permitted to appear before the grand jury with his witnesses. *Ganea v. Railroad Co.*, 51 Cal. 140. So it might be said of the examination before the magistrate, who hears all the evidence both against and for the accused, and determines from the whole evidence whether probable cause exists. To hold that a discharge by him is *prima facie* evidence of the want of probable cause is to contravene the other rule, which is just as binding, that, in determining whether the prosecution was sustained by probable cause, the facts must be examined from the standpoint of the prosecutor at the time of the institution of the prosecution. A magistrate might well say, after hearing all the evidence, that there was not sufficient cause to hold the accused, while the facts known to the prosecutor, unexplained, might be amply sufficient to convict the accused beyond even a reasonable doubt. For instance, a man's property is stolen. It is found in the possession of another party, who refuses to give up or tell where he obtained it. He is arrested, and, on examination, proves that he came by it from a third party honestly. The magistrate discharges him, as he can do nothing else. Now, should this discharge be held to be *prima facie* evidence of want of probable cause?

The rule laid down in the case of *Vinal v. Core*, *supra*, is entirely too broad to fit all cases, and must, therefore, be regarded as a general rule, subject to exception and modification. Where the accused, on the other hand, has the opportunity of introducing his evidence before the magistrate, and of being fully heard, and he waives an examination, this undoubtedly raises a *prima facie* case of probable cause; for the presumption at once rises that a reasonably prudent man, accused of a crime, who was in a condition to show that the accusation was without probable cause, rather than rest under an unjust suspicion, would gladly seize the very first opportunity that presented itself to establish his innocence. His failure to do so is a matter of his own choosing, and for the unfavorable presumption cast upon him he has no one to blame but himself. If, in so doing, he acts with the malicious intention of increasing his own hardships, expenses, and difficulties for the purpose of enhancing any prospective damages he may seek to recover from his accuser, he ought not to be permitted to accomplish his purpose, but his damages should be limited to the unavoidable results of the prosecution. *King v. Colvin*, 11 R. I. 582. It has been well said that "actions for malicious prosecutions are regarded by the law with jealousy. Lord Holt said, a hundred and fifty years ago, that they 'ought not to be favored, but managed with great cau-

tion.' Their tendency is to discourage prosecution for crimes, as they expose the prosecutors to civil suits. And the love of justice may not always be strong enough to induce individuals to commence prosecutions when, if they fail, they may be subjected to expense of litigation, if they be not mulcted in damages." This action should therefore "be carefully guarded, and its true principles strictly adhered to, that it may not, on the one hand, impede the free course of public justice, nor, on the other, suffer malicious and causeless prosecutions to escape its grasp." *Stone v. Crocker*, 24 Pick. 83.

By these principles this case must be determined. The first instruction asked by the defendant was properly refused by the court, for the reason that it assumes as a fact the very matter in issue, to wit, that the statement made by the plaintiff before the justice was false. Plaintiff did not deny that he made the statement, but he did deny its falsity.

The fourth instruction is also bad, in that it negatives itself, and was therefore properly refused. It tells the jury, "if they believe from the evidence there was probable cause sufficient to warrant the justice in holding the plaintiff to answer an indictment, then it is immaterial whether or not there was evidence sufficient to warrant the grand jury in finding such indictment"; which, under the law, is equivalent to saying: "If there was probable cause, it is immaterial whether there was probable cause or not, for the same evidence that would warrant the justice in holding the plaintiff would warrant the grand jury in finding an indictment."

The defendant's eighth instruction tells the jury that, if they believe from the evidence that the plaintiff had witnesses sent before the grand jury to prevent an indictment, this circumstance should be considered by them upon the question of probable cause. Under the law as heretofore stated, the fact that the plaintiff had witnesses before the grand jury to prevent the finding of an indictment destroyed such finding as prima facie evidence of want of probable cause as against the prosecutor, and an instruction to this effect, if asked, should have been given; and therefore the instruction under consideration was improper, for the reason that the fact that the plaintiff had his witnesses before the grand jury could have no bearing on the state of facts existing at the time the prosecution was commenced.

The second instruction asked by the defendant, to the effect that plaintiff's waiver of examination before the justice was prima facie evidence of probable cause at least, propounds the law correctly, and should have been given. On no other reasonable theory can plaintiff's waiver be accounted for than that he believed the evidence against him would be sufficient to justify the justice in holding him to answer an indictment; and, while the presumption arising may not be held to be conclusive, it is at least prima

facie correct, and, if not rebutted or explained, would be conclusive.

The three instructions, Nos. 4, 7, and 8, given for the plaintiff over the objection of the defendant, are all founded on the finding of the grand jury; and as it is admitted that plaintiff had his witnesses sent before the grand jury, and by their testimony prevented, as must have necessarily been the case, the finding of an indictment against himself, and acquittal as to the accusation against him, he is precluded by his own conduct from relying on such acquittal as prima facie evidence of the want of probable cause, as the state of facts testified to and explained by plaintiff's witnesses could not have been otherwise than materially different from the state of facts existing and unexplained and known to the defendant at the institution of the criminal proceedings. If not, why did the plaintiff have his witnesses before the grand jury? For the foregoing reasons the judgment is reversed, the verdict of the jury set aside, and a new trial awarded.

Note by HOLT, P. I do not think the circuit judge erred in refusing to instruct the jury that "the waiving of a preliminary examination by the plaintiff, when charged with crime, was prima facie evidence that there was at least probable cause sufficient to justify the defendant in making the complaint."

1. Now, when the modern tendency is to cut loose from artificial rules of evidence, already created, as hampering the due administration of justice, I can see no good reason why we should overrule the circuit judges, who have daily experience of these evils, for refusing to create or apply new ones. "These artificial presumptions have no other effect than to disturb and obscure the judgment of juries in dealing with the evidence. Instead of dealing with the evidence in the natural way, according to their conscience and experience, and deciding according to common sense, they are told to go according to some artificial rule of evidence, which they understand but dimly, if at all, and may be thus induced to decide wrongly." See 1 *Thomp. Torts*, 9.

2. The only case cited for it is *Vansickle v. Brown* (1878) 68 Mo. 627, 637. When we turn to the case we find that Henry, J., dissented, and Hough, J., in delivering the opinion of the court, says: "If the finding of the magistrate on the facts proved before him makes a prima facie case, such waiving an examination, and voluntarily entering into a recognizance, amounts to a confessing by the accused that there is probable cause,"—citing *State v. Ralley*, below. To us it is a clear case of non sequitur, and, on turning to the case referred to (*State v. Ralley* [1864] 35 Mo. 168), we find that the docket of the justice is as follows: "*State of Missouri v. Lewis C. Ralley*. The defendant appeared before me, and waived an examination, and admitted that he did shoot H. E. W. McDearman



on the 11th day of May, 1861, with intent to kill, and entered into bonds," etc. And Judge Bates, delivering the opinion, on this point says: "The justice's docket, though not showing an adjudication by the justice, shows an actual admission of the defendant that the crime had been committed, and not merely that there was probable cause to believe him guilty of it, but a direct and unequivocal admission of his guilt." On the other hand, in *Schoonover v. Myers* (1862) 28 Ill. 308, it was held, in effect, that such waiver was not an admission of probable cause. It might be well enough said that as the examining magistrate hears evidence and inquires into the facts and circumstances, and is presumed to be a fair-minded man of common sense, when he reaches the conclusion that the offense has been committed, and there is probable cause to believe the accused to be guilty, and he sends the party on, such finding is, at least, *prima facie* evidence thereof. Here the presumption is not artificial, but it by no means follows that, because the accused waives an examination, such waiver has the same significance. The magistrate makes no examination; hears no evidence; decides nothing except the sufficiency of the recognition. The accused admits nothing; certainly he does not suppose himself to admit that there is probable cause for making the charge, when he knows that it is without the slightest foundation, but is the result of the promptings of the malice or avarice of some secret, false, or open enemy to get possession of the thing in controversy; to force the payment of a false claim; to ward off a suit or prosecution, or for some other private end or sinister motive of personal hate or personal gain. And to have this artificial non sequitur forced upon him may be doing him great injustice in so important a matter; and, although he is not likely to sue, he does not wish to rest under such an imputation.

3. The plaintiff opens his case weighted with the burden of making the negative proof that the charge was made without reasonable probable cause. Is not that enough? Is he, in addition, to be handicapped with an unnatural inference, drawn by an artificial rule of evidence from conduct that can be reasonably explained and accounted for in other ways? He wishes to expose some blackmailer; to avoid the charge of buying off his accuser; to show clearly that the charge is wantonly made from some sinister motive of personal gain; he wishes to have himself vindicated by the action of the grand jury or court, or to have the matter practically ended once for all; he acts under the advice of counsel, and for some one or many reasons, which imply no guilt, does not wish at that stage to expose his hand. Such artificial inference, drawn from waiver, has no analogy to preliminary examination and commitment. To give it the same effect is not in accord with the general mode of regarding it. The rule is not called for by public policy or gen-

eral convenience. It subverts no useful purpose in the administration of justice. Waiver is a circumstance in its own particular case; nothing more. To give it weight and efficiency as proof, which it does not have in and of itself, is certain to bewilder in some degree those whose course ought to be made practically plain, and is likely to mislead those who are expecting to be guided aright, as far as they are guided at all.

(40 W. Va. 331)

## MAYNARD v. NORFOLK &amp; W. R. CO.

(Supreme Court of Appeals of West Virginia.  
March 30, 1895.)

## RAILROAD COMPANIES—KILLING OF ANIMALS—DEFECTIVE GUARDS—WHO MAY RECOVER.

1. In order to charge a railroad company with damages for killing stock straying upon its track, negligence on the part of the company must appear, and the burden of showing it rests upon the plaintiff.

2. The provision of section 14, c. 42, of the Code, requiring railroad companies to construct and maintain cattle guards upon land condemned, is for the benefit of the landowner; and therefore the mere omission to do so will not entitle another party, whose stock is injured while straying upon the railroad track, by trains, to recover damages, though, but for the want of it, the stock would not have been where it was injured.

(Syllabus by the Court.)

Error to circuit court, Logan county.

Action by Alvis Maynard against the Norfolk & Western Railroad Company. Plaintiff had judgment, and defendant brings error. Reversed.

Campbell & Holt, for plaintiff in error. R. H. Hoyle, B. H. Oxley, and E. W. Wilson, for defendant in error.

BRANNON, J. In an action brought by Maynard against the Norfolk & Western Railroad Company before a justice, and carried by a writ of certiorari to the circuit court of Logan county, Maynard recovered \$140 damages for killing his horse,—the recovery being, not by verdict, but on a finding of the court in lieu of a jury,—and the company sued forth this writ of error.

It is settled that, to charge a railroad company for killing stock straying upon its track, the owner of the stock must prove negligence on the part of the company. There are so many cases heretofore decided by this court holding this principle and discussing this subject that it would be a waste of time to further discuss it here. *Blaine v. Railroad Co.*, 9 W. Va. 252; *Baylor v. Railroad Co.*, Id. 270; *Hawker v. Railroad Co.*, 15 W. Va. 628; *Washington v. Railroad Co.*, 17 W. Va. 190; *Layne v. Railroad Co.*, 35 W. Va. 438, 14 S. E. 123; *Hoge v. Railroad Co.*, 35 W. Va. 562, 14 S. E. 152. *Johnson v. Railroad Co.*, 25 W. Va. 570, pointedly holds, as those cases in effect do, that the burden to show negligence is upon the plaintiff. It is use-

less here to recite the evidence, as it would be no precedent for future practice, and necessary only to state legal principles arising from the facts as they appear to us. We think there is a failure to show negligence on the defendant's part,—a clear inadequacy of evidence to sustain the action on that basis.

There is another question of law proper to be decided. Touching it I make the following extract from brief of counsel, which I regard a fair statement of facts pertinent and necessary for the understanding of the question, and as a presentation of the law of that question: "In order that the second question may be clearly understood, it will be necessary to call attention to the location of the place where the accident occurred. The plaintiff lived a short distance east of the town of Williamson. To the east of him, and following the railroad track, the witness James Cary lived. And still further eastward, and entirely disconnected from the plaintiff's place, is what is known as the 'Widow Lawson Farm.' Through the latter farm the railroad company condemned its right of way, and the place was cleared and fenced at the time of condemnation; and it became the duty of the company, in consequence of section 14 of chapter 42 of the Code, to fence both sides of its track, and put in suitable cattle guards through the land so condemned, and it did construct the required fences, and place a cattle guard at the eastern line of the Lawson place, but omitted to put one at the western line thereof. This made an inclosure on three sides, with an opening at the west, into which, presumably, the plaintiff's horse strayed from the commons below; and the question is, does the omission on the part of the railroad company to put in Mrs. Lawson's cattle guard render it liable for the plaintiff's horse, killed on a part of its right of way from which such a guard would have excluded it? It will be observed that leaving the guard out simply extended and increased the size of the common through which the railroad ran, and upon which the horse was already grazing. The absence of the guard did not admit the animal to the railroad track. He was already grazing upon an uninclosed portion of it, and the omission of the guard simply enabled him to change his position on the track; and make choice of a place in which to die. For whose benefit is section 14 of chapter 42 intended? That portion of the section involved reads as follows: 'And in all cases when the property taken under this chapter is by a railroad company, and is land which has been cleared and fenced, the said railroad company shall construct and forever maintain suitable farm crossings, cattle guards and fences on both sides of the land thus taken.' The very terms of this statute indicate pretty clearly the object of the legislature. It only required certain portions of the track to be fenced, and those portions are located and determined by the manner in which the title thereto

was acquired, whether by condemnation or not, and the character of the land at the time of its acquisition, whether fenced and cleared or not. No right of way purchased or donated, or that runs through unimproved land, whether condemned or not, need be fenced. What is the meaning of such a restricted requirement? Why did not the legislature require railroad companies to fence their tracks from end to end? Why not compel them to fence through woodland, through cleared but unfenced common, through cleared and fenced lands donated or purchased? Had it been the object of the legislature, by this act, to benefit or protect any one but the adjoining proprietor,—that is, the public at large,—it would have required fences wherever that public was likely to come in contact with the track. The public and its property is just as likely to come upon the right of way where it has been purchased or donated through improved lands, or where it has been condemned through wild lands, or open common, as it is at a point where it has been condemned through improved land. If the legislature had for its object the protection of the public and its property by the construction of fences, is it not a little peculiar that it should require one mile of track to be fenced, and permit ten miles to lie open? The inference from this is almost irresistible that the legislature did not have the community at large in mind at all. It did not even contemplate the greater safety of passengers upon railroad trains. It simply undertook, by this restricted requirement, to make railroad companies place the landowner, whose cleared and fenced land they had taken by eminent domain, back in the position in which they found him, or as nearly so as practicable. Here he was not giving, but resisting, and without an opportunity to impose conditions; refusing to sell, and in consequence without opportunity to stipulate for fences. His wheat field is split in two, and a strip from eighty to a hundred feet wide taken thereout. Before he had one field, inclosed upon all sides. Now he has two, each of which is open upon one side, and his crops are at the mercy of the 'razor back.' The law has permitted this to be done without the owner's consent, and, furthermore, directed the commissioners who assessed his damage not to take the cost of fences made necessary by the taking into consideration at all; providing in lieu thereof, however, as above quoted, that the company condemning shall inclose the two newly-made fields by fencing both sides of its track clear through,—thus by statute giving back to a man his fences, whose fences had been by statute taken without his consent. Unquestionably the obligation is imposed for his benefit alone. No one else would seem to have any interest in the matter whatever. So far as any one else is concerned, the company may leave its track open, and that person may let his cattle run at large. The company is simply required to exercise

ordinary care to avoid injury to cattle so running at large when they come upon its track, and the owner thereof, so permitting them to run at large, takes the risk of injury to them from unavoidable accident. *Baylor v. Railroad Co.*, 9 W. Va. 270. The intention of the legislature in the passage of this statute would appear to be so manifest as to dispense with the citation of authorities in support of our view; but, as there has been more or less discussion of the subject before our circuit courts, it might be well to indulge in a few: 1 Redf. R. R. (4th Ed.) p. 485, par. 3; *Jackson v. Railroad Co.*, 25 Vt. 150; *Bemis v. Railway Co.*, 42 Vt. 375; Redf. Am. Ry. Cas. note, p. 351. The latter part of the paragraph first above cited from Redfield on Railways reads as follows: 'The obligation to make and maintain fences, both at common law and under the statute, applies only as against the owners or occupiers of the adjoining close.' Chief Justice Redfield, in the case of *Jackson v. Railroad Co.*, supra,—an extract from which is appended as a note to page 351 of his *American Railway Cases*, above cited,—used the following language: 'We cannot conceive, then, how any one can be said to be directly interested in the maintaining of fences upon a railway, beyond the adjoining proprietors of land, and those who may travel upon the road, either as passengers or workmen. And in regard to this latter class of persons, who are only interested in this matter temporarily, for the purpose of their own security while upon the road, we have no occasion to speak here. The adjoining proprietors certainly are primarily and principally interested in the maintaining of fences upon the line of railways. There is no doubt a remote, incidental, and contingent interest in all the citizens, in having such roads carefully fenced. One's teams, cattle, and children, even, are thereby rendered less likely to receive damage by reason of the running of such roads. But this is an interest of so remote and contingent a character as scarcely to be supposed to form the basis of so extensive and expensive a charge upon such companies by the legislature. Certainly it should not be so held, unless so expressed in totidem verbis, or by the most obvious implication.' The above observations of Judge Redfield were made upon a statute that required the railway company 'to build and maintain sufficient fence, upon each side of their railway, through the whole route thereof.' How much stronger then is the case, like the one at bar, where only portions of the track are required to be fenced." In *Hoge v. Railroad Co.*, 35 W. Va. 566, 14 S. E. 152, Judge Holt expressed the opinion that cattle guards are for the benefit of the landowner on whose lands they are. So I do not regard the omission to put this cattle guard in as alone sustaining the action. For these reasons we reverse the judgment and finding, and, rendering such judgment as the circuit court ought to have rendered, we enter judgment for defendant.

(40 W. Va. 300)

## CLARK et al. v. PERDUE.

(Supreme Court of Appeals of West Virginia.  
March 30, 1895.)

EVIDENCE—COPY OF DEED—EJECTMENT—RES JUDICATA.

1. An office copy of a deed improperly admitted to record is not competent evidence.

2. Where an action of ejectment is brought by an adverse claimant against a tenant to recover possession of the premises, and judgment is rendered for such plaintiff against the tenant by default, and a writ of possession is executed by which the plaintiff is placed in actual possession, the possession is thereby changed, and the landlord is thereby actually turned out,—in a second action of ejectment by plaintiffs, who derive title from the plaintiff in the first suit, against such landlord, sued as defendant, the record of the recovery in the former suit is competent evidence on behalf of plaintiff in the latter suit as showing or tending to show that the defendant's possession at that time was ended and changed by the execution of such writ of possession.

(Syllabus by the Court.)

Error to circuit court, Mercer county.

Action in ejectment by E. W. Clark and others, trustees, against George W. Perdue. Defendant had judgment, and plaintiffs bring error. Reversed.

J. S. Clark and A. W. Reynolds, for plaintiffs in error. Okey Johnson and A. C. Davidson, for defendant in error.

HOLT, P. J. This is an action of ejectment, brought in the circuit court of Mercer county on the 12th day of March, 1890, in which there was a trial on plea of not guilty, and verdict for defendant, Perdue; motion by plaintiffs to set the same aside and award a new trial overruled, and final judgment for defendant on 15th day of January, 1892, to which this writ of error was allowed.

The plaintiffs assigned as grounds for new trial seven rulings made by the court during the progress of the trial, which they claimed to be erroneous, and to their prejudice. Two of these grounds are relied upon in argument here: "(1) In the course of the trial the plaintiffs offered in evidence the record, including the judgment, writ of possession, and return indorsed thereon, in the action of ejectment of W. H. Witten v. Silas Perdue et al., in connection with the testimony of R. C. Christie, clerk of the circuit court, and of W. H. Witten. (2) Also offered in evidence as a part of their chain of title and as color of title a certain deed from James Hector to Obadiah Belcher, and a deed from Obadiah Belcher to Chrisplanos Belcher. The court refused to allow the record and the two deeds to be read in evidence to the jury, and plaintiffs excepted." The plaintiff in an action of ejectment must recover on the strength of his own title, and the defendant is not called upon to give up the possession to any one who does not show himself to be the legal owner, unless he is in possession under the plaintiff's title, or has entered upon and

ousted the plaintiff without title or authority. The commonwealth being the fountain head from which ownership of land is medially or immediately derived, the plaintiff generally begins by tracing back his title to the land in controversy to that source; and land in a state of nature of which no actual possession has been had he can, in general, recover in no other way. But where the land has been held in actual possession by himself, or by some predecessor under whom he claims, long enough to make the title good by adversary possession, he may show himself entitled to recover without being able to connect himself with the commonwealth. The order in which he introduces his chain of paper title is a matter generally left to his own convenience, and, although he may not be able to trace the legal title back from himself to the commonwealth by reason of the defective acknowledgment of some deed, or from any other cause, he is permitted nevertheless to go back as far as he can,—in fact to introduce any and all the paper titles he may have to the land in controversy,—for the purpose of showing the nature of his claim, and the commencement and extent of his possession.

The first deed offered by plaintiffs and ruled out by the circuit court is a copy of a deed from James Hector to Robert Belcher, dated the 11th day of May, 1842, purporting to sell and convey a certain boundary of land supposed to contain 1,500 acres, signed, sealed, and delivered in the presence of three witnesses; but it was proved before the clerk by but two of the witnesses, whereas, as the law then was, it was necessary to be proved before the clerk or court by the three witnesses before it could be properly admitted to record. See 1 Rev. Code 1819, p. 362, §§ 1-6. The deed, therefore, not having been duly admitted to record, a copy from such record was not competent evidence. The second copy of a deed excluded by the court was of a deed made by James Hector to Obadiah Belcher, dated the 11th day of May, 1842, for 2,500 acres, executed in the presence of three witnesses, but admitted to record on the 11th day of July, 1845, after being proved before the clerk of the county court of Mercer county by the oaths of but two of them. Such copy was properly rejected as incompetent evidence for the same reason as the first, there being no law authorizing it to be admitted to record on proof by less than three witnesses. The Code of 1849, taking effect on the 1st day of July, 1850, was the first statute to reduce the number to two. See Code 1849 (Ed. 1860), p. 569, c. 121, § 2. The next paper offered in evidence by plaintiffs was an office copy of a deed dated May 12, 1842, from Obadiah Belcher to Chrisplanos Belcher for 1,500 acres, admitted to record on the 9th day of February, 1846, on proof before the clerk by but two of the three

subscribing witnesses, which was also properly ruled out for the same reason. And, even if competent, there is nothing to show that they were relevant, for there is nothing on their face showing that they covered, in whole or in part, the land in controversy; nor was any such proof offered, nor any statement made that plaintiffs expected to follow them up with any such evidence.

Did the court err in ruling out the record of recovery in ejectment of *Witten v. Silas Perdue et al.* had by judgment entered on the 5th day of May, 1873? That recovery by William H. Witten of Silas Perdue embraced the land in controversy. It was followed by a writ of possession, issued on the 19th day of May, 1873, which was executed on the 12th day of July, 1873, by the deputy sheriff of Mercer county placing the plaintiff, William H. Witten, in possession of the land. There was evidence tending to show that when that suit was brought by filing the declaration and proof of the service of notice on defendant Obadiah Belcher on the 27th day of January, 1873, and on defendant Silas Perdue on the 28th day of January, 1873, Silas Perdue was in actual possession of the premises as tenant of George W. Perdue, the defendant here; and that George W. Perdue had actual notice of the bringing of that suit against his tenant. Defendant George W. Perdue claimed under a deed from Zachariah Perdue to him for 50 acres, dated 25th March, 1868, being part of a junior grant to Zachariah for 450 acres, dated 31st day of May, 1849; and his claim was, and his own evidence tended to show, that under this deed for 50 acres he took actual possession of the land in controversy in 1868, and so held the same continuously until this suit was brought. There is certainly one ground upon which this record was relevant, and admissible in evidence: (1) It tended to show that defendant George W. Perdue had not had continuous, uninterrupted possession of the land since 1868; and (2) it, with the accompanying evidence, tended to show that there had been a judgment against him in favor of Witten, under whom these plaintiffs claim. Whether it is conclusive against him as to such title and right of possession may admit of grave doubt. Our statute on the action of ejectment (chapter 90, Codes 1868, 1891) abolishes the writ of right, and molds into the one action called "ejectment," simple, and comprehending all the substantial provisions of former law, with such improvements as were found to be proper to disentangle justice from nets of form, preserve all the benefits of the writ of right and of the action of ejectment, as well as of all other actions, possessory and droltural, and is also made comprehensive enough to try the mere right to real property, as well as the right of possession, and to determine it finally, being substantially a writ of right as much as an action of ejectment. See Report of Revisors of Code 1849, p. 691, note. Such statutory remedy prevails now pretty much ev-

everywhere throughout common-law countries, and, except where a second trial is given, is a conclusive and final determination as to the title or right of possession established in such action upon the party against whom it is rendered, and against all persons claiming from, through, or under such party by title accruing after the commencement of such action, except as thereafter mentioned (see section 35, c. 90, Code); and such conclusiveness and finality applies as much to a judgment by default as to one rendered on verdict found on issue joined, for section 12, c. 90, says: "And if the defendant fail so to appear and plead, his default shall be entered and judgment given against him." Section 5, c. 90, prescribes that "the person actually occupying the premises shall be named defendant in the declaration." If they be not occupied, the action must be against some person exercising acts of ownership thereon, or claiming title thereto, or some interest therein, at the commencement of the suit. If the lessee be made defendant at the suit of a party claiming against the title of his landlord, such landlord may appear, and be made a defendant with, or in the place of, his lessee. It is conceded that the action of ejectment of 1873 was governed by the law as it was under the Code of 1868, and it was held under the law as it then was (prior to the act of 1877) that the action could be brought only against the party in possession when the premises were occupied. *Johnston v. Mann*, 21 W. Va. 15. It was optional with the landlord, George W. Perdue, whether he would appear or not. The plaintiff could not make him a defendant, as the premises were then occupied by his tenant, Silas Perdue, as the plaintiffs in this suit claim, and as their evidence tends to prove; for the term, "actually occupying the premises," as used in the statute, is not confined to one who has his home and dwelling place upon the premises, but embraces one who is in actual possession by the ordinary, visible, continuing acts of ownership which has produced a change in their condition, giving them the appearance of being used. So the term is used in the cases of *Taylor v. Burnside*, 1 Grat. 165; *Overton v. Davisson*, Id. 211. And such actual possession once taken and held by fencing a field and cultivating crops is presumed to continue until the contrary appears; throughout the winter season,—the month of January, for example, as in this case,—although no visible use may then be made of the premises other than the fact of having it inclosed or fenced in. These plaintiffs claim by title regularly derived from William H. Witten by conveyances made since his recovery of the land in controversy by the judgment rendered on default against Silas Perdue in 1873. In that action of ejectment William H. Witten complained and averred that on the 1st day of January, 1873, he was seised and possessed in fee simple of a certain tract of land, giving the metes and bounds, which includes the

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land here and now in controversy; and, being so seised and possessed, the defendants Obadiah Belcher and Silas Perdue afterwards, to wit, on the day and year aforesaid, entered upon said premises, and unlawfully withheld the said premises from the said plaintiff. The plea of not guilty would have put these facts in issue, and would have put plaintiff to the proof of such right to the possession of the premises at the time of the commencement of the suit, and such proof would have been necessary to uphold and justify such verdict and judgment. And the judgment by default against Silas Perdue was attended by the same legal consequences of conclusiveness as if there had been a verdict for the plaintiff (see 1 Freem. Judgm. § 330), for such is the language of our statute. It makes no distinction. See *Green v. Hamilton*, 16 Md. 317, 77 Am. Dec. 295, notes. George W. Perdue, being the landlord, was the real party in interest, who could not, as the law then was, have been made a defendant, who would, however, have been the real party benefited had there been a defense and judgment in favor of his tenant, or had he made himself a defendant, and obtained such judgment. Such a one, having an opportunity to make defense, and standing by and letting judgment against his tenant go by default, would, under our then statute, seem to be as much bound and concluded as his tenant in possession (there being no fraud or collusion which vitiates such judgments), for the plaintiff could not make him a defendant, but he could enter himself as such, and make defense, if he saw fit. But the law has been changed, and now permits the plaintiff to make the landlord a codefendant. See section 5, c. 90, Code (Ed. 1891) p. 699.

Can it be said that this record is *res inter alios acta*, when the law did not permit the plaintiffs to make him a defendant, but did give the landlord such right, and the notice of the suit gave him the opportunity to controvert the plaintiffs' claim, and resist their demand? Still such a judgment by default against the tenant is so obviously dangerous, as being exceptionally open to the temptation of abuse with serious consequences, that, if it were necessary to decide it, I should, as now advised, be reluctant to hold the landlord to have been a party to such first suit, within the meaning of the term as used in the statute, as this could only be done by construing the term "party," as used in section 35 of chapter 90, to comprehend the party in interest, and that the landlord in this case was a party by representation. But, without giving it a conclusive effect, there are other grounds upon which the competency of the excluded record can be safely rested, and among them the one first noted, viz. that it proves Witten's possession and defendant George W. Perdue's want of possession in 1873, when the writ of possession was executed. See 2 Herm. Estop. p. 224, citing *Clarkson v. Stanchfield*, 57 Mo. 573; *Mitchell*

*v. Davis*, 23 Cal. 381; *Chirac v. Reinicker*, 11 Wheat. 280; *Jackson v. Hill*, 8 Cow. 294. The evidence tends to prove that Silas Perdue was the tenant of George W. Perdue; and the judgment and writ of possession executed against Silas, putting the plaintiff Witten, who claimed in fee simple for himself, into possession, at least had the effect of interrupting and changing the character of the possession; and such record, as already stated, was to that extent and for that purpose relevant and material. See 2 Black, Judgm. § 577, citing *Stridde v. Saroni*, 21 Wis. 175; *Read v. Allen*, 58 Tex. 380; *Chant v. Reynolds*, 49 Cal. 213; *Read v. Allen*, 56 Tex. 176. The pleadings in ejectment are broad and indefinite. They contain no recital of title. The plaintiffs' chain of title shows that they claim under Witten, the plaintiff in the former action; and it is competent to show by parol that Silas Perdue claimed as tenant, and was in possession under George W. Perdue, at the time of Witten's recovery against Silas, for in no other way than by such parol helping evidence can the judgment be applied to its proper subject-matter, or what was decided be ascertained, and given its true legal effect, if any, between the parties to this suit. For the reasons given, I am of opinion that the record in the action of ejectment of Witten *v.* Silas Perdue and the evidence of the witness Witten were improperly excluded, to the prejudice of the plaintiffs. Therefore the judgment complained of must be set aside, and a new trial be awarded.

(40 W. Va. 222)

**ELDER et al. v. INCORPORATORS OF CENTRAL CITY.**

(Supreme Court of Appeals of West Virginia.  
March 27, 1895.)

**SPECIAL LEGISLATION—INCORPORATION OF MUNICIPALITIES.**

Chapter 47 of the Code, in relation to the incorporation of cities, towns, and villages, in so far as it confers on the circuit court functions in their nature judicial and administrative, although in furtherance of the power of the legislative department of the state government, is constitutional and valid.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

On the application of J. S. Farr and others, the town of Central City was incorporated by order of the circuit court, from which order B. D. Elder and others bring error. Affirmed.

C. S. Welch and Simms & Enslow, for plaintiffs in error. Geo. J. McComas, for defendants in error.

**HOLT, P.** The circuit court of Cabell county, on petition of J. S. Farr and others, by order entered on the 31st day of July, 1893, directed a certificate of incorporation to be issued of a part of Guyandotte district as a town by the name of Central City, from which order B. D. Elder and others ob-

tained this writ of error. In 1872 the organization of many parts of the state into municipal corporations, for the purpose of local self-government, had become a matter of frequent and urgent necessity. The framers of the constitution thought that this need in the great majority of cases could be met more efficiently and impartially by a general law than by a great multitude of special enactments; hence section 39 of article 6 of the constitution prescribes that the legislature shall not pass special laws incorporating cities, towns, or villages, or amending the charter of any city, town, or village, containing a population of less than 2,000, but should provide for the same by general law. Thereupon the legislature enacted chapter 47 of the Code,—see Code, p. 421 (Ed. 1801),—which provides that any part of any district or districts not included within any incorporated town, village, or city, and containing a resident population of not less than 100 persons, and if it shall include within its boundaries a territory of not less than one-quarter of one square mile in extent, may be incorporated as a city, town, or village, under the provisions of this chapter. It then provides that an accurate survey and map shall be made of the territory; that a census of the resident population shall be taken; public notice thereof be given that application will be made to the circuit court for a certificate of incorporation; and that the question will be, at a named time and place, submitted to the vote of the qualified resident voters; and upon filing a proper certificate, and upon satisfactory proof that a majority of all the qualified voters residing within such boundary have voted in favor of such incorporation, and that all the provisions of the law have been complied with, the circuit court shall by an order entered of record direct the clerk of said court to issue a certificate of incorporation of such city, town, or village in form or in substance as follows (giving the form). The statute then proceeds to prescribe the various powers and duties of such municipal corporation. This statute itself erects the local body of citizens into a municipal corporation upon their bringing themselves within its provisions and upon complying with its terms, all of which are specified and fixed therein (see *Thomp. Corp.* § 110 et seq.); and whether the facts thus required exist in the particular case the circuit court, after due notice to all concerned and an opportunity to be heard against the application, ascertains and determines. This is, at least, an administrative or quasi judicial function, which the circuit court may be authorized to perform. See latter clause of section 12, art. 8, Const. This court has already held the statute in question to be constitutional (see *In re Town of Union Mines*, 39 W. Va. 179. 19 S. E. 398); and, no other objection being made or discussed, the judgment complained of, in my opinion, ought to be affirmed,

as a constitutional question is involved; but the majority of the court being of opinion that the matter is only administrative, and that this court has no jurisdiction in a matter merely quasi judicial, the writ of error must be dismissed as improvidently awarded.

(40 W. Va. 339)

COSNER et al. v. McCURUM et al.

(Supreme Court of Appeals of West Virginia.

April 3, 1895.)

DEED—HUSBAND TO WIFE—SEAL.

1. A paper purporting to be a deed or gift of real estate, which has a scroll annexed to the grantor's signature, with the word "seal" written in it, but which fails to recognize said scroll as a seal in the body of the instrument, but which paper has been duly acknowledged for record by the grantor, held to be a deed.

2. A deed from a husband to his wife for real estate, while inoperative and void at law, is nevertheless valid in equity, and will confer upon the wife a good equitable estate, which in all cases will be enforced against the husband by a court of equity.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county.

Bill of review by C. P. Cosner and others against C. McCrum and others. From the decree rendered, C. P. Cosner appeals. Reversed.

Dayton & Dayton and A. B. Parsons, for appellant. W. B. Maxwell, for appellees.

ENGLISH, J. On the 23d day of November, 1891, C. P. Cosner, U. S. Cosner, Free-land H. Cosner, and others, parties defendant in a certain suit in equity pending in the circuit court of Tucker county, in which S. McCrum was plaintiff, filed their petition, verified by affidavit, in the nature of a bill of review, alleging errors in a decree of sale which had been entered in said cause at the June term, 1891, of said court, and praying for a review and hearing of said decree, and a correction of the errors therein, which petition, with its exhibits, was ordered to be filed; and the plaintiff, S. McCrum, appeared thereto, and waived the service of process therein, and tendered his answer to said petition, admitting that said decree of sale was erroneous in so far as the same directed a sale of the land directed to be sold before the assignment of the widow's dower therein, but denying that there was any other error in said decree; and on his motion said answer was ordered to be filed, upon consideration whereof it was ordered that so much of said decree as directed a sale of the land of Solomon W. Cosner, deceased, which land was ordered to be sold before the assignment of the widow's dower therein, be reversed and set aside. Commissioners were appointed to go upon the 201 acres of land in the commissioners' report mentioned, and ascertain if the same could be identified and located, and, if so, to lay off and assign unto Elizabeth Cosner, widow of Solomon W. Cosner, de-

ceased, one-third thereof, as and for her dower therein, having regard to quantity and quality; and said commissioners were directed to further ascertain and report if the said Solomon W. Cosner died seised of any other lands, and, if so, they should assign to his said widow her dower portion therein, having regard to quantity and quality. The errors alleged and relied upon by the petitioners, C. P. Cosner and others, to annul and set aside the decree rendered in said cause of S. McCrum v. F. H. Cosner, administrator, etc., entered at the June term, 1891, are: (1) That the said decree directs 201 acres of land to be sold, but nowhere upon the face of said decree, or in the papers or proceedings in the cause, is there any identification of the said 201 acres, or any description thereof whereby the same can be in any manner located, or its boundaries defined, and it was wholly impossible for petitioners to know or understand which one of their lands was to be sold. (2) The land was decreed to be sold subject to the dower of the widow, Catherine Cosner, who had in no way expressed her election to take her dower interest in money, instead of in kind. (3) Said petitioners alleged that said Solomon W. Cosner died seised of no real estate, but all that he was ever possessed of was conveyed away by him in his lifetime, by largely voluntary deeds, which were executed more than five years before the institution of said suit; that by deed of gift, purely voluntary, as shown on its face, nearly 13 years before this suit was brought, and when the said Solomon W. Cosner was in no way indebted, he conveyed all of the lands of which he was possessed, consisting of three tracts, of 524 acres, 166 acres, and 148 acres, in Canaan Valley, fully described in said deed, to his said wife, Catherine Cosner, and her children, which deed was duly acknowledged, delivered, and admitted to record; that subsequently said Catherine Cosner, the wife, and W. H. H. Cosner and wife, Armeda J. Flanagan and husband, C. C. Cosner, and Elizabeth Cosner (then Harr) reconveyed their interests in said lands to said Solomon W. Cosner, who shortly after, by deed dated March 9, 1890, conveyed 166 acres of said lands to Emile and F. H. Cosner, and by deed of same date conveyed to Melissa J. Cosner, the wife of W. H. H. Cosner, 100 acres thereof, and by deed of same date conveyed to C. C. Cosner 100 acres, all of which deeds were voluntary, but were delivered and recorded at least 10 years before said suit was brought; that on the 20th day of July, 1880, by deed of that date, and for a valuable consideration, said Solomon W. Cosner conveyed 186 acres of said lands to his cousin Daniel Cosner, and by deed dated April 26, 1888, for a valuable consideration, the said S. W. Cosner sold and conveyed 88 acres of said land to Mitchell Carroll and wife, both of which deeds were duly admitted to record, which conveyances more than covered the entire interest of said S. W. Cosner in said lands, and therefore the



remainder of said lands were in no wise subject to his debts. And for these reasons they pray that said final decree may be annulled and set aside, that said lands may be held exempt from the debts of said Cosner, and that the title thereto be held to be vested in petitioners and the other beneficiaries under the deeds therein set forth, and, there being no assets for the payment of said debts set forth in said decree, may said original cause be dismissed, etc. On the 14th day of June, 1892, the defendant S. McCrum obtained leave to file an amended answer to the plaintiff's petition, in which he claims that, from an inspection of the alleged deed from Solomon W. Cosner to Catherine Cosner and her children, it will be seen that the same is no deed, but is only an agreement, so far as the land mentioned therein is concerned, to make a gift thereof to said Catherine Cosner and her children, and no actual conveyance of said land was ever made to said donees, and that said alleged deed is the only shadow of claim the said petitioners have, or ever had, to said land, except as heirs of said Solomon W. Cosner, and that said agreement to make a gift did not vest any right, legal or equitable, in said donees, and, no actual transfer of said land having been made, the said agreement, as against respondent, a creditor of said Solomon W. Cosner, was an absolute nullity, and of no effect whatever. He also directs attention to the fact that said alleged deed is not under seal, the description of the property claimed to have been conveyed thereby vague and uncertain, and but one guaranty is named therein, and that said pretended deed is void for uncertainty; that after the execution of said pretended deed the parties thereto regarded the same as an absolute nullity. Said Solomon W. Cosner remained in the possession of the land, and treated it as his own, and the said donees, nor any of them, at any time, ever attempted to use, control, or manage the same, or any part thereof, and, after the death of the said Solomon W. Cosner, partitioned the same among themselves, as his heirs, and exchanged mutual deeds of partition; and the said S. W. Cosner claimed such exclusive and notorious ownership over said land that after the execution of said alleged deed to Catherine Cosner, etc., he actually conveyed away two large parcels thereof to Daniel Cosner and Mitchell Carroll, and made general warranty deeds therefor. Respondent also denies the right of Freeland H. Cosner to be entertained by said petition for any purpose, for the reason that he filed his answer in the original cause, raising the very questions sought to be reviewed by said petition, and the same were decided against him, and the opinion of the court upon these questions was not only conclusive against the said Freeland H. Cosner, but was also conclusive against all the petitioners. And respondent charges that the questions sought to be raised by said petition are not such questions as can be raised on a proceeding of this

kind, but such of said petitioners as let said original cause go by default can only review said decree by errors appearing upon the face of the proceedings, and cannot in this way bring in matter to the attention of the court; but, if said petition is to be treated as a bill of review, then the petitioners do not present such a statement of fraud, accident, surprise, or adventitious circumstance as entitles them to be entertained for the purposes sought by said petition, nor do any such circumstances exist as will enable them to amend their said petition so as to be entertained. And he prays that said petition be dismissed, and that the lands of which Solomon W. Cosner died seised be sold, subject to the dower of the widow therein, to satisfy respondent's debt against the same. This amended answer was excepted to by the petitioner because it presented no new matter of defense, and no good reasons are shown for its filing. On the 23d day of June, 1892, the court overruled the exceptions to said amended answer, and the petitioners replied generally thereto, and the cause was referred to a commissioner to report all the facts and circumstances connected with the title to the land claimed by the plaintiff, S. McCrum, to have been owned by S. W. Cosner at the time of his death, reporting specially what, if any, control and possession said Solomon W. Cosner exercised over the land in controversy after the date of the deed from him to his wife and children. On the 29th day of June, 1893, the cause was heard upon the report of James W. Bowman, surveyor, and others, commissioners to assign dower to said widow, the former orders and decrees therein, and upon the report of commissioners, to which there is one exception filed by the defendants, and upon the evidence taken before said commissioner, upon consideration whereof the exceptions to the report of Commissioners Valentine and Adams were overruled, and said reports confirmed, except so far as therein modified; confirmed the report of commissioners assigning dower to Catherine Cosner, widow of Solomon W. Cosner; ascertained that said S. W. Cosner, at the time of his death, was the owner of three tracts of land, one containing 221 $\frac{1}{4}$  acres, one containing 143 $\frac{3}{4}$  acres, and the mill lot of 1 acre; ascertained the amounts due the plaintiff, S. McCrum, and to Freeland H. Cosner, as administrator of Solomon W. Cosner; and decreed that unless there was paid to the parties entitled thereto, respectively, their debts, as therein ascertained to be due them, and the costs of suit, within 30 days, a special commissioner, therein named, should make sale of the land ascertained to have been owned by said S. W. Cosner at the time of his death, or so much thereof as might be necessary to satisfy the said debts and cost, upon the terms therein prescribed, which sale was to be made subject to the widow's dower therein; and a writ of possession was awarded the said Catherine Cosner, if desired by her, to have possession of the land so



assigned to her as her dower. And from this decree C. P. Cosner obtained this appeal.

In examining the questions raised by the petition of C. P. Cosner and others, in the nature of a bill of review, which petition must be so regarded, we encounter some difficulty in passing upon the questions raised by said petition, in the absence of the original record, or the final decree which is sought to be reviewed. Enough, however, appears from the allegations of the petition which are uncontradicted, and the exhibits therewith filed, to enable us to pass upon the material questions raised.

The third error alleged and relied upon by the petitioner raises the question as to the effect of the paper filed as Exhibit X with the petition, which purports to be a deed of gift from Solomon W. Cosner to his wife and children, bearing date July 12, 1877, whereby, in consideration of love and affection it is alleged in said petition, he conveyed all the lands of which he was possessed unto his wife and children, which deed was duly acknowledged and admitted to record, which deed was voluntary, and was acknowledged and admitted to record nearly 13 years before this suit was instituted. It is contended in argument that said Exhibit X is not a deed, because the scroll and seal are not recognized in the body of the instrument; and while it is true that our statute (Code, c. 13, § 15) provides that "when the seal of a natural person is required to a paper, he may affix thereto a scroll by way of seal or adopt as his seal any scroll, written, printed or engraved made thereon by another," a distinction appears to exist between instruments which are not required to be acknowledged and recorded and those that are only to be signed and sealed. Where the latter do not recognize the scroll or seal in the body of the instrument, the weight of authority is that such papers are not sealed instruments. Where, however, a scroll is annexed to the signature of a paper purporting to be a deed, and the word "seal" is written within the scroll, and said writing is properly acknowledged and admitted to record, it must be regarded as a deed, although the scroll or seal are not recognized in the body of the instrument. So in the case of *Ashwell v. Ayres*, 4 Grat. 283, the court of appeals of Virginia held that "an instrument purporting to convey land, with a scroll attached to the grantor's name, though the scroll is not recognized in the body of the instrument, will be held to be a deed, where the instrument has been acknowledged in court by the grantor as his deed, for the purpose of having it recorded." Prof. Minor, in his *Institutes* (volume 2, p. 653), upon this question, says, "In instruments not required by some statute to be under seal, the scroll must be recognized as a seal in the body of the instrument, as in the case of a common bond for money;" citing *Clegg v. Lemessurier*, 15 Grat. 108, where it is held that "a writing for the payment of

money or other purpose, which is not required to be by deed, having a scroll at the foot thereof, with the word 'seal' written therein, but which is not recognized in the body of the instrument as a seal, is not a sealed instrument." In this case, Judge Lee, in delivering the opinion of the court, reviews the authorities, and, referring to the case of *Ashwell v. Ayres*, 4 Grat. 283, says: "And, as recording was essential to perfect the instrument for the purposes intended, it might be said, without impropriety, that this was part and parcel of the perfect deed, and sufficiently manifested the recognition of the writing as a sealed instrument. The distinction, then, between instruments of this character, which can only be effectual as deeds, and a promise in writing simply for the payment of money, which might be indifferently an obligation under seal, or a promissory note, and as to which neither acknowledgment before witnesses or in court, nor recording, was necessary, must be apparent." In the case of *Smith v. Henning*, 10 W. Va. 630, Haymond, J., in delivering the opinion of the court, after elaborately discussing this question, and citing the case of *Taylor v. Glaser*, 2 Serg. & R. 504, and numerous other authorities, says: "In the case at bar the paper writing in question, called the 'Deed,' from Jones, the executor, to the defendant, for the land in controversy, commences, 'This indenture,' etc. It is signed by the executor with his name, with a scroll opposite his name, and within the scroll, opposite his name, the word 'seal' is written. In this condition the said paper writing was presented to the clerk of the county court by the grantor therein, and, as presented with the scroll,—seal and all,—was acknowledged by him before the clerk. Taking the certificate of the clerk and the whole paper together, it is manifest that the grantor not only acknowledged the whole body of the paper writing, but his signature and scroll as his seal, because the word 'seal' was written within the scroll, and also that in acknowledging it before the clerk he acknowledged it as his deed, as was then understood by the clerk, as is manifest from the certificate of said clerk." This deed has a striking similarity to the one under consideration,—in fact, in every material point it is precisely the same; and, in view of these authorities cited, the paper bearing date the 12th day of July, 1877, and signed by Solomon W. Cosner, and acknowledged before William Rains, justice, and admitted to record by the clerk of the county court of Tucker county, was the deed of said Solomon W. Cosner to his wife and children for the property therein mentioned. The effect of this conveyance was to confer upon Catherine Cosner the equitable title to the undivided one-eleventh part of said land, and to convey to her 10 children the remaining ten-elevenths thereof.

It appears that the said Solomon W. Cosner originally owned three tracts of land, con-

taining, respectively, 524, 166, and 148 acres each, and aggregating 888 acres. After conveying the same to his wife and children, four-elevenths thereof, amounting to  $304\frac{3}{11}$  were reconveyed to him by his wife and three of his children, and then, on the 9th day of March, 1880, said Solomon W. Cosner conveyed to Emile and F. H. Cosner 166 acres thereof; to Melissa J. Cosner, wife of W. H. H. Cosner, 100 acres thereof; and to C. C. Cosner, 100 acres thereof,—and shortly afterwards, to wit, on the 20th day of July, 1880, said Solomon W. Cosner conveyed 186 acres of said lands to Daniel Cosner, and on the 26th day of April, 1888, said Solomon W. Cosner conveyed 88 acres from said lands to Mitchell Carroll and wife, all of which deeds were duly admitted to record; and the record discloses the fact that, while only  $304\frac{3}{11}$  acres of land were reconveyed to him, he has sold and conveyed to different parties 640 acres. The plaintiffs in the original cause, so far as we can determine from the portions of the record presented, relied almost solely upon the alleged invalidity of the deed from Solomon W. Cosner to his wife and children, which reliance was based on the fact that the seal was not recognized in the body of the instrument. Having determined that this defect was cured by the acknowledgment and recordation, the next question was as to the effect of the conveyance from the husband to the wife directly, and this question was determined by reference to the case of *McKenzie v. Railroad Co.*, 27 W. Va. 306, where it was held "a deed from a husband to his wife for real estate, while inoperative and void at law, is nevertheless valid in equity, and will confer upon the wife a good equitable estate, which, in all cases, will be enforced against the husband by a court of equity." The wife then took an equitable estate in the land, and the children a legal estate. At the time this conveyance was made, it is alleged in the petition, and undenied, that said Solomon W. Cosner was in no way indebted; that the lands conveyed by him to his wife and children were all the lands which he possessed; he has conveyed away more land than was reconveyed to him by his wife and a portion of his children. At the time this suit was brought, it was too late to attack any of these conveyances as voluntary, and no effort appears to have been made to assail them as fraudulent. The court, however, in the decree complained of, acted upon the theory that the deed from Solomon W. Cosner to his wife and children, not being under seal, was a nullity, and the commissioner Adams—having found that, if said deed passed no title to said wife and children, said Solomon W. Cosner was at the time of his death, in 1888, the owner in fee simple of three several tracts of land, one containing  $221\frac{1}{4}$  acres, another containing  $143\frac{3}{4}$  acres, and the other the mill lot—adopted this view of the case, and decreed the sale of these three tracts of land. Having, however, reached the conclusion that

the paper executed by Solomon W. Cosner to his wife and children on the 12th day of July, 1877, was a deed conveying an equitable interest in said lands to his wife, and a fee-simple estate to her children, and it being apparent that in this view of the case the said Solomon W. Cosner, at the time of his death, was the owner of no real estate which could be subjected to the payment of his debts, the decree complained of must be reversed, and the cause remanded, with costs.

(40 W. Va. 312)

## HALE v. TOWN OF WESTON.

(Supreme Court of Appeals of West Virginia.  
March 30, 1895.)

## MUNICIPAL CORPORATIONS—INJURIES FROM DEFECTIVE STREET—SPLITTING ACTION.

1. Under section 53 of chapter 43 of the Code, any person who sustains a direct injury to his person or property,—for instance, having a limb broken or a horse disabled,—by reason of a street in a town being out of repair, may recover damages for such injury by an appropriate action, in a court of competent jurisdiction, against said town.

2. One who suffers an injury only in his business from a street being out of repair cannot recover damages therefor from a city or town under section 53 of chapter 43 of the Code.

3. The proprietor of a brickyard who is engaged in the manufacture of brick in the vicinity of a city or town, and in the erection of houses in said town or city, who, in common with others, is injured in his business by reason of the municipal authorities thereof failing to keep a street in repair which constitutes the highway from said town passing said brickyard, cannot maintain an action for damages against said city or town for losses sustained by him in his business.

4. A person who asserts a claim to a specific amount of damages for an alleged injury sustained in his business will not be allowed to split up his claim in order to reduce it to the jurisdiction of a justice, and to bring consecutive suits before a justice for such claim.

(Syllabus by the Court.)

Error to circuit court, Lewis county.

Action by P. M. Hale against the town of Weston to recover damages resulting from a defective street. Plaintiff had judgment, and defendant brings error. Reversed.

W. W. Brannon and Andrew Edmiston, for plaintiff in error. W. B. McGary, for defendant in error.

ENGLISH, J. This was a suit brought by P. M. Hale on the 3d day of June, 1890, before R. L. Mason, a justice for the county of Lewis, against the town of Weston, in which the plaintiff claimed and recovered \$300 damages. The case was removed to the circuit court on certiorari, and was again tried in that court, resulting in a verdict for the plaintiff, and judgment for \$300. During the trial of said action in the circuit court the defendant excepted to various rulings and instructions given by the court, and, after the evidence for the plaintiff was all in, the defendant, by its counsel, moved the court to strike out the plaintiff's evidence, and exclude the same from the jury, which motion

the court overruled, and permitted the said evidence to remain before the jury, and the defendant excepted. The action appears to have been predicated upon the following state of facts: The plaintiff was the owner and operator of a brickyard in the vicinity of the town of Weston in the fall and winter of 1889-90, and in order to reach said brickyard from said town with fuel to be used by him in burning his brick, and to carry his brick, when ready for use, to such places as he needed them, in the town, he was compelled to pass over a certain street of said town, which was in bad condition, and which, although the town authorities had attempted to repair by scraping dirt into the holes, was almost impassable, on account of the wet season which followed, and that by reason of the condition of this street he was unable to haul fuel to his kiln, which was ready to burn; that the brick were injured by drawing dampness, and he was damaged thereby to the amount of \$1,000. The plaintiff was asked the question whether he divided up his suits, and sued for \$300 at different times, and replied: "Yes, sir; I did, so I could get them tried. After suing first time, and obtaining judgment, I waited, thinking the town authorities would fix up the street, and, after their failure to do so, sued again, and in like manner, after waiting a second time after judgment, sued the third time." The defendant moved to strike out the plaintiff's evidence, to set aside the verdict, and award it a new trial, because the same was not founded on sufficient evidence, because it was contrary to the law and the evidence, and because the same was contrary to the court's instructions, which motion having been overruled, the defendant excepted, and set out all the evidence offered before the jury in a bill of exceptions, and applied for and obtained this writ of error.

The first error assigned and relied upon is the refusal of the court to strike out the plaintiff's evidence. Under this assignment of error the question is presented whether or not, everything being proven in the case which the evidence tends to prove, the plaintiff is entitled to recover; in other words, does the fact that the street or road complained of, during the wet season and winter of the years 1889-90, became impassable for teams, render the town of Weston, through a portion of which said highway passes, liable in damages to the plaintiff, who was engaged in the manufacture and sale of brick in the locality shown by the evidence? Under the heading "Public Wrongs," Sedg. Dam. (5th Ed.) p. 32, says: "To this general principle, that, where loss and legal injury unite, relief will be given by suit, the law recognizes but one exception,—that where the wrong is on so great a scale that the whole community, or a large portion of them, suffer from it. 'Here,' says Blackstone, 'I must premise that the law gives no private remedy for anything but a private wrong.' And so the law is

laid down by Lord Coke in regard to nuisances on the highway: 'A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance; and then it is not reasonable that a particular person should have the action, for, by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished a hundred times for one and the same cause.' 'In such a case the remedy is by indictment.' So, also, in the case of Quincy Canal v. Newcomb, 7 Metc. (Mass.) 278, it was said that if a party had suffered damage from the filling up of a canal, and want of cleansing, by means of which he was unable to enter it, it would have been a damage suffered in common with all other members of the community, and therefore redress must be sought by a public prosecution. Where one suffers in common with all the public, although, from his proximity to the obstructed way, or otherwise, from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action, because it would cause such multiplicity of suits as to be itself an intolerable evil. But where he sustains a special damage, differing in kind from that which is common to others, as where he falls into a ditch unlawfully made in a highway, and hurts his horse or sustains a personal damage, then he may bring his action." 2 Shear. & R. Neg. § 371, states the law upon this question as follows: "He, and he only, can maintain an action for a defect in a highway who has sustained some damage peculiar to himself, his trade or calling. A private action will not lie for an injury caused by the nonrepair of a highway, if all other persons passing suffer in the same kind, even though in far less degree. \* \* \* Thus the mere fact that one is delayed by an obstruction, and is obliged, in common with every one else who attempts to use the highway, either to pursue his journey by a less direct road, or else to remove the obstruction, will not entitle him to maintain an action for damages. And although an obstruction in a highway may make it difficult, or indeed impossible, for a merchant to deliver goods at his store, or for a farmer to gather his crops, or for a landlord to rent his houses, yet if the whole neighborhood suffer damages from the same cause, similar in kind, even if less in degree, no damages are recoverable. Upon this principle, no one can recover damages for being deprived, with the rest of the community, of the use of a highway by its total obstruction, as, for example, by a great fall of snow." And in note 1 it is said: "An action cannot be maintained against a town for damages alleged to have been caused to the plaintiff by the obstruction of a road by snow, by reason whereof he was prevented from traveling on the road with his cattle and teams, and on foot, and from transporting his logs and timber to a saw-mill, and from otherwise working on his wood

lot and about his logs and wood, and a declaration setting forth such a cause of action is bad on demurrer"; citing *Holman v. Townsend*, 13 Metc. (Mass.) 297, etc. It is difficult to distinguish between the consequences and liability resulting from a fall of snow on a highway and the fall of rain upon a street or roadway which has been recently repaired, and the holes filled with loose dirt, as the result would be the same in both instances. A case very similar in its circumstances to the one under consideration is that of *Gold v. City of Philadelphia*, reported in 8 Atl. 386, in which it is held by the supreme court of Pennsylvania that "a municipal corporation charged with the duty of keeping highways in repair is not liable to the owner or occupier of property fronting thereon for a consequential loss to his business resulting from the neglect of such duty." The facts in this case, as disclosed by the report of the referee, appear to have been that the plaintiff was the lessee and proprietor of an inn situated in the suburbs of the city of Philadelphia, at which farmers and drovers were in the habit of stopping, with their cattle, and sheds had been erected for their accommodation, and the patronage of the house was such that it was a source of considerable profit. The inn fronted on the road leading into the city, which road was under the supervision of the city authorities. The road had been neglected for several years, and, as a natural result, was in bad repair; and in the fall of 1880 the city graded Gowen avenue, at Mt. Airy, some distance below the inn of the plaintiff, and, from the cuttings made necessary by that grading, obtained a quantity of red or yellow earth or loam, which was spread upon portions of the road in question, with the intention of grading it. During the winter, after this red earth was put upon the road, the condition of it was very bad; the ruts and holes, which had been allowed to grow deeper in the old roadbed, were covered and hidden from sight by the soft earth spread over them; and when the rains came, and this soft earth was converted into mud, these old holes served as pitfalls for travelers, who, by reason of the covering of the mud, were unable to see them, and the custom at the plaintiff's inn was greatly decreased by the condition of this road. One of the defenses relied on by the city was that the obligation imposed upon the city to keep the road in repair was a public duty, a neglect to perform which was punishable by indictment, and that no one was entitled to a private action for negligence against the city, unless he could show some injury peculiar to himself, and different in kind from that which was suffered by the general public. The learned judge, in concluding his opinion in this case, says: "When a duty is imposed upon a municipal corporation for the benefit of the public, no benefit or consideration is received by such municipality, as in the case of a trading corporation; hence no implication arises

of liability to the individual citizen for any injury, which he has suffered in common with other citizens, resulting from a neglect of such duty. To sustain a contrary doctrine would be disastrous to municipalities, and consequently to the general public. If we once throw open the door to a recovery in such cases, how are we to measure the extent to which a public highway may be out of repair, in order to entitle owners of property abutting thereon to recover damages? Such questions would have to be referred to a jury, whose standard of duty would be as shifting as their verdicts would be uncertain, and in many instances oppressive." Mr. Bigelow, in his note to *Rose v. Miles* (Lead. Cas. Torts, 471) states the general principle thus: "If, then, the right invaded or impaired is a common or public one, which every subject of the state may exercise and enjoy, such as the use of a highway or canal, or a public landing place or a common watering place upon a stream, in all such cases a mere deprivation or obstruction of the use, which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no ground of action in favor of an individual." See, also, *Willard v. Cambridge*, 8 Allen, 574, the syllabus of which case reads as follows: "No action lies to recover damages for the obstruction of a highway, against a city which is bound to keep it in repair, by an individual whose place of business thereby becomes more difficult to reach, his business injured, the delivery of articles which he has sold and the gathering of his crops more expensive, his houses less desirable for tenants, and his rents diminished in value, if other persons suffer damages from the same cause, similar in kind, though less in degree." Also, *Hill v. City of Boston*, 122 Mass. 344, in which Chief Justice Gray, after carefully reviewing the English decisions on this subject, concludes that "the result of the English authorities is that when a duty is imposed upon a municipal corporation for the benefit of the public, without any consideration or emolument being received by the corporation, it is only where the duty is a new one, or is such as is ordinarily performed by trading corporations, that an intention to give a private action for a neglect of its performance is to be presumed."

The failure to keep a road or street in repair is not an offense against a single individual, but against the whole community. It is a public offense, and is therefore punishable by indictment. Many individuals might complain with propriety of a public offense, but the law does not delegate the punishment of such an offense to each individual that could reasonably complain, nor does it allow him to recover private satisfaction, in the shape of damages, unless he has received a personal injury, or some direct damage to his property. To allow every man who is injured in his calling or business by reason of

the bad condition of the roads and streets within the limits of a municipal corporation to sustain an action against the town or city, and receive compensation in damages, would lead to disastrous results. It would be difficult to say what degree of perfection in paving and draining their streets would give such a corporation immunity. The farmer, the furnisher of fuel, stone, or brick, and in fact every one having occasion to pass over the street, could furnish a grievance; and the degree of perfection in the highway which would be acceptable to one might be entirely unsatisfactory to another, so that if the door is thrown open, and every person who has a real or supposed cause of complaint on account of the condition of the streets can recover damages against the city or town, it would lead to a multiplicity of suits which would be disastrous. This question was discussed at some length by Judge Green in the case of *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 654; and after commenting on our statute (section 53 of chapter 43 of the Code) which provides that any person who sustains an injury to his person or property by reason of a public road or bridge in a county, or by reason of a public road, bridge, street, sidewalk, or alley in an incorporated city, village, or town, being out of repair, may recover all damages sustained by him by reason of such injury, etc., he says, "This being the extent of the liability in damages to any person, imposed by statute, for neglect of duty in reference to the public roads, either by the county court, or by a surveyor of roads appointed by the county court, can the county court be subject by suit to the payment of damages in any other case than that specified in the statute?" etc. And it will be perceived that streets, sidewalks, or alleys in an incorporated city or town being out of repair stand in the same category. He says, also, on page 660, 30 W. Va., and page 654, 5 S. E.: "But it would seem to follow from the fact that as counties, or county courts, or other political corporations who manage their affairs, are created, not for any private advantage, but almost exclusively with a view to the policy of the state, and charged with the superintendence and administration of the local affairs of a county, as a mode of carrying out such public policy, they would not be liable in damages for any neglect of a public duty to any individual who had directly suffered an injury from such neglect, unless the statute has expressly, or by necessary implication, made them responsible as corporations. At common law, such political corporations or such county would not be liable in any civil suit for damages resulting from a neglect of duty. And, in accordance with these views, it has been almost universally held, both in England and in this country, that neither a county nor a political corporation, managing its local affairs, causing public roads and bridges to be made and kept in repair, public school houses to be

built and kept in repair, and other public duties to be performed, are ever liable, as corporations, to be sued by any individual for damages sustained by their neglect to perform such duties, or by the neglect of public officers or agents appointed by them to perform such duties, except when they are made responsible as corporations, either expressly or by necessary implication, for damages resulting from neglect of duty." 1 Shear. & R. Neg. § 253, in speaking of municipal corporations as state agencies, says: "The governmental powers of the state are further exercised by a great number of municipal and quasi municipal organizations, such as cities, towns, counties, and boards, to which, for purposes of government, and for the benefit and service of the public, the state delegates portions of its sovereignty, to be exercised within particular portions of its territory, or for certain well-defined public purposes. To the extent that such local or special organizations possess and exercise governmental powers, they are, as it were, departments of state. As such, in the absence of any statute to the contrary, they have the privilege and immunity of the state. They partake of the state's prerogative of sovereignty, in that they are exempt from private prosecution for the consequences of their exercising, or neglecting to exercise, the governmental powers they possess. To the extent that they exercise such powers, their duties are regarded as due to the public, not to individuals. Their officers are not agents of the corporation, but of 'the greater public,' the state. No relation of agency existing between the corporation and its officers with respect to the discharge of these governmental duties, the corporation is not responsible for the acts or omissions of its officers therein. This is nothing more than an application and proper extension of the rule that the state is not liable for the misfeasance of its officers." And again, under the heading, "The Damage must be Special to Plaintiff," the same authors say, in section 24: "It is not only essential to the maintenance of an action for negligence that some damage should have been suffered, but that damage must have been suffered by the plaintiff, or he has no cause of action. If, by reason of a breach of duty owed to the public, he has suffered no special damage,—that is, no damage other than such as every other member of the community has suffered in equal measure,—a private citizen has no right to sue." See, also, note 2: "The fact that a citizen's route to his market is interfered with by obstructions placed in the highway is not such a special injury as will entitle him to maintain an action"; citing *Brant v. Plumer*, 64 Iowa, 33, 19 N. W. 842, and *Sohn v. Cambern*, 106 Ind. 302, 6 N. E. 813. My interpretation of our statute (section 53 of chapter 43 of the Code) is that any person who sustains a direct injury to his person or his property, as, for instance,

having a limb broken or a horse disabled, by reason of the street or road being out of repair, may recover damages for such injury by an appropriate action in a court of competent jurisdiction; but it was not intended by said statute that a person who, in common with the community, suffers in his business relations by reason of the bad condition of the streets, should recover damages from the city or town for such injury. Therefore, my conclusion is that the court erred in refusing to strike out the plaintiff's evidence.

Another question is raised by counsel for the plaintiff in error, and that is whether the plaintiff could split up or separate his demand so as to bring it within the jurisdiction of a justice. The plaintiff, in his testimony, stated that he divided up his suits, and sued for \$300 at different times. He says, "After suing first time, and obtaining judgment, I waited, thinking the town authorities would fix up the street, and, after their failure to do so, sued again, and in like manner, after waiting a second time after judgment, sued the third time." Our statute (Code, c. 50, § 8), provides that "a justice shall have jurisdiction of all civil actions for the recovery of money or the possession of property, including actions in which damages are claimed as compensation for an injury or wrong, provided the amount of money or damages or the value of the property claimed does not exceed three hundred dollars, exclusive of interest and costs," etc. Prof. Minor, in his Institutes (volume 4, pt. 1, p. 206), says: "Where an entire claim exceeds \$20, and has been divided into several parts, each not exceeding \$20, and separate securities are taken therefor, and all are due, it seems the better opinion, in this case, that the courts of record cannot thus be deprived of their jurisdiction, nor the defendant to his right to trial by jury, and that a writ of prohibition will be awarded by the circuit court in order to prevent the usurpation"; citing *Hutson v. Lowry*, 2 Va. Cas. 45. The question raised in this case is not whether the justice had jurisdiction in this particular case, but whether the plaintiff had a right to divide up his claim so as to bring it within the jurisdiction, and then bring successive suits. In the case of *Stewart v. Railroad Co.*, 33 W. Va. 88, 10 S. E. 26, this court held that, "in determining the question of jurisdiction in an action before a justice for a wrong, the amount claimed in the summons, not the damages shown by the testimony, must control." In the case of *Aulick v. Adams*, 12 B. Mon. 104, it was held that "in actions of tort the damages claimed usually determined the jurisdiction, as to amount." In the case under consideration, however, three successive suits appear to have been brought for the same cause of action, for \$300 each; and the plaintiff states that his object was to avoid the jurisdiction of the circuit court,

and bring his claims within the jurisdiction of a justice. He states that his claim was \$1,000. If his claim was *ex contractu*, there could be no question that it would not be allowed; and where the claim he asserts is definite, as it was in this instance, I should think the same rule should be applied as in the case of contract. The right to divide his claim into three parts would imply the right to divide it into ten, and there would be no end to litigation and costs. In the case of *Bodley v. Archibald*, 33 W. Va. 229, 10 S. E. 392, this court held that prohibition would lie to prohibit justices and other petty tribunals, which are limited by law to the decision of controversies where the amount falls within a specified sum, from exercising a jurisdiction wholly beyond their authority, even after judgment, but before the judgment has been fully carried into effect, "and in such cases the want of jurisdiction may be made to appear by matters dehors the record of the proceedings before such inferior tribunals." If the plaintiff in this case had sued for his whole claim, \$1,000, before the justice, we could not hesitate as to want of jurisdiction. Can he be allowed to do the same thing—effect the same result—by three or four suits? We say not. The judgment must be reversed, and the cause remanded, with costs.

(40 W. Va. 611)

#### WARD v. WARD'S HEIRS.

(Supreme Court of Appeals of West Virginia.  
April 13, 1895.)

#### TENANCY IN COMMON—PARTITION—IMPROVEMENTS —COMMISSIONER'S REPORT—EXCEPTIONS —AMENDING REPORT.

1. By common law, one joint tenant, tenant in common, or parcener using the common land exclusively, but not ousting or excluding his co-owners, is not chargeable to them for use and occupation; but this rule has been changed by section 14, c. 100, Code, as to joint tenants and tenants in common, but not as to parceners.

2. A coparcener, merely from sole occupation of the premises, is not chargeable in favor of coparceners, unless he excludes them.

3. Where it is proper to allow a coparcener for improvements a charge for use and occupation may be set off against the improvements.

4. Permanent improvements made by one coparcener, without request or agreement of others, are not chargeable to the others personally or upon their shares in the land; but, if made by their request or agreement, they are a debt upon them, and a lien on their shares in the land.

5. One joint tenant, tenant in common, or coparcener can compel others to contribute to make necessary repairs to a mill or house, after request to assist and refusal. But this compulsion is as to future repairs, not those already made by one of the co-owners. This compulsion only applies to mills and houses, not to fences or other repairs to other properties.

6. In partition the part improved, if it can be done without injury to others, should be assigned to the improver; but, where this cannot be done, the cost of improvement cannot be charged to him to whom it goes.

7. Where, however, the property is not susceptible of partition, and must be sold to divide the proceeds, the coparcener who made repairs and permanent improvements shall receive out

of the proceeds that amount by which the property, at the date of sale, remains enhanced in value from the improvements, not their original cost.

8. Where there is no exception to a commissioner's report, except as to error on its face, it is taken as admitted by the parties to be correct, both as to the principles and the evidence on which it rests, and the court will not look into it, but must act on it as so admitted, except as to infants and persons non compos. If excepted to not later than the first term after its return, or later by leave of court, the admission of its correctness ceases, and the court will examine it; but on the hearing of such exception, unless taken within 10 days after completion of the report before the commissioner, no evidence before him can be used, unless he has made it a part of the report, or certified it, or the court requires him to certify such evidence by order, in which cases it may be used to sustain the exception; but depositions taken after the return of the report cannot be used to overthrow the report. They can be used only to support a motion to recommit the report.

9. Error on the face of a report may be taken advantage of in the lower or appellate court, with or without exceptions.

10. Where exception is taken to a commissioner's report before the commissioner, within 10 days after its completion, it is his duty to certify the exceptions and evidence before him relating to the exceptions, with such remarks as he may see proper to make, in order that the exceptions may be heard by the court upon such evidence. He should so certify the evidence as to show it to be the evidence sent up.

11. Where such exception has been so taken within the 10 days, the party excepting, or the adverse party, may take further evidence before the return of the report, and upon it the commissioner may amend his report, or make an amended report, as may suit the case, and then return his report and amendment, if any, to the office of the court.

(Syllabus by the Court.)

Appeal from circuit court, Taylor county.

Bill by La Fayette E. Ward against Maria E. Ward's heirs. From the decree rendered, plaintiff appeals. Modified.

W. R. D. Dent, for appellant. B. F. Martin and Frank Woods, for appellees.

BRANNON, J. Maria Ward died seised of an hotel property known as the "Ward House," in the town of Grafton, leaving a husband and six children. Her husband, George W. Ward, occupied the property as tenant by the curtesy from February, 1878, when his wife died, until December, 1880, when he died. Four of his children lived in the hotel with him, the plaintiff, L. E. Ward, John B. Ward, Mrs. Broyles, and Archibald Ward. Before the father's death, and for 11 years afterwards, the plaintiff, L. E. Ward, occupied a stable on the property as a livery stable, and after his death Mrs. Broyles and husband occupied the hotel. Mrs. Broyles, by purchase from coparceners at different times after her father's death, became owner, including her own share, of five-sixths of the property. L. E. Ward brought this suit in the circuit court of Taylor county, alleging that in 1879 he and several others of the parceners, seeing that the property was badly in need of repair, almost entirely rebuilt and greatly enlarged the hotel, at great expense, he furnishing a large amount of means, labor,

and material, of the amount of \$1,538.26, and that Archibald F. Ward and Lloyd M. Broyles, for his wife, furnished material and labor, for which amount expended by him he claimed compensation. He further alleged that for several years Broyles and his wife had the possession and use of the hotel property, except the stable, without payment of rent, but had paid taxes, and put some repairs on the property from time to time as needed, and that he, the plaintiff, had occupied the stable without payment of rent. He prayed that an account of the rent and improvements be taken; the amount due him and others be decreed; that the property be rented or sold to satisfy those charges; and also that the property, not being susceptible of partition, might be sold, and the proceeds divided. The other parties resisted this demand of the plaintiff for improvements, saying that such improvements were made by their father while in possession as tenant by the curtesy, and any charge by the plaintiff was against him, not against his coparceners, as they never assented to such improvements, and neither they nor their property were liable therefor. The case was referred to a commissioner, and he reported a large sum as due the plaintiff from Mrs. Broyles, one of the parceners, for rent and improvements. The court disallowed all claim by the plaintiff for improvements or rent, and, declaring the property insusceptible of partition, directed its sale. The plaintiff appealed.

First, let us consider the subject of rent. Are those of the heirs who occupied the property after the end of the father's estate by the curtesy liable to pay rent, or rather compensation for use and occupation? At common law neither a joint tenant, tenant in common, nor coparcener occupying the common property, and thus taking more than his share of the rents and profits, can be made to account to his fellows, unless he has been appointed bailiff or receiver by his fellows. Each one has right to enter and use the land, and this right cannot be impaired by the fact that others absent themselves or do not claim their right to a common enjoyment. Unless the one in possession denies the right of the others to enter and enjoy the estate, or agrees to pay rent, nothing can be claimed of him. It is presumed that the others consent to his use. He cannot call on the others to help him farm or otherwise use the property, and, in case of loss from failure of crops or other cause, he cannot call on the others to contribute to the loss. If the others do not wish to occupy the premises with their co-owners, the remedy of partition is at hand, or, if the property be indivisible, the court will sell it, and divide its proceeds. Lomax, Dig. 501, 481; 2 Minor, Inst. 437, 429; Freem. Coten. § 269; note to Early v. Friend, 78 Am. Dec. 665. This is the view stated in Freem. Coten. § 258; Gayle v. Johnston, 80 Ala. 395.

By section 14, c. 100, Code, it is provided that an action of account may be maintained



"by one joint tenant, or tenant in common, or his personal representative, against the other for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common." This statute originated in England, and there and in a majority of the American states it has received the construction, which I would think the proper one, that merely by exclusive occupation and use one tenant in common or joint tenant does not become liable to account to others, but only where he receives rents or proceeds of the estate from strangers. *Freem. Coten.* § 274; note to *Early v. Friend*, 78 Am. Dec. 605; *Chambers v. Chambers*, 14 Am. Dec. 605, and note. But in *Early v. Friend*, 16 Grat. 21, which was decided at a date making it binding authority here, it is held that one tenant in common may sue his cotenant, who has occupied the whole property, for an account of rents and profits. He is accountable whether he receives rents and profits from strangers, or receives them by occupying the premises himself, with interest from each year's close. *Rust v. Rust*, 17 W. Va. 901, holds just the same. In *Dodson v. Hays*, 29 W. Va. 577, syllabus 2, 2 S. E. 415, this doctrine was somewhat qualified in the holding that where the property is such as to admit of use by several, and less than his just share is used by one tenant in common in a manner not hindering or excluding the others from the use of their shares, he does not receive more than his share, within the meaning of section 14, c. 100, Code, and is not accountable for the profits of that portion owned by him to his cotenants.

But it will be observed that this statute in terms applies to joint tenants and tenants in common, and does not mention parceners. Does the statute apply by analogy to them? Its letter does not. Joint tenancy, tenancy in common, and coparcenary are the three notable joint estates, and to them alike the common-law rule applied that one cotenant using alone the common property was not liable to account therefor, and the legislature in changing the rule leaves out coparceners, and expressly names joint tenants and tenants in common. Why do this, unless it intended to exclude coparceners from the statute? Could there be a stronger instance of the application of the principle of construction that "the mention of the one is the exclusion of the other"? The lawmakers did not intend that the sister or brother remaining under the roof of the old home, or making bread from the home farm after the departure of parents, should every day be running in debt to the others. While it might be reasonable, as between joint tenants or tenants in common, often strangers, it would not be so between brothers and sisters. There was reason for omitting parceners from the statute. It is humane and reasonable to assume that brothers and sisters do not object, but consent, that brothers and

sisters continuing on the premises are still at home, and not expected to pay rent. Such we know to be the uniform course between members of a family. The same presumption does not hold between two who own as joint tenants or tenants in common. Thus, I think neither the letter nor reason nor the equity of the statute applies to parceners. Prof. Minor, admitting that parceners are not within the letter of the statute, says that "it is believed" that the common-law rule of nonliability has been changed by construction of the statute, partly because courts of equity before the statute of Anne in England had obliged parceners to render an account, and partly from the irresistible reasonableness of the thing, and partly because of the force of the analogy between joint tenants, tenants in common, and coparceners. 2 Minor, Inst. 437. I have examined the authorities there referred to, and find that this opinion rests on *Drury v. Drury*, decided in the year 6 of the reign of Charles I., which does seem to sustain the position, as it makes one of two heirs account to the other heirs; but the report in 1 Ch. R. 48, 49, is so meager that we cannot tell how far the element of ouster or exclusion may have entered into the case. *Dean v. Wade*, Id., decided 10 years later, simply adopted *Drury v. Drury* expressly as a precedent. No facts are given. *Eq. Cas. Abr. c. 2, tit. "Account" (A)*, p. 5, note, so far from sustaining Prof. Minor, is against his position, as it limits the equity jurisdiction to joint tenants and tenants in common, and that under the statute of Anne, not mentioning coparceners. It is but a note citing no case. Though Kent is cited by Prof. Minor, Kent does not insert it in his text. It is an annotator's note, based on the old English case and the note in *Eq. Cas. Abr.* just mentioned, and the Kentucky case of *O'Bannon v. Roberts*, below referred to. Lomax refers to same authority. Now, as to the Kentucky case cited by Prof. Minor (*O'Bannon v. Roberts*, 2 Dana, 54), it supports Prof. Minor's inclination to an opinion. But examine the case. The opinion plainly shows that Judge Nicholas hesitated to hold that one parcener may be held to account in equity for profits and rents of land exclusively occupied by him, saying that St. 3 & 4 Anne, the source of ours, applied only to joint tenants and tenants in common, but he felt bound by a former Kentucky case (*Graham v. Graham*, 6 T. B. Mon. 562, 17 Am. Dec. 166). When that case is examined, it has nothing whatever to do with the point, for it was a case where one child claimed exclusively in severalty as purchaser of their father by a forged title bond. It was a case of ouster, where one heir shut out another by adverse claim. The syllabus itself states that he held in severalty. I must refer to *Chinn v. Murray*, 4 Grat. 348, cited by Minor. It is peculiar. A judicial partition was made in 1820, which lay unconfirmed till 1836, and on appeal as late as 1848 it was



reversed. The parties took possession and improved the parcels under the partition as their own. Improvements were allowed as far as they added to the present value, and rents and profits were charged, or rather set off. This case cannot be said to hold the clear proposition that a coparcener, merely from occupation of the premises, receives more than his share, under the said Code section, by construction. It is a case of charge to offset improvements, which I elsewhere say can be done. The parties had to be allowed improvements, because made under the mistaken belief that they owned the parcels in severalty, under a partition so long acquiesced in, and, claiming improvements, they must be charged for use and occupation. Where it is proper to allow improvements, rents and profits should be charged. Where it is proper to charge rents and profits, improvements should be allowed. The decree in the case says that, "under the circumstances of the case," justice required an allowance for improvements, and then said that rents and profits be charged. The opinions do not touch on the point. They do not consider whether the said statute naming joint and in common tenants includes within its equity coparceners. The matter was not discussed, not even mentioned. The Virginia cases sustaining an account are cases of joint tenants and tenants in common. So the two West Virginia cases cited above. If there is a case in either state pointedly holding that a mere sole use by a coparcener subjects him to account, I have not seen it, except *Fry v. Payne*, 82 Va. 759, 1 S. E. 197, holding, by a mere remark, a parcener liable to account for sole use; but there was no consideration of the point whether the statute applied to parceners, but it was assumed it did. The distinction between parceners and joint tenants or tenants in common was not thought of. So, I do not think these parceners could by law demand an account of use and occupation. But, in addition, all the parceners, save one, including the plaintiff, by uniting in the form of a letter signed by all as an agreement, declared that they did not wish the hotel to go into the hands of strangers, and wished Broyles, then in possession, not to leave it, but to keep it and use it, and insure and paint and repair it, and, after all the improvements contemplated by it had been made, if he thought the heirs were entitled to anything he could pay; but, if he thought they were not, then pay nothing, leaving it to him, and they would be satisfied. This was April 17, 1884. It spoke no intent to charge back rent, but by plain implication disclaimed it, and disclaimed an intention to charge in future. The suit would not change this. Mrs. Broyles still had right till partition or sale, so she did not exclude an actual effort at entry and enjoyment by others. Let the question of liability for use and occupation be settled as it may on general principles of

law. This agreement in this case repels a charge.

Next, as to improvements claimed by L. E. Ward. Can he be allowed for them? One joint tenant or tenant in common at common law could compel others to unite in the expenses of the necessary reparation of a house or mill owned by them, though the rule is limited to three parts of the common property, and does not apply to fences enclosing wood or arable land. This right was enforced by a writ *de reparatione facienda*. It did not apply to past repairs, and could only be resorted to after request to unite in the repairs and refusal. 1 Lomax, Dig. (504) 648; 2 Minor, Inst. 430; 4 Kent, Comm. 370. It was confined to a mill or houses, because it is for the public good to maintain houses and mills, which are for the habitation and use of men,—as Lord Coke said in *Co. Litt.* 200b; *Id.* 54b. "If there be two joint tenants of wood or arable land, the one has no remedy against the other to make inclosure or reparation for safeguard of the wood or corn." Bowles' Case, 11 Coke, 82. I have no doubt this old common-law writ, though disused, might yet be resorted to. It applies to future, not past, repairs. *Freem. Coten.* § 261; *Calvert v. Aldrich*, 99 Mass. 76. I think it can be safely laid down, with the exception stated, no joint tenant, tenant in common, or parcener can compel his cotenant to make improvements, or maintain an action against him personally to compel him to contribute to the expense of improvements made by him upon the estate, without his consent, express or implied, or fix it as a lien on his interest in the estate. One cannot improve his fellow out of his estate. He has voluntarily put improvements on land of another, knowing his right, and he cannot impose a debt on him or his estate without his consent. *Freem. Coten.* §§ 261, 262; *Aldrich v. Husband*, 131 Mass. 480; *Id.*, 135 Mass. 317; *Nelson v. Clay*, 23 Am. Dec. 387; *Hancock v. Day*, 36 Am. Dec. 293; *Scott v. Guernsey*, 48 N. Y. 106; *Calvert v. Aldrich*, 99 Mass. 74; *Mumford v. Brown*, 16 Am. Dec. 440; *Hancock v. Day*, 36 Am. Dec. 293. It is not the case of one making improvements in good faith believing the land to be his. The common law denied such a one relief, and it is only allowed by statute. Code, c. 91. It seems that, where a tenant in common or joint tenant is called on for rents and profits in equity, he may deduct ordinary repairs on the principle that he who asks help from a court of equity must do equity. *Hannan v. Osborn*, 4 Paige, 343; *Ruffners v. Lewis*, 7 Leigh, 720, 743; 2 Minor, Inst. 420; 1 Story, Eq. Jur. § 655; *Graham v. Pierce*, 19 Grat. 28, syllabus 6; *Freem. Coten.* § 279. Where partition is made, the part improved should, if not prejudicial to others, be allotted to the one who made improvements, estimating its value without improvements. 2 Minor, Inst. 420; *Patrick v. Marshall*, 4 Am. Dec. 670; *Nelson v. Clay*, 23 Am. Dec. 387. But, if this cannot be

done, he to whom the improvement falls does not have to pay for it. *Nelson v. Clay*, supra. Where improvements are made with consent of the cotenants, they are personally bound, and the demand is a lien on their shares. *Houston v. McCluney*, 8 W. Va. 135; *Freem. Coten.* § 262.

It seems to be claimed in the brief of counsel that the letter to L. M. Broyles, written by some of the heirs, justifies a charge by L. E. Ward for improvements. After requesting him not to leave the house, but to stay, it recited what he ought to pay, viz. keep and use the property, have it insured, keep taxes paid, keep the house in good repair; and then said "Go to work and have the house painted and repaired as in your opinion you think it should be; and, after all this improvement has been made, if you think, after calculating the expenses of the improvements and the taxes, etc., which you may have paid heretofore, that the heirs are entitled to anything, then you can arrange and pay them their proportion; and if you think that nothing is coming to the heirs after paying for painting, etc., then we are satisfied." This did not refer to improvements made by L. E. Ward before the letter, but to future improvements. The word "paid" refers to taxes. But although it be law that one coparcener cannot, without consent, make permanent improvements, and charge his coparcener or his share with their cost, where the estate is partible in kind, as a tract of land, how is it in the case of a house or land which is impartible in kind, for any reason, so that it has to be sold in order to effect a partition, as was the case in the present instance? Is there no difference here? Circumstances alter cases. Is it right for a court of justice to sell the land greatly increased in value by the expenditure of one brother, and put the money into the pocket of another with its eyes shut to the fact that the property brought more, a great deal, by reason of the new house built by one of the brothers? Ought it not to be ascertained how much the value was enhanced by the improvement, and pay the amount of enhancement to the one whose means produced it, and divide the balance? This is different from the case where there is division in kind. In the latter case, to charge the brother who did not consent to the improvement is to force upon him a debt he did not assent to, and to mortgage his estate with a debt which he cannot pay and which will take away his patrimony. One ought not to be made a debtor without his consent; but, where the whole is to be converted into money and distributed, another principle is admissible, doing harm to no one and justice to all. The others get just what they would have received without the improvements, and the one making them is reimbursed. I have observed that in Illinois this doctrine has been frequently applied. *Louville v. Menard*, 41 Am. Dec. 161, and note; *Howey v. Golings*, 54 Am. Dec. 427; *Dean v. O'Meara*,

47 Ill. 120. And on further search I find this exception approved in *Moore v. Thorp*, 16 R. I. 655, 19 Atl. 321. I think *Elrod v. Keller*, 89 Ind. 382, would also allow it in such a case as we have in hand. *Alleman v. Hawley*, 117 Ind. 533, 20 N. E. 441, does. It does not follow that the original cost of improvements be given, but the actual enhancement of value at time of sale by reason of improvements is ascertained. See opinion in last-cited case, and in *Moore v. Williamson*, 10 Rich. Eq. 323. The opinion in the last case very properly says that, if the cost of improvements be allowed, "It would subject the owner to the want of judgment or economy of the improver, and render him liable to be built out of his land by the improvidence of his tenant." I would add that the improvement may have depreciated from some time before the sale.

It is objected that the bill does not charge a request on the part of the cotenants for the improvements. It would be necessary to charge them otherwise than as indicated above, but it is not necessary to so charge them; that is, as a simple increase of value.

It follows, from what has been said, that, while there could be no claim for use and occupation against Broyles and his wife, yet the decision of the court below is wrong in wholly disallowing all claim for improvement made by the plaintiff out of the proceeds of sale, in the manner above stated, which was directed to be made because the property was found insusceptible of partition.

A reference was made to a commissioner, and his report charged rents and profits to Mrs. Broyles for the hotel, and to the plaintiff for the stable, and charged Mrs. Broyles, as the owner of five-sixths of the property, with five-sixths of the money spent by the plaintiff in improvements. The commissioner made a part of his report a deposition of the plaintiff, and, as the report imports, there was no other oral evidence before him. Taking that deposition alone, it supports the report as to the charge for improvements, as it shows consent on the part of the cotenants. No exception was made within 10 days, and the plaintiff contends that the result reached and returned by the commissioner must be taken as correct, and cannot be impaired by after-exceptions and evidence afterwards taken, and that the court could not, upon depositions afterwards taken, overturn and reject the result reached by the commissioner, but must confirm or recommit. *Ward v. Ward*, 21 W. Va. 262. The plaintiff's deposition must be considered a part of the report,—a part of its face. *Lynch v. Henry*, 25 W. Va., opinion page 424; *Kester v. Lyon*, 40 W. Va. —, 20 S. E. 933. It is plain that if we decide the exception only by the face of the report, including that deposition, we must overrule it, because the deposition sustains the report in the point of view of fact. But after the report, and we will say after the exception, the defense took depositions. They deny

the statement of the plaintiff's deposition, that the other heirs agreed that the plaintiff make the improvements. The court read them on the hearing. Could they be read to impair the finding of the report in favor of the plaintiff as to the improvements? This may seem at first an immaterial question, since, as above stated, the plaintiff ought to be allowed out of the sale an amount equal to the amount of increase of value at the time of sale imparted to the property by the improvements; but a second thought makes it material, in this: that if there was an agreement between the parties that the improvements be made, that would entitle the plaintiff to perhaps a larger recovery, that is, the original cost of improvements with interest from the date when made, while, if there was no request, he would get out of the sale the mere increase of value. Can these depositions be read then? If there had been no exception, they could not, as, without exceptions, a report is taken, as to adult parties, to be correct, and will not be examined by the court except for errors on its face. *Kester v. Lyons*, 40 W. Va. —, 20 S. E. 933. But where there is an exception, but not within 10 days, how is it? Where the party says that he does not intend to be regarded as admitting the correctness of the report, but excepts to it, and appeals to evidence subsequently presented in the case, can he overthrow the report with that evidence? Is he unalterably bound by the report, if not erroneous on its face? If he had excepted within 10 days, he could have taken other evidence, and the commissioner could retain the report to await it, and upon it make remarks, or even make a further or amended report. I think this is so because section 7, c. 129, Code, says that, if exceptions be taken within 10 days, the commissioner shall with his report "return the exceptions, and such remarks thereon as he may deem pertinent and the evidence relating thereto." Judge Green expressed the same opinion in *Lynch v. Henry*, 25 W. Va. 423. I have some question as to the last matter, but think it tenable, and that the rule may be convenient in practice. The Code, after providing for exceptions before the commissioner within 10 days, goes on to add: "But any party may except to such report at the first term of the court to which it is returned, or by leave of the court after such term." What does this mean? It may be asked of what use such exception, if evidence taken after the return of the report cannot be read? The answer can be given, that the party may think the commissioner has reached the wrong conclusion on the evidence, and, desiring to have it reviewed, desires to except to get rid of the admission of its correctness which would operate against him from silence, and designs to ask the court to review the evidence, if it has been made part of the report, and, if it has not

been, then to ask the court to order the evidence to be certified to be read with his exception, which he may do, if he has been prevented from excepting within the 10 days. *Arnold v. Slaughter*, 36 W. Va. 590, syllabus 4, 15 S. E. 250.

If we say that after a report has been made a party may go on and take depositions, and have them read, we introduce confusion in practice, install a bad practice, and put a premium upon negligence and delay. A case is referred to a commissioner. He gives notice, and proceeds to execute the order of reference. The parties ought to attend before him. They can be much better heard upon the facts before a commissioner than in court. It is the most important proceeding in the case, save, perhaps, the final hearing; in many cases even more important than that. If the action of the commissioner is unsatisfactory, the party can, within 10 days after he has finally announced his conclusion by a completed report, except, and, if he does not want more evidence, ask the commissioner to certify the evidence to the court for its review; and if he is surprised at the inferences drawn by the commissioner upon that evidence, and thinks he can strengthen his case by additional evidence, he can except within 10 days, and take more evidence, and, under proper circumstances, the commissioner will delay returning his report to enable the party to do so, as the statute giving him right to take such evidence ought to be liberally construed to promote a fair, full hearing; and then the commissioner can report on such evidence, or make an amended report, or send up his original report, the exceptions, and all the evidence, old and new. After all the toll before a commissioner, after he has given his decision, and after the full opportunity for a hearing before him, a negligent litigant ought not to be allowed to reopen the case, often to the inconvenience and surprise of the other party. If so, where the utility of this tedious hearing before that important auxiliary of the court, the commissioner? It would be an almost meaningless performance. We do not think the Code means such a reopening by giving right to except at the first term after the report. We think such after-taken depositions cannot be read on the hearing to impair the report, as was done in this case. We think the only office they can perform is to support a motion for a recommital of the report, or to suggest to the court, where it appears contrary to justice to confirm the report, the propriety of such rehearing before the commissioner; but on such evidence the court cannot overturn the report, or remodel or restate the account, which may work great injury and surprise to the other party, but must recommit the report, if dissatisfied with it. *Ward v. Ward*, 21 W. Va. 262.

I have said this much upon this matter of commissioners' reports because of the

importance, in every day's practice, of proper understanding as to proceedings before commissioners, and the frequent controversies arising upon them. Under these views, it would have been error to overturn the report, based on the theory that the improvements were made with the consent and agreement of the coheirs, but for the fact that the bill and amended bill have no allegation that the coheirs requested such improvements to be made or consented thereto. As this was not charged, the finding of the report is error apparent on its face, and vindicates the action of the court against the argument that only by using the after-taken depositions it rejected the finding of the report. Does it thence follow that the total disallowance of anything to the plaintiff is justified by this omission in the bills? By no means. The bills charged the fact of the improvements, and that the hotel property itself was not susceptible of partition, and must be sold, and the same decree which disallowed all compensation for improvements subjected the property to sale in order to divide its proceeds, and upon those facts the plaintiff was entitled to something on the principle of increased value above stated. Nor ought the court to have confirmed the report and decreed its full finding, because it allowed, not an amount for increased value, but the account of expenditure by the plaintiff in improvements, and because it charged use and occupation. There ought to have been a recomittal to ascertain the amount of increased value, viewing the case on those facts. The court could not make a new statement. If the plaintiff amended his bill by the allegation wanting, he could have claimed the account filed by him, with interest, if he could succeed in sustaining the theory or contention that his coparceners agreed to the making of improvements by him, but without such allegation he could not. He can still amend his bill to that effect, if he wishes to do so.

It is contended that in no view can the plaintiff claim anything at all for the improvements, since they were made in 1879, while the father yet lived, and his estate by the curtesy existed, and the heirs had only an estate in reversion, not in possession, and the improvements were made for and by the father. All the children, save two daughters, continued to reside in the home as a family with their father, after the mother's death, and the existence of this curtesy would not prevent any reversioner, by agreement with the others, from making improvements beneficial to the inheritance, and charging the property with them. Nor would it debar one from claiming such increase of value in the reversion or inheritance as his improvements imparted. Of course, were it shown that the plaintiff contracted with the father to make them; if the father became his debtor, his sole debtor, for them, and he looked to the father

for pay,—he could claim nothing from the heirs. I do not consider that the evidence at present shows such a case as enables us to say this. So much of the decree complained of as disallows the claim of the plaintiff or Lavina Broyles or L. M. Broyles for repairs, improvements, or rents is reversed, and the cause remanded for further proceedings in respect thereto, according to principles above stated, so far as applicable, and further according to principles governing courts of equity in such case.

(40 W. Va. 434)

**YEAGER v. CITY OF BLUEFIELD.**

(Supreme Court of Appeals of West Virginia.

April 6, 1895.)

**INJURY FROM DEFECTIVE STREET — LIABILITY OF CITY—DECLARATION—REVIEW OF EVIDENCE.**

1. A declaration, in case against a city for personal injury by reason of a defect in a street crossing, alleging that the plaintiff fell, and thereby was "greatly injured, bruised, wounded, and crippled," is not bad because it does not state the particular injury, as a broken leg, for instance. Where special damages consequent on the particular injury are claimed, it seems otherwise.

2. Where the plaintiff's evidence appreciably tends to sustain the action, the court ought not to strike it out.

3. Under section 9, c. 131, Code 1891, when exception is taken to the action of the court upon a question involving evidence on a motion for a new trial or otherwise, all the evidence, conflicting or not, may be certified, and this court must consider all such evidence, whether conflicting or not, not rejecting any from consideration. If, upon such evidence, the verdict plainly appears to be contrary to or without sufficient evidence, plainly against the decided and clear preponderance of evidence, it may be set aside, though the evidence be conflicting. This power should be exercised with great caution.

4. A municipal corporation is not an insurer against accidents upon streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes, with ordinary care, by day or night; and whether so or no is a practical question to be determined in each case by its particular circumstances.

5. While the liability of municipal corporations is in its nature absolute, that does not refer to the cause of action. That must exist before the liability arises.

(Syllabus by the Court.)

Error to circuit court, Mercer county.

Action by Theodore Yeager against the city of Bluefield. Plaintiff had judgment, and defendant brings error. Reversed.

Johnston & Hale, for plaintiff in error.  
John M. McGrath, for defendant in error.

**BRANNON, J.** This was an action of trespass on the case in the circuit court of Mercer county by Theodore Yeager against the city of Bluefield to recover damages for the breaking of the plaintiff's leg, on the allegation that it resulted from defect in the crossing over one of the streets, in which there was a verdict for \$3,500 and a judgment. The city brings the case here.

There is an objection to the declaration,

the point of the objection being that it is too general in its statement of the injury to the plaintiff's person,—the allegation being that by reason of his fall he "was greatly injured, bruised, wounded, and crippled, and put in great danger and peril,"—and that it should have alleged that his leg was broken. No authority is cited to sustain this point, but it seems to be relied upon with confidence. I think the declaration sufficient on this point. The plaintiff sues for a bodily injury. That is clearly alleged. That his leg was broken is only a fact evidentiary of the ultimate fact predicated; that is, that he was injured, bruised, wounded, and crippled. Pleadings need not state evidence, but only ultimate facts shown by the evidential facts,—the ultimate facts,—else there would be endless prolixity, as ultimate facts may include many subordinate or evidential facts. Often it is imprudent to allege such facts, as it produces variance. 1 Chit. Pl. 407. See *Hawker v. Railroad Co.*, 15 W. Va. 635. If a man's wagon is broken by reason of a road's defects, he can charge that it was injured, broken, and rendered useless, without saying its axles and wheels were broken. I have found very little pointed law on the subject, common as the matter seems, and it is a matter not without practical importance. In *Corey v. Bath*, 35 N. H. 531, a case for personal injury from defect of a highway, the very point was maturely considered, and it was held that it was not necessary that the injuries received by the plaintiff should be particularly described in the declaration. It is enough if it shows that the plaintiff received a bodily injury. I have found nothing to the contrary. The rule contended for would condemn precedents long approved and everywhere used in assault and battery, which are of same nature as the declaration in such cases as this. Declarations for assault and battery allege that the defendant did beat, wound, and ill treat the defendant, without saying how he did beat him or wound him, without giving the mere manner of wounding. So with indictments for that offense. This is the rule where only general damages are claimed. Where special damages are claimed, it is different. For instance, if the plaintiff were engaged in any business requiring specially the use of the limb, and the injury unfitted him for that business, then the injury to that limb, I think, should be specified, as its result or consequence in the particular case would be loss of business. 1 Chit. Pl. 411, 412. At this point I notice a form in 2 Chit. Pl. 281, for placing rubbish in a street, overturning carriage, and injuring plaintiff, using only the general language that plaintiff "was greatly hurt, bruised, cut, and wounded, and sick and sore." It is a case just analogous to this.

Another ground of demurrer is that the declaration alleges that the crossing over  
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the street was uneven, sidling, muddy, rocky, and slippery, and there was a deep mudhole in it, and the crossing in bad order and condition, and out of repair, and no proper crossing had been made, and the street foundered, and covered with mud and water; and the contention is that the plaintiff saw, or could have seen, the danger, and in crossing was guilty of contributory negligence. I do not concur in this point of demurrer. It was essential that the declaration charge these things to maintain the action, and so stating does not bar the plaintiff of his action. It does not state that plaintiff knew its bad condition. And, even if one knows a street is in bad condition, he need not stay indoors, and he need not refrain from crossing. It does not appear from the declaration that the defects were patent, and the danger obvious, so as to deter a prudent man from doing what everybody does,—pass along streets even though not in proper condition. This declaration states these matters as basis of defendant's negligence. It does not admit his own contributory negligence, and any inference that might be drawn of it he need not negative. *Sheff v. Huntington*, 16 W. Va. 307.

The next question of the case is whether the defendant is liable upon the facts. And that depends upon whether the crossing was defective within the meaning of the statute (section 53, c. 43, Code 1891), that "any person who sustains an injury by reason of a public road or bridge in a county, or by reason of a public road, bridge, street, sidewalk or alley in an incorporated city, village or town being out of repair may recover all damages sustained." When we are told, as in *Chapman v. Milton*, 31 W. Va. 384, 7 S. E. 22, and *Gibson v. City of Huntington*, 38 W. Va. 177, 18 S. E. 447, that the liability of cities and towns for injuries by reason of streets being out of repair is absolute, we must not be misled. It is meant that, when the basis or cause of the liability exists, that liability is absolute, in the sense that no want of notice or other excuse for the defect in the street will exonerate the town. But this idea of absoluteness does not refer at all to the cause of liability, but only to the liability when it exists. It does not mean that the state of the street must be perfect. Before imposing this absolute liability, we must first determine whether the street is out of repair in the sense of the statute. When is it so out of repair? Is it to be absolutely free from stones, mud, or inequalities, like the floor of your own home, or like the paths, walks, and drives in the grounds of a royal palace or beautiful park? Where shall we find this perfection? Is it to furnish absolute immunity from accident and injury? What city or town in the country might not be bankrupted if this is to be the construction of the statute? There is

no city, however well ordered, complying with this standard. None could do so with the means at its command, short of confiscatory taxation. It is hard, indeed impracticable, to define in advance, suitably for every case, just what the words "out of repair" here used do mean. About all that can be said by way of general rule is that cities, towns, and villages are simply required to keep streets and sidewalks in a reasonably safe condition for persons traveling in the usual modes by day and night, and exercising ordinary care. Elliott, Roads & S. 448. This court has held against the doctrine of the highest state of repair by announcing the law to be that: "A municipal corporation is not an insurer against accidents upon streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets—which include sidewalks and bridges thereon—are in a reasonably safe condition for ordinary travel in the ordinary mode, by night as well as by day; and whether they are so or not is a practical question to be determined in each case by the particular circumstances." *Wilson v. City of Wheeling*, 19 W. Va. 323. Let it be understood once for all, under the principle long ago announced by this court, and ample authority elsewhere, that the law does not require a municipal corporation to respond in damage for every accident that may be received upon a public street. The law does not require it to have its streets or sidewalks so constructed as to secure absolute immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. 2 Dill. Mun. Corp. § 1006. Were it otherwise, what would be the burden cast upon taxpayers in this state, where heavy rains and snows constantly fall, freezes and thaws frequently come, which, with other causes, work great and constant injury to streets? Now let us look at the present case in the light of these principles.

The claim of the plaintiff is that on a December night he, in company with another, was walking along Princeton avenue, and, crossing Bland street at its junction with the avenue, he stepped upon a stone, to keep out of the mud, and, it slipping from under him, he fell and broke his leg. There were two mudholes, as plaintiff's evidence tends to show, in the crossing,—one very small, one of considerable size and depth,—and this rock was between them, 2 to 3 feet from one, and 1 foot from the other, people passing between them. The rock was 8 or 10 inches wide,—as large as a splittoon. He could have passed between the rock and either mudhole, though it would have put him in mud, as a bright electric light 60 feet distant was giving light, and, besides, Yeager's companion had a lantern; and when they reached Bland street Yeager himself saw the situation, as he exclaimed, "Look out; here

is a bad place." If disposed to be rigid, we might say that he should not have stepped on this rock, and thus have used the very thing he now says was a defect. But waive that. What is the particular point of defect causing the injury? Not alone the mudhole, as he avoided that. I suppose it is that the crossing was uneven and sidling, causing the rock to slip, and when he fell his legs went into the mudhole, increasing the force of the fall. This evidence adduced by the plaintiff was enough to go before the jury, as appreciably tending to sustain the action, and the motion of defendant to exclude it was correctly overruled. *Powell v. Love*, 36 W. Va. 96, 14 S. E. 405. And yet it may be gravely questioned whether, tested by the plaintiff's evidence alone, the action is sustainable. But when we look at all the evidence we are led by the clear and decided weight and preponderance of it to say that the verdict is contrary to the evidence. We must look at and consider the evidence on both sides, including the evidence in conflict with that of the plaintiff. Code 1891, c. 131, § 9; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686.

The defense introduced 13 witnesses whose evidence bears on the condition of the crossing, as against 6 for the plaintiff, and, so far as we can see from paper and positions of trust and business held by them in the community, their evidence is credible. We do not see that any question of veracity was made against them. The evidence shows that a couple of months before this accident there was a large mudhole in Bland street at its junction with Princeton avenue, and that limestone rock was hauled and thrown into it, and a crossing made clear across it, at least 8 feet wide, the work occupying 3 days with 3 teams and 12 men. The rock was broken to the size used in macadamization,—about as large as an egg. It was level, and only sidling, or inclined, to give drainage. There were no mudholes in the crossing when the accident took place. There was no such sized rock there as the plaintiff claimed; indeed, no rock. Men examined it that night and next morning, and no rock was seen. It was a good, solid crossing. Special labor and attention had been just used to make it so. The statute commands us to consider all the evidence, and, unless that consideration is a merely perfunctory one, we are compelled to say that this is the state of the case, decidedly, under the evidence. The evidence conflicts as to the presence of the mudhole and stone, the decided weight being with the defense. Muddy and slippery this crossing was. The true explanation of the accident is that the plaintiff, in making long steps or effort to get quickly across, and avoid or hasten through the mud, slipped. No doubt the mud there caused the slip. Had the crossing been free of it, likely the fall would not have occurred. Then the case narrows itself to the question, is the presence

of this mud a defect under the statute? If so, what town of moderate size in the state would not be subject to action upon action? This mud was peculiarly slippery,—“as slick as glass,” both sides say; but that was owing to the peculiar character of the soil in those parts; as some witnesses say, it was an ocherous soil, and the slickest substance anywhere to be met. Princeton avenue and Bland street were not macadamized in this newly-built town, and wagons would inevitably and constantly deposit from their wheels on this crossing quantities of this mud, as this crossing was very prominent in this business town. Did this make the road actionably defective? I say not. And this is the length and breadth of the city's offense, if we must say it arose from anything pertaining to the crossing, and not from an unaccountable accident, as several witnesses say it was. Any one is liable to fall in walking, especially at night, using the legs in effort to cross muddy places. It is charged by the town that the plaintiff was drinking. I do not at all place the misfortune on that ground. I think it was simply an accident, or, if the city is chargeable, it is only because of the mud on the crossing. Is that enough to make it liable? Our state has great and often-recurring precipitation of rain and snow, especially in winter. Mud follows inevitably everywhere. No means at a town's command can prevent its presence in some quantity, even on crossings, and in small quantity it makes them slippery. In applying this statute we can consider the location of the road, the nature and circumstances of the particular section, the difficulty of keeping it in high repair without unreasonable expense, the season of the year, and the nature and amount of travel. Ang. High. § 259. The mere slipperiness of a sidewalk occasioned by ice or snow—the same, certainly, as to mud—“not being accumulated so as to constitute an obstruction, is not ordinarily such a defect as will make the city liable for damages occasioned thereby. Where there is snow upon a sidewalk, there is danger from slipping and falling, even on the best-constructed sidewalks.” 2 Dill. Mun. Corp. § 1006. This mud's presence was not a structural defect, not an obstruction.

Being of opinion that the verdict is contrary to the evidence, we reverse the judgment, set aside the verdict, award a new trial, and remand.

(40 W. Va. 442)

#### NORFOLK & W. R. CO. v. PERDUE.

(Supreme Court of Appeals of West Virginia.  
April 6, 1895.)

##### ESTOPPEL IN PARS—INJUNCTION.

1. Where a party who claims to be the owner of a tract of land has notice of the fact that a railroad company is excavating a tunnel through a mountain located on said land, under claim of title thereto, remains silent as to his ownership of the land, with full knowledge of

his rights, and assists in the construction of said tunnel from its commencement until its completion, and the railroad is constructed through the same, without asserting any claim to the land through which the tunnel passes, and then institutes an action for damages against the railroad company for taking his land, he will be estopped from recovering in said action, and may be enjoined from further prosecuting such action for damages.

2. Such equitable estoppel may be asserted in a court of equity.

3. When one of two innocent persons—that is, persons each guiltless of an intentional moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible.

4. A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances when he should do so, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be a fraud.

(Syllabus by the Court.)

Appeal from circuit court, Mercer county.

Action by the Norfolk & Western Railroad Company against George W. Perdue for an injunction. From a decree for defendant, plaintiff appeals. Reversed.

Johnston & Hale and A. W. Reynolds, for appellant. Okey Johnson, G. J. Holbrook, and A. C. Davidson, for appellee.

ENGLISH, J. On the 2d day of December, 1892, the Norfolk & Western Railway Company presented to the circuit court of Mercer county in open court its bill praying for an injunction to restrain the defendant, George W. Perdue, from prosecuting certain actions at law mentioned in said bill, and from instituting any future actions against the plaintiff on account of the matters set up in said bill, which injunction was awarded. The material facts alleged and relied upon by the plaintiff in said bill are: That it was a consolidated corporation doing business in said county of Mercer pursuant to the laws of the state of West Virginia, and was the owner and operator of a certain railroad which runs through said county, part of which runs through a tunnel known as “Flat Top Tunnel.” That on the 7th day of January, 1887, it entered into a contract in writing with the Flat Top Coal Company by which it agreed and bound itself to convey to plaintiff a strip of land 220 feet in width, and extending the entire length of said tunnel, one-half thereof to be on each side of the center line of said railroad or tunnel; the object in acquiring said strip being to construct a tunnel through which to locate its railroad, which was well known to both parties to the contract. That at the time said contract was entered into the land in controversy belonged in fee simple to the Blue Stone Coal Company, and that on the 12th day of April, 1889, the said Blue Stone Coal Company conveyed, by deed of that date, to the plaintiff, the said strip of land.



through which the said tunnel now runs, and that on the 25th day of February, 1890, E. W. Clark and others, trustees, who were grantees of the said Blue Stone Coal Company, again conveyed the said strip or parcel of land to the plaintiff; and in this manner the plaintiff became the owner in fee simple of said strip of land. That soon after obtaining the contract aforesaid, by which it acquired said strip of land, it began the construction of its tunnel through the said strip of land, and prosecuted the said work, at a cost of many thousands of dollars, until it was completed, early in the year 1888, and constructed therein its railroad, over which it began running its trains in the early part of the year 1888. That part of the excavation of said tunnel was through a vein of bituminous coal, which was taken out by plaintiff, but the cost of the said tunnel was many thousands of dollars more than the value of the coal taken out of the same. That on the 21st day of February, 1890, the defendant, George W. Perdue, instituted in the circuit court of Mercer county, West Virginia, against the plaintiff, an action of trespass on the case, in which he set up claim to 34.35 acres through which the said tunnel is located and constructed, claiming \$10,000 damages on account of injury to the said tract of land claimed by him as aforesaid, and for excavating and removing the coal from the same in the construction of the said tunnel, which action is still pending and undetermined in said court, the papers in which cause are exhibited. That on the 25th day of March, 1891, the defendant, George W. Perdue, instituted another action of trespass on the case against the plaintiff, in which he claims \$1,000 damages on account of the construction of the tunnel through the said 34.35 acres of land, and the construction and operation of the said railroad therein, which action is still pending and undetermined, and the record in which action is also exhibited with plaintiff's bill. That said George W. Perdue is prosecuting the said actions, and declares his intention to prosecute them to a final judgment. That the plaintiff is informed and believes that the said Perdue will bring other actions, and continue to harass the plaintiff with repeated actions, on account of his pretended claim to said 34.35 acres of land, and in regard to the same subject-matter involved in the first aforesaid action, unless he is restrained from so doing by a court of equity. That plaintiff is involved in a multiplicity of suits, and will continue to be harassed with a multiplicity of suits, on account of the pretended claim of the said Perdue to the said 34.35 acres, which embraces part of the said tunnel, unless the title of the plaintiff to its said strip of land is quieted by a court of equity, and the said Perdue restrained from setting up further claim to it. That the claim of said Perdue to that part of said 34.35 acres of land which covers part of its said strip of 220 feet

through which the said tunnel is located is a cloud on the title of the plaintiff. That the said Perdue does not own the said land, or any part of the strip of land, belonging to the plaintiff as aforesaid, and that the claim of said Perdue should in equity be set aside as a cloud upon the title of the plaintiff. That the said Perdue knew when the plaintiff acquired title to the said land, and soon after the plaintiff began the work of constructing the said tunnel, and taking out the said coal, the said Perdue began work for the contractors who were carrying on the said work for plaintiff, and aided them in the construction of the said tunnel, and continued to aid in the construction of the same, for wages to be paid to him by said contractors, until the completion of the said tunnel. That notwithstanding the full and complete knowledge of the said Perdue of the claim of the plaintiff to said land, of the immense amount of money they were spending in the construction of the said tunnel and the railroad therein, he stood by and saw the work proceed till its completion and made no objection whatever to it, and gave to the plaintiff no notice whatever of his claim to the said land, and that the said George W. Perdue is estopped from setting up claim to any part of said strip of land belonging to plaintiff as aforesaid. That the conduct of said Perdue in keeping silent under the circumstances was a fraud upon the plaintiff, which will estop him from setting up claim to any part of the land of the plaintiff. That plaintiff had no notice whatever of the said Perdue's claim to the land purchased by it as aforesaid through which the said tunnel is located, or any part thereof, until after the completion of the said tunnel and railroad therein; its first notice of said claim being but a short time before the institution of said first action by said Perdue against plaintiff. That plaintiff has been in the complete and full possession of its said land, and every part thereof, continuously ever since the beginning of the construction of the said tunnel, is now in the possession of the same, and entered into the possession thereof peaceably, quietly, with the full knowledge of the said Perdue, and without any objection by him. That said George W. Perdue asserts his claim to said land under a deed from one Zachariah Perdue; that said deed is a cloud on plaintiff's title; that it is invalid, so far as conveying title is concerned, and that it should be set aside as a cloud on plaintiff's title. An injunction was prayed for enjoining and restraining said George W. Perdue from prosecuting said actions at law, and from instituting future actions against the plaintiff on account of the matters set forth in said bill, and that the said deed under which said Perdue claims title, and the entire claim of title of the said Perdue to any part of the plaintiff's land, might be set aside as a cloud upon the plaintiff's title, and that the plaintiff be quieted in its title and



possession of its said land and railroad. An injunction was awarded restraining said Perdue from prosecuting the actions at law then pending against the plaintiff, and from instituting and prosecuting other actions against the plaintiff with respect to the land and subject-matter and things set up in the bill. The defendant, George W. Perdue, demurred to the plaintiff's bill, and on the 2d day of March, 1894, the court sustained said demurrer, and dissolved said injunction, and the plaintiff, declining to amend its bill, applied for and obtained this appeal.

The first error assigned and relied upon by the appellant is that the circuit court erred in sustaining the demurrer to the plaintiff's bill, upon the ground that the bill presented a strong case for the relief of a court of equity, by decreeing in favor of the plaintiff an equitable estoppel against the said Perdue, which was fully, clearly, and distinctly alleged, together with all the facts constituting the said equitable estoppel in said bill, by decree removing the cloud from the title of appellant cast upon it by said Perdue's claim, the facts in relation to which were fully and distinctly alleged in the bill, and by decree perpetually enjoining the prosecution of the said actions at law, which were shown by the facts alleged in the bill to be purely vexatious, etc. Now, upon the demurrer, the universally recognized rule is that all allegations of the bill which are well pleaded must be taken as conceded to be true, and the defendant by his demurrer asserts that, admitting the allegations of the bill to be true, the plaintiff by his bill has not shown himself to be entitled to relief in a court of equity. Applying, then, this test to the bill filed in the case under consideration, let us examine the question of equitable estoppel, which is presented in the plaintiff's bill in the following language: "Plaintiff alleges that said George W. Perdue is estopped from setting up claim to any part of the said strip of two hundred and twenty feet in width of land belonging to this plaintiff as aforesaid. The said Perdue knew when this plaintiff acquired title to the said land in the manner hereinbefore stated, and soon after this plaintiff began the work of constructing the said tunnel, and taking out the said coal, the said Perdue began to work for the contractors who were carrying on the said work for this plaintiff, and aided them in the construction of the said tunnel, and continued to aid in the construction of the same, for wages to be paid to him by said contractors, until the completion of the said tunnel. Notwithstanding the full and complete knowledge of the said Perdue of the claim of the plaintiffs to said land, of the immense amount of money they were spending in the construction of the said tunnel and the railroad therein, he stood by and saw the work proceed till its completion, and made no objection whatever of his claim to the said land." "Plaintiff had no notice whatever of the said Perdue's claim to the land purchased by it as aforesaid through which the said tun-

nel is located, or any part thereof, until after the completion of the said tunnel and railroad therein." Regarding these allegations as conceded to be true on demurrer, and turning to the law bearing upon the question, we find that a similar question was presented for the consideration of this court in the case of *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878, in which case Green, J., delivering the opinion of the court, said: "It is recognized as law that if the owner of real estate, whether he has the legal title in him or not, permits such real estate to be sold in his presence by another, who claims to be the owner of the land, or by one who claims that he has full authority and power to dispose of the same, it is the duty of the true owner of the land to assert his claim then. And if he stands by and permits an innocent purchaser to buy such land from such person claiming to have full power to dispose of it, he will be estopped thereafter from setting up a claim to such land, because of a want of full power and authority on the part of the person selling it to make good title thereto, as against such innocent purchaser, by his acquiescence at the time in the legality of such sale made in his presence." He also says: "Whenever, in this or any other manner, such owner of lands misleads another, by his conduct or words, into the belief that a third person owns certain land, or possesses full power or authority to sell it, and he knows that such conduct or words would naturally have this effect, whether he intended them to defraud such purchaser or not, he will not only be estopped from claiming, against such innocent purchaser, this land, because in fact the person so selling it as his own, or having full power and authority to sell it, either did not own it or had no authority to sell it such as he claimed, but the courts of equity go further, and would under such circumstances compel him to convey such land to such innocent purchaser." Now, the facts being conceded as stated in the bill, it is easily perceived what gross injury and injustice would result to the appellant from the conduct of the appellee, if the doctrine of estoppel was not applied.

It appears from the allegations of the bill that the appellee, George W. Perdue, was cognizant of the fact that this strip of land 220 feet wide was acquired by the appellant for the purpose of constructing a tunnel through the Flat Top Mountain and using it as a thoroughfare for its railroad. Not only so, but that he actually aided in the construction of said tunnel, as a laborer, from a period soon after its commencement until its completion, being fully cognizant of the claims of appellant and of the immense amount of money it was expending in the construction of the same. A question somewhat similar to the one submitted by this record was before the supreme court of the United States in the case of *Morgan v. Railroad Co.*, 96 U. S. 716, in which it was held that "a party is not permitted to deny a state of things which his conduct or

misrepresentations led another to believe existed and to act in accordance with that belief." In that case a bill was filed by Morgan against the Chicago & Alton Railroad Company. The suit involved the ownership of two strips of land adjoining that over which said company had the right of way, and forming part of its depot grounds in the town of Dwight, and the question was whether these strips of land had been dedicated by the owners thereof for depot purposes for the use of the railroad. Justice Swayne, in delivering the opinion of the court, says: "The appellee insists that the record discloses a case of estoppel in pais, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken shall not be heard to speak when he ought to be silent,"—citing *Bank v. Lee*, 13 Pet. 107. "He is not permitted to deny a state of things which, by his culpable silence or misrepresentations, he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." The bill alleges that the appellee was cognizant of the manner in which appellant claimed to have acquired title to said strip of land, and he must be presumed to have known the land he claimed, and yet with all this knowledge he worked in silence for the company that constructed the tunnel, and set up no claim to any portion of said strip until after the tunnel was completed and the railroad constructed through the same. If he had objected when the work was commenced, the appellant might have made other arrangements, or perhaps changed the route. Would it, then, be doing equity to allow the appellee to wait in silence until the railroad was located, and the tunnel completed, and then assert his claim for damages? Surely not. 2 Herm. Estop. § 776, on this point, thus states the law: "If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This is the proper sense of the term 'acquiescence,' and in that sense it may be defined as 'quiescence,' under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct." In the case of *Boardman v. Railway Co.*, 84 N. Y. 182, Miller, J., in the opinion of the court,

says: "The principle applicable to such a case is laid down by Lord Denman in *Pickard v. Sears*, 6 Adol. & E. 474, as follows: 'The rule of law is clear that where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time;' " and Miller, J., adds: "Nor is it essential to an equitable estoppel that the party should design to mislead, and it is sufficient if his acts were calculated to mislead, and have misled, another acting upon it in good faith, and exercising reasonable care." So, also, in the case of *Jowers v. Phelps*, 33 Ark. 468, the law in regard to estoppel in pais is well stated by English, C. J., as follows: "Estoppels in pais depend upon facts which are rarely in any two cases precisely the same. The principle upon which they are applied is clear and well defined. A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances where he should do so, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be a fraud."

Counsel for the appellee contend that equity has no jurisdiction in this case, because the remedy at law was adequate and complete, the action being trespass on the case for injury done to real property. This court, however, in the case of *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536, held that equity is the proper forum in which to assert an equitable estoppel. In that case Hanly obtained an injunction to restrain Watterson from cutting and removing timber from certain lands which he, Hanly, had purchased from one Kirk, and from further proceeding in an action at law which he, Watterson, had instituted against said Hanly for the value of 1,030 trees, etc., claiming damages to the amount of \$9,000, which timber said Watterson claimed under an option from Kirk executed previous to said Hanly's purchase. It appeared from the allegations of the bill that Watterson stood by and saw Hanly's employees removing these trees, and pointed out certain trees to Hanly's employees, and acquiesced in the manufacture of the same into railroad ties, and furnished said Hanly the use of his tramways when removing said timber; and it was held that in such circumstances Watterson was estopped from asserting a claim to said timber, or recovering damages for the cutting and removal of the same. Herm. Estop. § 735, says: "There are many fundamentals of the law which are applicable to and explanatory of this doctrine of equitable estoppel"; and among them he names: "Volenti non fit injuria" ("No one

can maintain an action for a wrong where he has consented to the wrong which occasions his loss"); "*Qui non prohibet quod prohibere potest assentire videtur*" ("He who does not forbid what he can forbid seems to assent"); and "*Qui tacet, consentire videtur*" ("He who is silent appears to consent"). What more potent evidence could the Norfolk & Western Railroad Company have wished or desired of a want of claim or interest on the part of George W. Perdue in said strip of land than was furnished by his acts in assisting in the construction of the tunnel through the land he now claims, without asserting any claim or raising any objection? Now, as to what constitutes an equitable estoppel, 2 Pom. Eq. Jur. § 802, says: "Equitable estoppel, in the modern sense, arises from the conduct of a party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel. The doctrine of equitable estoppel is pre-eminently the creature of equity." In section 803 the author says: "It is accurate, therefore, to describe equitable estoppel in general terms as 'such conduct by a party that it would be fraudulent or a fraud upon the rights of another for him afterwards to repudiate and to set up claims inconsistent with it.' This use of the term has long been familiar to courts of equity, which have always treated the word 'fraud' in a every elastic manner. The meaning here given to 'fraud' or 'fraudulent' is virtually synonymous with 'unconscientious' or 'inequitable.'" Again, in the same section, he says: "When all the varieties of equitable estoppel are compared, it will be found, I think, that the doctrine rests upon the following general principle: When one of two innocent persons—that is, persons each guiltless of an intentional moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible." And, also, in section 804, the same author says: "From the foregoing general description it will appear, I think, that the following definition is accurate, and covers all phases and applications of the doctrine: 'Equitable estoppel' is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for

the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy." The essential elements constituting the estoppel are set forth in section 805 of the same work as follows: "(1) There must be conduct, acts, language or silence amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him. (4) The conduct must be done with the expectation that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply impossible to ascribe any intention or even expectation to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse. In other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct, and to assert rights inconsistent with it." And, again, in section 807, the same author says: "The general rule is that, if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and compelled to make his misrepresentation specifically good. It applies to one who denies his own title or incumbence when inquired of by another who is about to purchase the land, or to loan money upon its security; to one who knowingly suffers another to deal with the land as though it were his own; to one who knowingly suffers another to expend money in improvements without giving notice of his own claim, and the like. \* \* \* In the language of the most recent decision, to preclude the owner of land from asserting his legal title or interest under such circumstances, there must be shown either actual fraud, or fault or negligence equivalent to fraud, on his part, in concealing his title, or that he was silent when the circumstances would impel an honest man to speak," etc. Applying these principles to the facts stated in the bill, and which are conceded upon demurrer, my conclusion is that the circuit court erred in sustaining the demurrer to the plaintiff's bill, and in dissolving the injunction awarded in said cause. The decree complained of is therefore reversed, and the cause remanded, with costs.

(40 W. Va. 455)

**STATE v. HALL et al.**(Supreme Court of Appeals of West Virginia.  
April 6, 1895.)**PLEADINGS—OVERRULING DEMURRER—ACTION ON  
INJUNCTION BOND—DAMAGES.**

1. A judgment on a verdict for the plaintiff virtually overrules all demurrers to the declaration and each count thereof.

2. Where the condition of an injunction bond in pursuance of the statute provides that the plaintiff in the injunction cause shall faithfully prosecute said injunction, and shall pay the amount of the judgment enjoined, and all such costs as may be awarded against the complainants, and all such damages as shall be incurred in case the injunction bond to recover damages incurred by reason of the suing out of said injunction, the declaration must aver that the plaintiff in the injunction, by reason of the dissolution thereof, has incurred and become liable to pay the plaintiff in the suit on said bond some amount of damages.

3. Where such bond is made payable to the state, suits may be prosecuted from time to time thereon for the benefit of the person injured by the breach of the condition thereof, until damages are recovered in the aggregate equal to the penalty of the bond.

4. In such suit it is incumbent on the relator to show title to the judgment enjoined before he would be entitled to recover damages on account of its collection being restrained by the injunction.

(Syllabus by the Court.)

Error to circuit court, Wood county.

Action on a bond by the state of West Virginia for the use of another against Cyrus Hall and A. J. Patton. There was judgment for plaintiff, and defendants bring error. Reversed.

Couch, Flournoy & Price and P. W. Morris, for plaintiffs in error. Hutchinson, Hutchinson & Camden, for defendant in error.

**ENGLISH, J.** This was an action of debt upon an injunction bond brought in the name of the state of West Virginia, which sued for the use and benefit of D. F. Haymond, sheriff of Ritchie county, W. Va., and, as such, administrator of the estate of Isaac Lambert, deceased, who sued for the use and benefit of James Taylor, against Cyrus Hall and A. J. Patton, brought in the circuit court of Ritchie county. The suit was brought upon an injunction bond, the condition of which as set forth in the plaintiff's declaration is as follows: "That is to say, the condition of the above obligation is such that whereas, John S. Porter, for the use of Isaac Lambert, obtained a judgment against the said Cyrus Hall and W. M. Patton at the June term of the county court of Ritchie county, 1858, for two hundred and fifty dollars (\$250), with interest thereon from the 1st day of September, 1854, and the costs of the action at law, upon which the said Cyrus Hall and William M. Patton have signed a release of errors on said judgment at law; and whereas, the said Hall and Patton have obtained an injunction against the execution of the said judgment allowed by the judge of the circuit court of Ritchie county in December, 1867; and whereas, the

circuit court of Ritchie county, at its spring term, 1877, by an order directed and required the said Hall and Patton to execute and file in the papers of the said injunction cause a new bond upon the said injunction: Now, therefore, if the said Cyrus Hall and William M. Patton shall faithfully prosecute said injunction, and shall pay the amount of the said judgment, and all such costs as may be awarded against the complainant, and all such damages as shall be incurred in case the injunction aforesaid be dissolved, then the above obligation to be void; otherwise to remain in full force and virtue." And for assigning the breach of said condition the plaintiff says that: "Afterwards, to wit, at a circuit court for the said county of Ritchie, held on the 26th day of October, 1877, it was by the said circuit court, amongst other things, adjudged, ordered, and decreed that the injunction theretofore awarded in the said cause in said condition mentioned be, and the same was, dissolved, and that the said James Taylor recover against the plaintiffs in said chancery cause his costs by him about his suit in that behalf expended. And the plaintiff in fact further says that the said costs last mentioned amount to a large sum of money, to wit, the sum of five hundred dollars. And the plaintiff in fact says that said decree so dissolving said injunction was afterwards, to wit, on the 12th day of November, 1881, by the supreme court of appeals of West Virginia, so far as it dissolved said injunction, with costs against the said plaintiffs in said chancery suit, affirmed. And the plaintiff in fact says that the damages to which he is entitled at the rate of ten per cent. per annum from the time the said injunction took effect until the said dissolution thereof on such sum as appears to be due, including the costs recovered at law, have been ascertained to be, and are in fact, one thousand dollars. Nevertheless, payment has not been made of said judgment in said condition mentioned, nor of the costs so awarded against the said Hall and Patton in said injunction case, nor of the said damages, and so the condition of said bond is broken, and the plaintiff in fact is injured by the said breach thereof, and right has accrued to prosecute this suit upon said writing obligatory for the benefit of said James Taylor, relator, and to demand the said sum of one thousand dollars above demanded, and also the said sum of fifteen hundred dollars costs and damages aforesaid. And the plaintiff further says that the said sums have never been paid by the defendants or either of them, and the plaintiff, by reason of the nonpayment thereof, has sustained damages to the amount of twenty-five hundred dollars," etc. It does not appear from the record that this demurrer was ever acted upon by the court. This court, however, in the case of Hood v. Maxwell, 1 W. Va. 219, held that "a judgment on a verdict for the plaintiff virtually overrules all demurrers to the declaration, and each count

thereof," and the court in the case under consideration having gone on, and given judgment for the plaintiff, must be considered to have overruled the defendants' demurrer. Did the court err in so ruling? The plaintiff in this case appears from the record to have recovered judgment for a large amount of damages, not only against the principal, but the surety, in said injunction bond; and High on Injunctions (volume 2, § 1640) thus states the law: "The sureties in the bond are entitled to stand upon the precise terms of the contract, and their liability will not be extended beyond its terms. When, therefore, the bond is conditioned for the payment of such damages as shall be awarded against the principal by reason of issuing the injunction, an action cannot be maintained against the sureties when it is not averred that any damages were so awarded. So if the bond is conditioned for the payment of such costs and damages as may be recovered against the principal for the wrongful suing out of the injunction, there can be no recovery upon the bond when it is not alleged that there has been a recovery against the principal for wrongfully suing out the injunction." The condition of the injunction bond sued upon complied with the statute, and provided that "if the said Cyrus Hall and William M. Patton should faithfully prosecute said injunction, and should pay the amount of the said judgment, and all such costs as may be awarded against the complainants, and all such damages as shall be incurred in case the injunction aforesaid be dissolved, then the above obligation to be void; otherwise to remain in full force and virtue." At the time this injunction was dissolved, section 12 of chapter 133 of the Code provided that "when an injunction to stay proceedings on a judgment or decree for money is dissolved, wholly or in part, there shall be decreed to the party having such judgment or decree, damages, \* \* \* at the rate of ten per centum per annum from the time the injunction took effect, until such dissolution on such sum as appears to be due including the costs"; but the court wherein the injunction is may direct that no such damages be paid, or such portion thereof as it may deem just. This law must be regarded as a part of the contract when the bond was executed, and shows that the damages contemplated were such as should be awarded by the chancery court in which the injunction was pending, which court, by the terms of the statute, appears to have had complete control over the question of damages, as it could direct that no such damages be paid, or such portion thereof as it might deem just, and the contract of the surety was to pay such damages as should be thus awarded. Barton, in his Chancery Practice (volume 1, p. 477), after stating the statutory provision, says: "The damages thus decreed are in satisfaction of so much of the interest for the time they are given as may not exceed the said damages. \* \* \* The

damages are calculated on whatever appears to have been due by virtue of the judgment, or so much thereof as was enjoined at the time the injunction was awarded,—that is, upon the principal and interest up to that time, and the costs at law; and when there are two defendants to the judgment, and one of them obtains an injunction, which is dissolved, that one only is liable for the damages, while, of course, the other defendant remains, as before, liable for the principal and interest of the debt, and the costs at law;" plainly indicating that the damages are within the control of, and to be awarded by, the chancellor when the injunction is dissolved. In the case under consideration, however, the injunction bill was dismissed by this court on appeal from a decree of the circuit court of Ritchie county, and no damages were awarded, and the declaration does not claim that any damages were awarded in said injunction suit, but does claim that the plaintiff is entitled to damages at the rate of 10 per cent. per annum from the time the said injunction took effect until the dissolution thereof, on such sum as appears to be due, including the costs recovered at law, which have been ascertained to be, and are in fact, \$1,000. How said damages have been ascertained or awarded the declaration does not state, but the contract of the surety was to pay such costs as might be awarded against the complainants, and all such damages as should be incurred, in case the injunction be dissolved; and we have seen that the law provides how these damages shall be ascertained and awarded, to wit, by the chancery court, when the injunction was dissolved.

In the case of Tarpey v. Shillenberger, 10 Cal. 390, the supreme court of that state held that in an action against the sureties on an injunction bond, the condition of which is that the plaintiff in the suit for whom the sureties undertook should pay all damages and costs that should be awarded against the plaintiff by virtue of the issuing of said injunction by any competent court, and the complaint did not aver that any damages had been awarded. Held, that such complaint is fatally defective. And in the case of Anderson v. Falconer, 34 Miss. 257, it was held that an injunction bond which is conditioned for the payment by the complainant of all such damages as shall be awarded against him "is no security for the general damages which the obligee may sustain from the injunction, but only for such as shall be properly awarded against the complainant; and hence, in an action on such bond, unless the declaration avers that damages have been awarded against the complainant, and that he has failed to pay them, it will be bad on demurrer." Now, the language of our statute prescribing the condition of the bond is as follows: "With condition to pay the judgment or decree—proceedings on which are enjoined—and all such costs as may be awarded against the party obtaining the injunction,

and also such damages as shall be incurred in case the injunction be dissolved," etc. Prof. Minor, in his work (volume 4, pt. 2, p. 1525), prescribes the form for a declaration on an injunction bond, which, after setting forth the condition, reads as follows: "And the said plaintiff in fact saith that the injunction aforesaid in the said condition mentioned hath been in due form of law dissolved by an order of the said ——— court of ——— county, sitting as a court of chancery, and that costs against the said D. D. have been awarded by said court in the premises to a large amount, to wit, to the amount of ——— dollars; and the said D. D. hath incurred and become liable, by reason of the dissolution of the said injunction, to pay the said plaintiff damages to a large amount, to wit, the amount of ——— dollars." Referring to the declaration under consideration, it is at once perceived that it contains no such averment. It does not state that the defendants have incurred or become liable, by reason of the dissolution of said injunction, to pay the plaintiff any sum of money. It does state that the damages to which plaintiff is entitled "at the rate of 10 per cent. per annum from the time said injunction took effect until the said dissolution thereof, on such sum as appears to be due, including the costs recovered at law, have been ascertained to be, and are in fact, one thousand dollars." It is silent as to what party he is entitled to have said damages from, or how the amount of damages has been ascertained. It does not state that said damages were incurred by reason of the dissolution of the injunction, or fix the liability for the same upon any person or persons. As we have seen, a declaration has been held bad when it failed to aver that any damages were awarded when the condition of the bond was that the principal should pay all costs and damages that should be awarded against the plaintiff,—the statute so requiring. Now, when the statute requires that the surety shall pay such damages as shall be incurred in cash, if the injunction shall be dissolved, the same rule applies; and, unless the declaration avers that the plaintiff in the injunction, by reason of the dissolution of said injunction, has incurred and become liable to pay the plaintiff some amount of damages, the declaration is defective, and a demurrer thereto should be sustained. Again, this bond, in pursuance of the provisions of section 1 of chapter 10 of the Code, was made payable to the state of West Virginia; and in section 2 of the same chapter it is provided that suits may be prosecuted from time to time in the name of the state, if the bonds be so payable, for the benefit of the person injured by a breach of the condition of any such bond, until damages are recovered in the aggregate equal to the penalty thereof; but the declaration must show that the relator has been injured by a breach of the condition of the bond. The relator in this declaration, in assigning the breach, avers that

payment has not been made of the judgment in the condition of the bonds mentioned, nor of the costs awarded against said Hall and Patton in said injunction case, nor of the said damages; but the declaration fails to show how the relator, James Taylor, acquired any title to said original judgment for \$250 which John S. Porter, to use of Isaac Lambert, obtained in the county court of Ritchie county against Cyrus Hall and William M. Patton at the June term, 1858; and it is incumbent on said relator to show title to said judgment before he would be entitled to recover damages on account of its collection being restrained by injunction. Barton, in his *Law Practice* (volume 1, p. 166), in speaking of fiduciary bonds, says: "The action of debt may be maintained upon bonds executed by fiduciaries, such as executors, administrators, guardians, committees, trustees, and receivers, which are made payable to the commonwealth, and conditioned for the faithful performance of their several duties by the various officers who execute them. The suit is brought in the name of the commonwealth at the relation of the claimant; but the relator must be the party having the legal right to the debt,"—citing *Allen v. Cunningham*, 3 Leigh, 395. There is nothing, however, set forth in the declaration we are considering that shows the relator's right to recover in the action. It is true that the declaration contains the averment that the damages to which he (plaintiff) is entitled at the rate of 10 per cent. per annum from the time the said injunction took effect until the dissolution thereof on such sum as appears to be due, including the costs recovered at law, have been ascertained to be, and are in fact, \$1,000, but it neither avers the ownership of the judgment nor in any manner states how he acquired title to said judgment, interest, and costs, nor does said declaration state how said relator was damaged by the delay caused in the collection of said judgment by reason of said injunction. In the case of *Tazewell v. McCandlish*, the court of appeals of Virginia, in 10 Leigh, p. 116, ruled upon a similar question as follows: "In debt in a circuit court, upon the official bond of the marshal of the late superior court of chancery for the district, the breach assigned in the declaration is that, the chancery court having, in a suit therein pending, in which the relator was defendant, made an order directing the marshal to take possession of certain slaves,—averred to be the property of the relator,—and hire them out until the further order of the court, the marshal accordingly took possession of the slaves, hired them out, and collected the hires, but failed to pay them over to the relator, to whom they belonged, and who was entitled to receive them from the marshal, as would appear by reference to the record and proceedings in the said suit remaining in the office of the circuit court. On general demurrer to the declara-

tion, held, the assignment of the breach is defective in substance, the title of the relator to demand and receive the hires from the marshal not being sufficiently set forth." Tucker, P., in delivering the opinion of the court, said: "I am of opinion that the judgment in this case—which sustained the demurrer—should be affirmed, the declaration being radically defective, as it shows no right of action in the relator;" and, after setting forth the material facts averred in the declaration, he says: "To this declaration the defendant filed a general demurrer, which, of course, only brings in question the substantial character of the declaration. I am of opinion that it is defective in substance in this: that it nowhere shows any title in the relator to sue." So, in the case under consideration, no averment in the declaration shows any title in the relator to sue. In order that the relator should have been entitled to the damage caused by the injunction, the declaration should have shown him entitled to the judgment which was enjoined. It avers that the damages to which he is entitled at the rate of 10 per cent. per annum from the time said injunction took effect until the said dissolution thereof, on such sum as appears to be due, including the costs recovered at law, have been ascertained to be, and are in fact, \$1,000, but it does not show how he was entitled to the damages, how any sum appears to be due, and in what manner the damages have been ascertained, or why he is entitled to said damages. For these reasons the court erred in overruling the demurrer. The judgment complained of must be reversed, and the cause remanded, with costs.

(40 W. Va. 593)

#### STATE v. ZEIGLER.

(Supreme Court of Appeals of West Virginia.

April 13, 1895.)

#### JUSTIFIABLE HOMICIDE—MISLEADING INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

1. If an assault is made upon a man with an attempt to commit a felony upon him, he may resist so far as it is necessary to resist the assailant, even if he must take the assailant's life. But this has a limitation. If he can resist the assault, and free himself, without taking life, and kills the assailant without necessity, he is not excusable. If mere heat of blood impels him to take life in such case, he is guilty of manslaughter.

2. To reduce homicide in self-defense to excusable homicide, it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault.

3. Where one, without fault himself, is attacked by another, in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearances,

and, without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him some serious injury, nor danger that it would be done. But of all this the jury must judge from all the evidence and circumstances of the case.

4. It is error in a court, in a case of felony, to give to the jury instructions which are not relevant to the evidence, and which may mislead the jury to the prejudice of the defendant.

5. If there be, in the opinion of the jury, a substantial conflict in the evidence or circumstances, as to whether the killing was done in self-defense, and the circumstances or other evidence preponderate in favor of self-defense, or if it was equally balanced as to the killing being done in self-defense, the jury ought not to convict either of murder or manslaughter.

6. Where a court which tries a cause certifies all the evidence adduced on the trial, and from the evidence so certified it clearly appears that it was wholly insufficient to sustain the verdict, this court will set aside the verdict, and, in a proper case, award a new trial.

(Syllabus by the Court.)

Error to circuit court, Morgan county.

Rudolph Zeigler was convicted of manslaughter, and brings error. Reversed.

D. B. Lucas, for plaintiff in error. F. W. Brown and Atty. Gen. Riley, for the State.

ENGLISH, J. At the April term of the circuit court of Morgan county, in the year 1894, the grand jury of said county found an indictment against Rudolph Zeigler; charging that on the 13th day of February, 1894, in said county of Morgan, he feloniously, willfully, maliciously, deliberately, and unlawfully did slay, kill, and murder one John Santters, against the peace and dignity of the state. The plea of not guilty was interposed, issue joined thereon, and the case was submitted to a jury on the 1st day of May, 1894, which resulted, on the 9th day of the same month, in a verdict of not guilty of murder as charged in the indictment, but guilty of voluntary manslaughter. A motion was made in arrest of judgment, and for a new trial, which motions, having been argued, were overruled by the court, and the prisoner excepted. Judgment was rendered upon the verdict, and the prisoner was sentenced to confinement in the penitentiary for the period of two years, and the prisoner obtained this writ of error. Self-defense was relied on by the prisoner, and it appears from bill of exceptions No. 8 that after the evidence was concluded, and before the argument commenced, the prisoner, by his counsel, prayed the court to give the jury the following instructions: Instruction No. 1 for defendant: "The court instructs the jury that if, from the evidence, the jury be of opinion that there is a substantial conflict of the evidence or circumstances as to whether the killing was done in self-defense, and the circumstances or other evidence preponderate in favor of self-defense, or if it was



equally balanced as to the killing being done in self-defense, the jury cannot convict the prisoner either of murder or manslaughter." Instruction No. 2: "The court instructs the jury that the owner of property, in the possession of the same, has the right to use as much force as is necessary to prevent a forcible trespass; and if they find that the defendant was standing upon his own ground, and that in attempting to force a passage over the same, if they so find, the deceased was violating the law, and was a trespasser, with the intent and with the means to commit a felony, if necessary to accomplish the end intended, then the defendant, as owner of the property, if they so find, might repel force by force, to the extent of killing the aggressor, and such killing would be self-defense." Instruction No. 3: "The court instructs the jury that a party who is assailed by his adversary with a deadly weapon is not compelled to retreat, but may slay his adversary, if the assault be so fierce as not to allow the party assailed to retreat without manifest danger to his life, or enormous bodily injury. In such case, if there be no other way of saving his own life, he may, in self-defense, kill his assailant." Instruction No. 4: "The court instructs the jury that if, when the deceased fired the fatal shot, he was not the aggressor, but was assailed, and such demonstrations of force, with a deadly weapon and otherwise, made against him as to lead a reasonable man to suppose he was in danger of death or great bodily harm, and under such reasonable apprehension he killed the deceased, who was assailing him, if they so find, then the killing was justifiable, in self-defense." Which instructions were objected to by the state, and the court declined to give them, and the prisoner excepted; and the court, on its own motion, gave to the jury, in lieu of said instructions, the following: Instruction No. 1: "The court instructs the jury that when one, without fault himself, is attacked by another in such a manner or in such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there are reasonable grounds for believing the danger imminent, that such design will be accomplished, and the person assaulted has reasonable grounds to believe, and does believe, that such danger is imminent, he may act upon such appearance, and, without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done. But of this the jury must judge, from all the evidence and circumstances in the case."

No. 2: "And the court further instructs the jury that as to the imminency of the danger which threatened the prisoner, Rudolph Zeigler, and the necessity of his killing John Sautters, in the first instance, the prisoner is the judge, but he acts at his peril, as the jury must pass upon his action in the premises, viewing said actions from the prisoner's standpoint at the time of the killing, and if the jury believe, from the facts and circumstances in the case, that the prisoner had reasonable grounds to believe, and did believe, the danger imminent, and that the killing was necessary to preserve his own life, or to protect him from great bodily harm, he is excusable for using a deadly weapon in defense, otherwise he is not." No. 3: "The court instructs the jury that, on a trial for murder where a deadly weapon is used, if the prisoner relies on self-defense, the burden of proof is on the prisoner, and he must excuse himself by a preponderance of the evidence." No. 4: "The court instructs the jury that the defendant is, by law, presumed to be innocent, and it is the duty of the state to prove him guilty, as charged in the indictment, beyond all reasonable doubt; and, if the state fails to prove every material allegation in the indictment, then the jury must find him not guilty." The court also, at the instance of the state, gave the jury the following instructions, which were excepted to by the prisoner. The exceptions were overruled by the court: Instruction No. 1: "The court instructs the jury that under an indictment for murder the jury may find the prisoner guilty of murder in the first degree, or guilty of murder in the second degree, or guilty of voluntary manslaughter, or guilty of involuntary manslaughter, or not guilty." Instruction No. 2: "The court instructs the jury that, where a homicide is proven, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, she must establish the characteristics of that crime; and, if the prisoner would reduce it to manslaughter, the burden of proof rests upon him to establish the same by preponderance of evidence." Instruction No. 3: "The court instructs the jury that if they believe from the evidence that John Sautters came to his death by a pistol-shot wound inflicted by Rudolph Zeigler, and at the time he was so killed the said John Sautters was in the exercise of a right that belonged to him, of passing along a private right of way, and that Rudolph Zeigler at said time was wrongfully preventing his passage along said right of way, and in so doing, willfully and maliciously, deliberately and premeditatedly, inflicted the wound by which said Sautters came to his death, then he is guilty of murder in the first degree." Instruction No. 4: "The court instructs the jury that where there is a quarrel between two persons, and both are in fault, and as a result



of such quarrel a combat takes place, and death ensues, in order to reduce the offense from the degree of murder two things must appear from the evidence and circumstances of the case: (1) That before the mortal wound was given the prisoner declined further combat, and retreated as far as he could with safety; and (2) that he necessarily killed the deceased in order to save his own life, or to protect himself from great bodily harm." Instruction No. 5: Same as last one. Instruction No. 6: "The court instructs the jury that a man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act; and if the jury believe from the evidence in the case that Rudolph Zeigler, the prisoner, with a deadly weapon in his (prisoner's) possession, without any, or upon very slight, provocation, gave to the deceased, John Sautters, a mortal wound, then said Zeigler is *prima facie* guilty of willful, deliberate, and premeditated killing, and throws upon the prisoner the necessity of proving extenuating circumstances, and that unless the prisoner has proved such extenuating circumstances, or such circumstances arise out of the case made by the state, the jury must find the prisoner guilty of murder in the first degree." The prisoner moved the court to set aside the verdict of the jury, which motion was overruled by the court, and the evidence was certified in a bill of exceptions.

The first error assigned and relied upon by the prisoner is as follows: "(1) It was error not to arrest the judgment, and grant him a new trial." The evidence clearly established that the petitioner acted strictly in self-defense, and the homicide was therefore excusable. There was but one witness for the state whose testimony made out a case of murder or manslaughter, and that was Christian Baurle. Upon the contrary, three other witnesses who were present—the prisoner, his son William, and his wife, Louisa Zeigler—all contradict Baurle, and their testimony tends to establish a case of self-defense, and to show that Baurle and the deceased, Sautters, were the aggressors; that Baurle assaulted Zeigler first, and Sautters followed it up by snapping his musket at him, and then clubbing the gun and striking him, with the butt end, a severe blow, leaving a scar still plainly visible. His evidence is confirmed by Dr. Green, who dressed and probed the petitioner's wound and proves that it was inflicted by some blunt instrument. The state itself introduced a witness (the wife of the deceased) who proved that she distinctly saw something raised up in the air like the butt of a gun. It is plain, therefore, that the jury found against the weight of evidence, and this verdict should have been set aside, and a new trial granted.

This assignment of error calls for an investigation of the feeling existing between the prisoner and the deceased, and the im-

mediate circumstances surrounding the parties, at the precise moment when the fatal shot was fired. Trouble existed between the deceased and the prisoner in regard to a road which the prisoner claimed was a private road, and which the deceased claimed was a public road. In pursuance of his claim, prisoner had obtained an injunction restraining the use of said road as a public road. On the day the shooting occurred, the deceased was evidently apprehensive of something which might not only require a witness, but also the use of a gun. He told Baurle he was going to the store, but it must be regarded as an unusual occurrence to carry a musket when merely going to the store. The testimony shows that said Baurle and Sautters had been on the prisoner's premises on the 15th of July previous with two other men, all armed with guns, and cut down the bars which Zeigler (the prisoner) had constructed across this road. Sautters called on his friend and neighbor, Baurle, who claimed this road as an outlet from his farm, to accompany him as a witness; saying that prisoner stopped him before, and he would like to have some one go along with him. When deceased, carrying his gun, arrived at prisoner's premises, he found him engaged in hauling out manure. Prisoner and his son came out of his barnyard, and prisoner told deceased he had an injunction on that road, and that they should not travel it any more. Baurle says he told him, "All right," but heard Sautters say, "It is our road, and we are going to travel it." That Zeigler came up pretty close to him. He stood still. Zeigler stood right in front of him, two or three feet away. Witness told him, "Better stop that;" he did not want to see any bloodshed on this place. That Zeigler struck him first, about his body, with his fist. That he struck back; struck Zeigler on his head; gave him the mark he got on his head. Sautters was four or five steps away. Zeigler's son came up, and took hold of witness, and shoved him back on a bank at the side of the road. When witness raised up and turned around, Zeigler shot him in the arm. Witness then turned and ran. Saw Sautters as he passed. He had his gun on his arm. Was doing nothing. It was an old army gun. This only lasted from five to eight seconds. Witness was running away, and did not see the parties when the fatal shot was fired. Saw Zeigler point pistol towards Sautters. Saw no blood on Zeigler's face after he struck him. This is, in substance, the testimony of Baurle, who went with Sautters for the purpose of being a witness. William Zeigler, who was present, says, as he came out of the barnyard gate, Sautters came up with his gun pointed at his father. That Baurle had both hands in his pockets, but, as Sautters came up, he out with his left hand, and motioned in front of his father, and said, "Hold on, John, we don't shed cold blood," and his father, facing

that way, said, "I neither,"—waving his hands outward, and had nothing in his hands. Sautters still advanced until he held his gun in 1½ feet of his father. Baurle pulled his right hand out of his pocket, and struck witness' father, and witness came around behind Baurle, and pulled him away. Had no more than caught hold of Baurle than Sautters snapped guncap. That he got Baurle away from his father after the cap snapped. Sautters raised his gun up, and reversed; caught hold of barrel of gun, and struck prisoner over the head with it, and had gun raised to bring it down a second time before prisoner shot. That Baurle got away from witness, and ran into his father, and wheeled him around, and prisoner shot at Baurle, who ran. Sautters stood a little while after he received the first shot, and was fixing at his gun, as though putting another cap on. He then looked towards his house, and saw Baurle running, and started and ran also, until he fell. The prisoner also gave substantially the same statement as to the manner in which the killing was done; stating that he did not shoot Sautters until he had struck him once with the gun over the head, and was preparing to strike him a second time. According to Baurle's testimony, the prisoner was pointing his pistol at Sautters without his offering to strike with the gun, and he states that the wound in prisoner's head was caused by his fist; but Dr. Green states that he found prisoner suffering with wound on left side of head, and also one about the ear or temple; thinks it was inflicted by coming in contact with some blunt instrument; wound could have been inflicted by gun, or instrument of that kind. And Mrs. Sautters, the wife of the deceased, who says she went down to the end of the garden, and had a good view, and was near enough to hear what Zeigler said to Baurle about the injunction, and on cross-examination, when asked, "Did you not say, in substance, 'In the mêlée, I distinctly saw a gun in the hands of some one, with butt or breech in the air, overhead of parties'?" answered: "I did say that. I looked since, and saw a locust post that looked just like that." The witness Baurle further testifies that when he ran he saw Zeigler point his pistol towards Sautters, and heard pistol cracks coming closer and closer to him; seeking to create the impression that Sautters was retreating, and the prisoner pursuing him, at the time he was wounded. But that theory is at once refuted by the fact that the evidence shows that Sautters was shot in the breast. It is then apparent and manifest that this witness, Baurle, was retreating at full speed at the time the fatal shot was fired. He was not in a position to say whether Sautters clubbed his gun and struck the prisoner over the head with it, or not. The prisoner and his son concur in stating that Sautters had struck prisoner over the head with his gun,

and was preparing for the second stroke when he received the fatal shot; and it is evident there would have been no necessity for clubbing the gun, had he fired when the cap bursted. Baurle does not mention the stroke inflicted upon the prisoner with the butt of the gun, but states that the wound in Zeigler's head was caused by his fist; and, to place the most charitable construction upon this testimony of his, we must say that Baurle did not see or know what transpired after he received his wound and hastily left the battle ground. The fact that the gun was clubbed and used at some time during the combat does not rest alone upon the testimony of the prisoner and his son, but the wife of the deceased states that she saw the gun brandished above the heads of the combatants; and, unless it was done after Baurle retreated, it is clear that he suppressed a very material and important fact, in delivering his testimony. That the butt of the gun was used upon the head of the prisoner appears from the fact that the prisoner had a contusion on his forehead near his eye, and congestion of the eye, which was evidently the result of the blow received from the fist of Baurle, while Dr. Green, who examined the prisoner's wounds, says he had one wound on the left side of the head, and also one about the ear or temple, and that the wound was inflicted by some blunt instrument, and could have been inflicted by a gun, or instrument of that kind. Again, Sautters had not been shot when Baurle passed him, running away. Two things then must have transpired in a brief space of time after Baurle passed: The gun was brandished, and Zeigler received the blow, and the fatal shot was fired while Sautters was facing the prisoner, because he received the wound in front, as shown by the testimony of Dr. Ross. Zeigler received the blow from the gun on the left side of his head, as it would naturally be dealt by a right-handed man, facing his adversary. Sautters received the fatal shot immediately after Baurle passed him, for the evidence shows that he followed Baurle, and fell in the road only 30 yards behind him.

This was the case presented to the jury by those who were present, and had an opportunity of seeing what transpired. In addition to this, Mrs. Sautters, the wife of deceased, states that she heard the prisoner tell Baurle "they shouldn't travel that road, and said something about injunction." She also states that prisoner, after firing the first shot, fired two more shots at Baurle as he ran. Now, there can be no question from the testimony that bad feeling existed between the prisoner and the deceased. It appears from the testimony of Isaac Holton: That he was invited to go to Zeigler's, and was told that Baurle and Sautters were going to open this road. It was then obstructed by bars. That he went, and Sautters and Baurle had guns. Zeigler was engaged in hauling hay. That

Charles Butte cut the bars down, and he and Zeigler came together in fighting attitude, and Charles Butte pushed or knocked him down. That Zeigler picked up two rocks, and witness told him not to do that,—he might get hurt, or hurt somebody,—and he threw the stones down and went into his barnyard. Subsequent to that time, the record discloses that repeated threats were made by Zeigler and Sautters on account of the feeling existing in regard to this road. Zeigler appealed to the law for protection, and obtained the injunction, of which he gave Sautters notice at the time he approached, on the day the shooting occurred. The testimony in the case discloses the deadly hostility entertained by the deceased, Sautters, towards Zeigler. He told Simon Barsore that Zeigler stopped him in the road one time, and "if he'd stop him again he would kill him." Emma Young heard him say he was going to load his gun heavy with buckshot, and be ready for Zeigler. He said to W. H. Poole, "Let that ole booger stop me on that road, and right there is where he kills me, or I kill him." On the day of this fatal occurrence the deceased approached Zeigler (who was at his own home, engaged in his farming operations), carrying his loaded musket, ready cocked, and pointed directly at him. During the struggle between Baurle and the prisoner, deceased displayed his deadly intent by bursting the cap on his gun at him; and, after the prisoner had received a heavy stroke from the fist of Baurle, it was followed by a crushing blow on the head from the breech of the gun, and the deceased was preparing to follow it up with another. And it occurs to me that, if Zeigler wished anything left in the shape of self to defend, the time for action had arrived. It is true, he was carrying a revolver, and, thinking the occasion had arrived when it might be used, he used it with deadly effect; and while it is also true that our statute prescribed a severe penalty for carrying a pistol, yet it expressly excepts from such penalty a person who carries such weapon about his dwelling house or premises. In *Whart. Hom.*, under the head of "Excuse and Justification" (section 480, note 6), the definition of "justifiable homicide" is stated thus (quoted from the opinion of Chapman, C. J., in the case of *Com. v. Andrews*): "There is still another definition that needs to be given to you, namely, what constitutes justifiable homicide; for a question may arise here in regard to that subject. It rests upon the right of self-defense. The law regards it as a sacred right, and every man's heart justifies the principle. If an assault is made upon a man, with an attempt to commit a felony upon him, he may resist so far as it is necessary to resist the assailant, even if he must take the assailant's life. But this has a limitation. If he can resist the assault and free himself without taking life, and kills the assailant with-

out necessity, he is not excusable. If mere heat of blood impels him to take life, in such a case he is guilty of manslaughter." And in section 8 of the same work the author says: "Se defendendo, or in self-defense, which exists where one is suddenly assaulted, and in the defense of his person, where immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills the assailant. To reduce homicide in self-defense to this degree, it must be shown that the slayer was clearly pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault." The law never intended, however, that in the circumstances of this case it was the duty of Rudolph Zeigler, the prisoner, to run away from his home, or hide himself, when the deceased (Sautters), accompanied by his friend and witness, came with their guns to force their way through this road. They were warned of the existence of the injunction by Zeigler; and, after the difficulty commenced between Zeigler and Baurle, it must be remembered that the entire combat only lasted, according to the testimony, from five to eight seconds. During that period Zeigler had received a heavy blow on the head from the fist of Baurle, which, according to Baurle's testimony, knocked Zeigler away from him, and turned him around. Baurle had been pulled away and thrown back by William Zeigler (the son), and had rushed again at Zeigler, and received the shot in the elbow, and started to run. Zeigler fired two shots in quick succession after Baurle; and, Sautters' gun having failed to shoot, he clubbed his gun, and struck Zeigler over the head, and was raising it for a second stroke when Zeigler fired the fatal shot. Now, if we put ourselves in the place of Zeigler for the few seconds that this combat lasted, and consider that Baurle says he "don't know how hard he struck, and whether he struck once or twice"; who states that he is a coward, "and if he strikes a man he strikes him good"; staggered and blinded by this blow on the eye and forehead, he receives the crushing blow from the butt of the musket in the hands of Sautters,—we may well infer that the fierceness of the assault from these two men was such as to preclude all possibility of retreat with any degree of safety, even if sufficient strength was spared him by these paralyzing strokes.

In the case of *State v. Cain*, 20 W. Va. 680, this court stated the law as follows: "Where one, without fault himself, is attacked by another in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be ac-

complished, and the person assaulted has reasonable grounds to believe and does believe such danger is imminent, he may act upon such appearances, and, without retreating, kill his assailant, if he has reasonable grounds to believe that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him some serious injury, nor danger that it would be done. But of all this the jury must judge from all the evidence and circumstances of the case." It is proper just here to call attention to the fact that the prisoner had actually made no demonstration of any kind whatever towards the deceased until after he snapped his gun at him, and after he received the blow on his head with the breech of the gun. Before that his entire attention appears to have been occupied with Baurle. Bishop, in his work on Criminal Law (volume 1, § 865), states the rule thus: "If one who is assaulted (we have seen that there must be an overt act rendering the danger imminent), being himself without fault in bringing on the difficulty, reasonably apprehends death or great bodily harm to himself unless he kills the assailant, the killing is justifiable." Now, that the deceased started from his home with his loaded gun, with the deliberate intention of carrying out his previous threats by killing the prisoner if he came out to him in that road, is manifest from his subsequent actions. That Baurle knew what his intention was is shown by his language when Sautters first pointed his gun at the prisoner,—"John, hold on; don't shed cold blood"; by his snapping his gun at prisoner while engaged in combat with Baurle; by clubbing his musket and attacking prisoner before he had recovered from the stunning blow received from Baurle. Turning to the conduct of prisoner, we find that although the deceased, Sautters, came towards him in this threatening attitude, with his gun pointed, and hand about the lock, nothing in the entire testimony shows that the prisoner made any demonstration towards the deceased until after he received the blow from the musket. True, Baurle, who came there as a witness, says, as he ran, he saw the prisoner point his pistol towards deceased; but that is met and refuted by the fact shown that Baurle was running towards, and passing by, Sautters; was wounded and frightened himself; and the prisoner fired two shots after him after he commenced running. In this connection we may ask what is the law, as settled in this state, where self-defense or other justification is set up? Haymond, P., in the case of *State v. Abbott*, 8 W. Va. 766, in delivering the opinion of the court, said: "If the circumstances and evidence tend to prove self-defense, or other legal justification, then, as to the question of whether the act was done in self-defense, or other legal justification, if, in the opinion of the jury, a substantial conflict of circumstan-

ces or other evidence exists, there should be such a preponderance of circumstances or other evidence against the self-defense, or other justification, as to reasonably satisfy the mind of the jury that the killing was not in self-defense, or justifiable, before they can convict. If there be, in the opinion of the jury, a substantial conflict of the evidence or circumstances as to whether the killing was done in self-defense, and the circumstances or other evidence preponderates in favor of self-defense, and, I should add, if it was equally balanced as to the killing being done in self-defense, the jury ought not to convict of either murder or manslaughter." This court, however, in a later case (*State v. Jones*, 20 W. Va. 764), held that, "upon a trial for shooting with intent to kill, the use of a deadly weapon being proved, and the prisoner relies upon self-defense to excuse him for the use of the weapon, the burden of showing such excuse is on the prisoner; and, to avail him, he must prove such defense by a preponderance of evidence." It is true that the courts in this state and the old state have guarded with jealous care the province of the jury in criminal trials, and have declared more than once their aversion to interference with verdicts, and have announced that, although they might have rendered a different verdict if they had been upon the jury, yet they ought not to interfere. Still we find, in the case of *Hill v. Commonwealth*, 2 Grat. 595, it was held that "this court will only set aside a verdict because it is contrary to the evidence in a case where the jury have plainly decided against the evidence, or without evidence"; and in the case of *Grayson v. Commonwealth*, 6 Grat. 712, the law was thus stated, "A new trial will be granted when the verdict is against law, or where it is contrary to the evidence, or where the verdict is without evidence"; and in *Foster's Case*, 21 W. Va. 767, it is held that "where the court which tried the cause certified all the facts proved on the trial, and from the facts so certified it clearly appears that they were wholly insufficient to sustain the verdict, this court will set the verdict aside, and, in a proper case, award a new trial." The facts and circumstances developed by the testimony in this case are such as, in my opinion, made out a case of self-defense. The fierceness of the assault made upon the prisoner with the musket immediately after he had received the stunning blow from the fist of Baurle was such as to admit of no retreat with safety, and nothing was left him, to save his own life or prevent great bodily harm, but to use his weapon; and I think the jury should have so found, and the court, on motion, should have set the verdict aside.

The next assignment of error is as to the action of the court in excluding the testimony of Conrad Potter as to threats made by Baurle against the prisoner. These threats, whether communicated to the prisoner or not, were admissible to show the prejudice and state of mental feeling on the part of the witness

towards the prisoner, and should not have been excluded; and the same may be said in reference to the evidence offered in regard to the feeling of the witness Lutman, which was excluded by the court.

The fourth assignment of error is as to the exclusion of the testimony of John Johnson as to threats made by the deceased against the prisoner, that he would kill him if he came out to him on that road. It is true that the witness did not mention Zeigler's name in that conversation, but he was talking about this road, and it was well understood what he intended. This threat does not appear to have been communicated to Zeigler; but threats of Zeigler had been shown, and it should have been allowed to go to the jury, in connection with the subsequent acts of the deceased, to show that his going to Zeigler's with his loaded gun was in pursuance of a previously formed design.

The sixth assignment of error is as to the action of the court in excluding the testimony of George Shriver, who, after testifying as to his being road surveyor, and about some conversation with prisoner as to whether the road in controversy was a public road, was asked, on cross-examination, if the deceased cut down the bars of Zeigler on said road; and the court ruled that, if the defense wished to ask any questions about other conversations, they would have to make him their witness. And, while I think the question would have been proper, if asked in chief, I think it was properly excluded on cross-examination.

The sixth and seventh assignments of error, I think, were well taken. The first relates to the contradiction of the witness W. E. Butts in a material matter, where the foundation had been properly laid; and the second rests upon the same ground.

The eighth assignment of error relates to the action of the court upon the instructions asked for,—in refusing all of the instructions asked for by the prisoner, and giving all save one asked for by the state. The first instruction asked for by the prisoner was properly rejected, as it fails to state the law as laid down in the case of *State v. Jones*, 20 Grat. 764. The second instruction prayed by the defendant was properly refused, as I do not think it states the law correctly. Whart. Hom. § 414, states the law upon that point thus: "A bare trespass against the property of another, not his dwelling house, is not sufficient provocation to warrant the owner in using a deadly weapon in its defense; and if he do, and with it kill the trespasser, it will be murder, and this though the killing were actually necessary to prevent the trespass."

The circuit court committed no error in rejecting instructions Nos. 3 and 4, prayed for by the prisoner, for the reason that they are not sufficiently qualified by stating, as was stated in *Cain's Case*, in the instruction given by the court upon this question, in instruction No. 1 for the defendant, "When one, without fault himself, is attacked," etc. Instructions

3 and 4 should have contained this qualification, and instructions Nos. 1 and 2, given for the defense by the court, not only contained this qualification, but embodied all that was asked for by the prisoner in said instructions Nos. 3 and 4. It is true, this court held in *State v. Evans*, 33 W. Va. 418, 10 S. E. 792, that "a party has a right to have his instructions given in his own language, provided there are facts in evidence to support it; that it contains a correct statement of the law, and is not vague, irrelevant, obscure, ambiguous, or calculated to mislead." But, unless they state the law correctly, they should be rejected. For the foregoing reasons the judgment complained of must be reversed, the verdict set aside, a new trial awarded, and the cause is remanded.

BRANNON, J. I doubt whether, under the rule of practice in this court, we should express any opinion upon the evidence, as the case must be retried for other reasons than that arising under the motion for a new trial under the evidence.

(40 W. Va. 608)

UNITED STATES BLOWPIPE CO. v.  
SPENCER et al.

(Supreme Court of Appeals of West Virginia.  
April 17, 1895.)

MECHANICS' LIENS—ENFORCEMENT—STATEMENT  
OF ACCOUNT—PLEADINGS.

1. A lien is the ligament or tie which binds certain property to a particular debt for its payment or satisfaction.

2. What is known as the "mechanic's lien" on real estate and buildings is the creation of statute. It was unknown at common law, but the right given by statute to enforce it in a court of equity carries with it all the rights incident to that court's principles and rules and its methods of procedure.

3. Such lien can be maintained only by a substantial observance of and compliance with the requirements of the statute, but the statute is given a fair and liberal construction as to the creation of the lien and its enforcement.

4. In ascertaining whether the account which is required to be filed and recorded to create the lien is a substantial compliance with the statute in respect to designating the name of the owner of the property, the account proper, and the sworn statement annexed thereto, may be read together.

5. Section 4 of chapter 75 of the Code, which requires a just and true account of the amount due after allowing all credits, to be sworn to and filed for record, uses the term "due" in the sense of an existing liability, without reference to whether it be then matured and enforceable by suit or not matured and not then enforceable by suit.

6. A bill framed with a double aspect, but upon consistent states of facts, praying relief in the alternative, is not for that reason open to objection.

English, J., dissenting.

(Syllabus by the Court.)

Appeal from circuit court, Mason county.

Action by the United States Blowpipe Company against J. S. Spencer and others. From a judgment for defendants on demurrer to the bill, plaintiff appeals. Reversed.

Tomlinson & Wiley, for appellant. C. E. Hogg and J. S. Spencer, for appellees.

HOLT, P. This is a suit in equity, brought in the circuit court of Mason county on the 19th day of December, 1892, by plaintiff against J. S. Spencer, the Point Pleasant Furniture Company, etc., to enforce a mechanic's lien against the property of the furniture company, and for other relief. On the 10th day of May, 1893, four of the defendants suggested the nonresidence of plaintiff, and required security for costs; and, the security having been given, they demurred to plaintiff's bill. The court sustained the demurrer, and, plaintiff desiring to amend, on its motion the cause was remanded to rules for that purpose. The amended bill having been filed, and the cause again on the court docket for hearing, the same four defendants demurred to the amended bill. The court, on December 19, 1893, sustained the demurrer, and, the plaintiff declining to further amend, the bill and amended bill were dismissed, with costs, and this appeal was allowed the plaintiff. The grounds of demurrer are: (1) The bill and amended bill are multifarious. (2) Plaintiff does not, by its pleading, show itself to have a valid mechanic's lien, has not complied with the statute, and therefore has nothing that fastens the claim to the property for its satisfaction; is a mere creditor at large, with no standing in a court of equity as a lienor against the property in question.

In our chancery practice it is usual in an amended bill to introduce supplementary matter, if necessary, without any additional designation of the bill itself. The bill is taken for what it shows itself to be, without regard to the name that may be given it. The plaintiff may, at any time before or after the appearance of the defendant, in the vacation of the court, file in the office an amended bill or supplemental bill, and have a summons to answer it. But, if the court shall be of opinion that the same was improperly filed, it will dismiss such bill, at the costs of the plaintiff. This is done on motion, not by demurrer. The scheme of the original bill is: That plaintiff has a mechanic's lien on the real property of the Point Pleasant Furniture Company for \$1,712.50, duly recorded on July 12, 1892, but that the furniture company had, on the 11th day of December, 1891, by deed of trust of that date, conveyed its property to defendant J. P. R. B. Smith, trustee, to secure the payment of four notes,—one for \$2,807, to J. J. Bight; and three others, making \$5,000 in all,—payable in 10 years from that date, but interest payable annually. The trustee was authorized to sell under the deed of trust for cash in default of payment of principal when due, or of interest, or on failure of the furniture company to keep the property insured to at least the amount of \$5,000. That the trustee, in violation of his trust, without giving the notice required by law, and before the trust was due, viz. on

the 5th day of December, 1892, sold the property, not for cash, but on credit, to defendant James P. Hayes for \$19,300, a grossly inadequate price. That the property sold was worth at least \$50,000. That although the sale was for cash, yet there was a contract and agreement between the trustee and defendant Hayes by which Hayes was to pay only a part of the purchase money in cash, and the balance on time, thus giving Hayes, the purchaser, an unfair advantage over the other bidders, which ought not to have been permitted. That defendant Hayes paid but a part of the purchase money, and has failed and refused to comply with the terms of sale. That the trustee has failed and refused to pay plaintiff's mechanic's lien, and the mechanic's lien of defendant the Moore Carving Machine Company, amounting to \$1,262. Plaintiff prayed that the sale under the deed of trust might be set aside, and the property legally and properly resold; and, after payment of the debts secured by the trust deed, plaintiffs' claim should be next paid; but, if the sale made by the trustee should be held to be legally and properly made, that in that event the trustee should be directed to pay the mechanics' liens next after the debts secured by the deed of trust; and for general relief. The same allegations are repeated in the amended bill, with the additional allegation that on the 6th day of February, 1893, a judgment was rendered in favor of plaintiff against the defendant the Point Pleasant Furniture Company for \$1,772.80, being on the same account for which it had its said mechanic's lien; and on the same day a judgment was rendered against said furniture company in favor of defendant the Moore Carving Machine Company for \$1,295.55, the same account for which it had said mechanic's lien. Of these judgments copies are filed as exhibits. That the trustee has, since the sale, and out of the proceeds, paid off all the other liens, viz. to defendant Tinsley, the Bradford Milling Company, the Buss Machine Works, the Lane & Bodley Company, and Laidlaw & Dunn Company, although all their liens were subsequent to the lien of plaintiff and the lien of the Moore Machine Company, and that there is still left in the hands of the trustee the sum of \$3,026.75.

This did not have the effect to render the bill multifarious. I know of no reason why plaintiff might not properly have obtained against its debtor the furniture company a judgment at law for its claim, as was done in this case. Such was its right whether the mechanic's lien was valid or invalid. It obtained such judgment without objection. Why should it not inform the court that it had obtained a judgment at law against its debtor for such claim, which it had been and was seeking by its original bill to enforce as a mechanic's lien? It did not and could not affect the mechanic's lien. It did not make it better or worse, but made its pleadings correspond with the change in fact which had

taken place in regard to defendant's account. There are several reasons why it may be permitted to obtain its judgment at law: (1) The plaintiff thereby establishes the justice of its claim, and ascertains the amount; so that there can be no claim that defendant has been deprived of his right of trial by jury. (2) It is in no way inconsistent with the lien. A party who has a vendor's lien may also sue and obtain a judgment at law, thus making his claim also a judgment lien. (3) That this may be done is contemplated by the statute itself, for section 12 of chapter 75 of the Code (the chapter which authorizes the creation of the lien) provides that "the court of chancery may, in addition, give a personal decree in favor of such creditors for the amount of their claims against any party as to whom they may be established, such decree to have the effect of and to be enforced as other decrees for money." Section 1 of chapter 139 provides that "a decree or order requiring the payment of money shall have the effect of a judgment \* \* \* 'for such money,' and be embraced by the word 'judgment,' where used in this or any of the three succeeding chapters." And section 5 of the same chapter provides that "every judgment for money rendered in this state heretofore or hereafter against any person, shall be a lien on all real estate of or to which such person shall be possessed or entitled, at or after the date of such judgment"; and by section 7 "such lien may be enforced in a court of equity." See *Phil. Mech. Liens* (3d Ed.) § 448, p. 760; *Bedsole v. Peters*, 79 Ala. 133. See, also, *Glacus v. Black*, 67 N. Y. 563. I can therefore see no reason why the judgment obtained at law in the interim should in any degree add to or take from the mechanic's lien, or how the bringing into the case by the amended or supplemental bill this new status of plaintiff's claim could have the slightest effect in making its bill multifarious. It may be that the court would decline to enforce it because of its being a new lien, which did not exist when the suit was brought; but it is the same claim which has now passed into judgment, and that allegation does not render the bill multifarious, as may be easily shown by supposing the fact and allegation to be that the judgment at law had been obtained before the institution of the suit in chancery. See *Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611. The deed of trust is an older and higher valid lien on the same property. That the plaintiff concedes, but its complaint is that the trustee made a sale improperly and illegally, to plaintiff's injury, and it asks that such sale may be set aside, and the property legally and properly sold under the direction and supervision of the court. But, if the court should hold such sale by the trustee to be valid, then plaintiff asks that the surplus may be applied pro tanto in satisfaction of its lien. As to this, the plaintiff alleges but one state of facts, or, if two, they are not inconsistent; and it adapts its alternative prayer for relief to meet each one of two views that

may be taken of this state of facts. If plaintiff's view is correct, that an illegal sale has been made, to its injury, then one prayer meets that view of the case; but, if the sale is valid, or is one of which plaintiff can make no proper complaint because not injured, then its other prayer is that it may be paid out of the surplus. It is the common every-day case of a bill framed with a double aspect, and it is based on one set of consistent facts, and no two contradictory or inconsistent states of fact are alleged. Each one of these four defendants who demur is a proper party, and they have no right to complain for other people, who do not themselves complain that such other persons are not proper parties defendant. James P. Hayes is a proper party, because he was the purchaser of the property at the trustee's sale, which plaintiff says was illegal and invalid, and which it asks to have set aside; the other three, because they are creditors by mechanics' liens, who have been paid out of the proceeds of such sale, whose liens are alleged to be younger and inferior in order of rightful payment to the lien of plaintiff.

This brings us to the main question discussed by counsel, does plaintiff show itself to have a valid subsisting mechanic's lien on the real estate in controversy? The bill must allege all the facts necessary to create the lien, for it is purely a creation of the statute, having nothing else to stand on. This is but a special application of the universal rule that the decree pronounced must stand justified by the pleadings as well as by the proof, and here it is decided as though all the allegations were true, but reasonable presumptions of fact, as admitted by demurrer, as well as the matters expressly alleged; but it does not admit matter of inference or argument. For example, in this case, plaintiff expressly alleges that its lien is valid; that all things required by the statute to create it were properly done and performed, averring them severally and specifically. But this is not taken as true, for the lien itself is exhibited, and as to those facts must speak for itself; and, as to the construction to be put upon it, that is a question of law for the court. A lien is said to be the ligament which binds certain property to a certain debt or claim for its payment or satisfaction. At common law it was the fact of possession in certain cases. It may be created by contract expressly or impliedly, or it may be created by statute. Prior to the 1st day of July, 1850, in this state, the vendor of real estate had an implied lien for the payment of the purchase money, even after a conveyance in which no lien was retained. Since that time he only has such lien by expressly reserving it on the face of the conveyance, but, as long as he retains the legal title, he has the power of reserving it, unless he expressly agree not to reserve it. "A mechanic has a lien at common law for labor done upon a chattel as long as he retains



possession of it, but a mechanic or laborer cannot retain possession of real property upon which he has performed labor." 2 Jones, Liens, § 1184. The mechanic's lien on buildings, etc., and the land on which they are erected, as we know it, is the creature of statute, and was unknown at common law or in equity. Phil. Mech. Liens (3d Ed.) § 1. But soon after the adoption of the federal constitution the states commenced to pass statutes creating such liens, in order to encourage the erection of buildings, and the improvement of town lots and real estate generally. Maryland came first, with the act of December 19, 1791; Pennsylvania with the act of April 1, 1803. Our first act upon the subject was passed February 21, 1843 (Acts 1842-43, p. 52). See Code 1849 (Ed. 1860), p. 567. And for labor done and material furnished see act of 1852 (page 242) local to Alexandria. The whole subject has been of gradual growth; but it has been extended, advanced, and encouraged and methodized until it now prevails in all the states; and, "while each state may have its own mechanic's lien law, which is rarely identical in every particular with that of another, yet all of them, having the same object in view, are, in their main provisions, very much alike, and in some instances mere re-enactments of each other." See Phil. Mech. Liens, § 8 et seq.; 2 Jones, Liens, § 1186 et seq. Our law on the subject is found in chapter 75 of the Code. See Ed. 1891, p. 652. Our first case on the general subject is *Laeye v. Bossieux* (1859) 15 Grat. 83, opinion by Judge Lee, where the act is given a construction plainly intended not to restrict, but to advance, the remedy, applying to it the general principles of equity, and not confining it to the act, after the lien is once created. But our present law, in its main outlines, first took definite shape in the Code of 1868. See chapter 75, p. 475. *Bodley v. Denmead* (1866) 1 W. Va. 249, was under the act of February 2, 1853, which was local, being confined to the city of Wheeling. Under the general law, we have *Mayer v. Ruffners* (1875) 8 W. Va. 384; *McKnight v. Washington*, Id. 666; *Stouts v. Golden*, 9 W. Va. 231; *Manuf'g Co. v. Brockmeyer*, 18 W. Va. 586; *Phillips v. Roberts*, 26 W. Va. 783; *McGugin v. Railroad Co.*, 33 W. Va. 63, 10 S. E. 36; *City of Wheeling v. Baer*, 36 W. Va. 777, 15 S. E. 979; *Richardson v. Railway Co.*, 37 W. Va. 641, 17 S. E. 195.

In this case, the plaintiff, for an agreed consideration and price, on the 10th day of June, 1892, furnished, delivered, and placed on the premises of the Point Pleasant Furniture Company, in Mason county, W. Va., certain machinery in the bill and proceedings mentioned and described, at the agreed price of \$1,712.50, ceasing to labor, etc., on that day, and filing in the clerk's office of the county court of Mason county, for record, their account, on the 12th day of July, 1892. By

section 2 of chapter 75 it is provided, among other things, that "every mechanic \* \* \* or other person who shall perform any work or labor upon, or furnish any material or machinery for constructing \* \* \* any house \* \* \* manufactory or other building \* \* \* fixtures \* \* \* or other structure by virtue of a contract with the owner or his authorized agent, shall have a lien to secure the payment of the same, upon such house or other structure, and upon the interest of the owner in the lot of land on which the same may stand or to which it may be removed." Section 4: "Every lien provided for in the second and third sections shall be discharged unless the person desiring to avail himself thereof shall, within sixty days after he ceases to labor on or furnish material or machinery for such building or other structure, file with the clerk of the county court of the county, in which the same is situated, a just and true account of the amount due him after allowing all credits, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner or owners of the property, if known; which account shall be sworn to by the person claiming the lien or some person in his behalf." The account required to be filed for record must show four things: (1) The just and true amount due the lienor after allowing all credits. (2) A description of the property intended to be covered by the lien, sufficiently accurate for identification. (3) With the name of the owner of the property, if known. (4) The account must be sworn to by the person claiming the lien, or by some one in his behalf. The account filed in this case consists of an itemized statement of the material and machinery furnished and work and labor done, with a sworn statement thereto attached as part thereof; and the two must be read together for our purpose as parts of one whole, called by the clerk who recorded it the "mechanic's lien." In this case the sworn statement says: (1) There are no credits or set-offs to said account other than are stated in the account, which is just and true, and for which defendant is debtor to plaintiff; and that there remains unpaid, after allowing all set-offs and credits, the sum of \$1,712.50. (2) That the property upon which the work and labor was performed and for which said material was furnished, as charged in the foregoing account, and upon which it is hereby intended to take a mechanic's lien, is situate in the town of Point Pleasant, Mason county, W. Va., being two certain lots (giving the number and location of each), and a certain tract of land adjoining (giving its metes and bounds), "being the same lots and tract of land conveyed to the Point Pleasant Furniture Company by the Kanawha Lumber and Furniture Company, by its deed, bearing date on the 11th day of December, 1891, and of record in the clerk's office of the county court of said Mason county in Deed Book No. 51,



pp. 342 and 343, to which deed reference is hereby made." The just and true account of the amount due, which is required to be sworn to and filed, cannot mean an account past due (one on which a suit can then be maintained), but it means owing (the state of indebtedness), whether then enforceable by suit or not. Under any other construction, it would be impossible for the builder to give the owner of the property any time in which to pay, and at the same time acquire his mechanic's lien, whereas section 11 of chapter 75 treats him as a valid lienor, who, at the time of filing his lien, can give the owner any extension of time in which to pay, short of six months. Why should he be required to swear that it is past due when it has five months to run? See *Albrecht v. Lumber Co.* (1890) 126 Ind. 318, 26 N. E. 157. On its face it appears to be due. *Hills v. Ohlig.* (1888) 63 Cal. 104; *Phil. Mech. Lien*, §§ 282, 290. As to these two requisites, no complaint can be made that they are insufficient, or in any respect defective. But complaint is made that there is no sufficient designation of the name of the owners, and I think the objection would be well taken if the designation given in the description of the property stood alone. But it does not, and, when read in connection with the account proper, it names and designates the owner in a plain and unequivocal manner; one that is obvious, and cannot be misunderstood; and is at least a substantial, if not a literal, compliance with the statute. In the account proper plaintiff states that the machinery furnished "was delivered and placed on the premises of the said Point Pleasant Furniture Company, and that the extra work and labor was done in and upon said premises in the affidavit hereto attached, described"; and in the affidavit it is called "the property," being two lots and five acres, which were conveyed to the Point Pleasant Furniture Company by deed dated December 11, 1891, as above recited. The president of the blowpipe company swore to the account in behalf of his company, and virtually said in so many words: "This account for \$1,712.50 is a just and true account, due said company, after allowing all credits. The following is a description of the property intended to be covered by the lien, viz.: Lot No. 1 in tier 6, and lot No. 1 in tier 5, of the town of Point Pleasant, and a certain tract of land, estimated to contain 5 acres [giving the metes and bounds], being the same lots and tract of land conveyed to the Point Pleasant Furniture Company by the Kanawha Lumber and Furniture Company by its deed bearing date on the 11th day of December, 1891, and of record in the clerk's office, etc., to which deed reference is here made; which said premises described in said deed are the premises of the said Point Pleasant Furniture Company." "Premises," the real estate conveyed (in this case conveyed in fee simple) with reference to the deed of conveyance, also used in describing the property. I do not see how any

more positive, explicit, and unequivocal designation could be made of the name of the owner. It is in this regard a substantial observance of and compliance with the requirements of the statute, and that has been held to be sufficient. *Mayes v. Ruffners*, 8 W. Va. 384. See *Hutch. W. Va. Treat.* § 958, form 250. See *Phil. Mech. Liens* (3d Ed.) § 345; 2 *Jones, Liens*, § 1400; 1 *Bart. Ch. Prac.* 166; 15 *Am. & Eng. Enc. Law*, 125. Thus read, it not only designates the owner, giving him information of the amount and character of the claim intended to be fixed as a lien upon his property, but gives to all notice that he has an estate in fee simple, and the legal title to the property, showing when, how, and to what extent and interest he became owner. On the subject generally, see *Montandon v. Deas*, 14 Ala. 33; *Lyon v. McGuffey*, 4 Pa. St. 126; *Chapin v. Paper Works*, 30 Conn. 461; *Rees v. Ludington*, 13 Wis. 276.

Being of opinion that the plaintiff has shown a valid, subsisting mechanic's lien on the property, it is not necessary to discuss the question whether it has also a judgment lien. This would depend on the question whether the \$3,026.75 resulting from the sale under the deed of trust, and paid over by the trustee, and now in the hands of the general receiver of the court, is to be regarded as real or personal property. The general rule is that, where real estate is sold under a deed of trust for the payment of the debt charged therein, the character of the property is only regarded as changed from realty to personality, so far as may be necessary to pay such debt, and the residue is still treated in equity as real estate. The question, however, may depend upon the provision in the deed of trust; but in this case there is none. It is silent on the subject, and would be to some extent determined by the language of the statute, which provides that the trustee shall pay the surplus, if any, to the grantor, his heirs, personal representatives, or assigns. The owner being a corporation did not have the effect to change it into personality, for it is authorized to hold a certain amount of real estate (see chapters 52-54, Code), and as the lien of the judgment, if any, is wholly independent of the deed of trust, is created by law as applicable to the judgment debtor's real estate, a court of equity would regard it as still realty, if not impressed by some other act or order of the court with the character of personality, before plaintiff's judgment was obtained; and no such act or order directing such conversion appears in this record. So that, if it were necessary to decide the point, such surplus, after paying the trust debts, would still be regarded as land. See *Fowler v. Lewis' Adm'r*, 36 W. Va. 112, 150, 156, 14 S. E. 447.

From the views of this case here expressed it results that the demurrer of the defendants the Buss Machine Works, the Lane & Lodley Company, the Laidlaw & Dunn Company, and James P. Hayes to plaintiff's

amended bill should have been overruled. Therefore the decree of September 19, 1893, sustaining the demurrer and dismissing plaintiff's bill and amended bill is reversed, and the cause is remanded for further proceedings to be had therein. Reversed and remanded.

ENGLISH, J., dissenting.

#### On Rehearing.

It is insisted by counsel for appellee that the claim of mechanic's lien of the Moore Carving Machine Company is clearly insufficient, and invalid as a lien, because there is in the affidavit no positive designation of the owner of the property, and that the account filed therewith is so meager of explanation and barren of statement as not to aid the affidavit, when used in connection therewith, on the question of ownership. The answer to this is that the United States Blowpipe Company is the only plaintiff, and its bill was finally dismissed by the court below on demurrer, and the sufficiency of its own case, as made by the bill, is the only question before us. And it appears that the defendant Moore Carving Machine Company had a judgment at law for their claim, and this, it was said in argument, without contradiction, had been paid. As to the validity of the plaintiff's lien,—the only one before us on this demurrer,—we need only say that a re-examination of the record and authorities has led us to our original conclusion.

(40 W. Va. 491)

BIG SANDY NAT. BANK v. CHILTON et al.  
(Supreme Court of Appeals of West Virginia.  
Jan. Term, 1894.)

#### NEGOTIABLE INSTRUMENTS—INDORSEMENT—NOTICE OF NONPAYMENT.

1. Where a negotiable note, indorsed by several parties, residing at different places, is made payable at a bank in the city of H., and before maturity it is discounted by a bank in the town of C., and by the last-named bank it is indorsed to a bank in the city of H. for collection, and one of the indorsers resides in said city of H. when said note matures and is presented for payment, and payment is refused, and the note is duly protested, the bank to which said note was indorsed for collection is only bound to give notice to the bank in C., its immediate indorser.

2. When notice has thus been given to said bank in the town of C., the duty devolves upon it to give notice of such protest to the prior indorsers, if it wishes to hold them as such.

3. Although one of said indorsers resides in the city of H., where said note was payable, said bank in the town of C. may send notice of such protest through the mail; and, if sent in due time, said indorser will be held, although he never receives the notice so sent.

4. Under the circumstances of this case, the indorser residing in the city of H., where said note was payable, is not entitled to personal service of the notice of such protest, although he resided in the city where said note was made payable.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Action by the Big Sandy National Bank against W. E. Chilton and others. There was judgment for plaintiff against part of defendants, and it brings error. Reversed.

Simms & Enslow, for plaintiff in error.  
Campbell & Holt, for defendants in error.

ENGLISH, J. On the 29th day of June, 1892, the Big Sandy National Bank brought an action of assumpsit in the circuit court of Cabell county against W. E. Chilton, M. B. Mullins, Thomas H. Harvey, Z. T. Vinson, J. C. Williamson, and W. H. Crum, on a certain negotiable note made by W. E. Chilton, dated January 13, 1891, whereby, three months after date, without grace, he promised to pay to order of M. B. Mullins \$2,000, payable at the First National Bank of Huntington, value received, with interest from date, which note was indorsed by M. B. Mullins, Thomas H. Harvey, Z. T. Vinson, J. C. Williamson, and W. H. Crum to the said Big Sandy National Bank. The defendants Z. T. Vinson and T. H. Harvey filed nonassumpsit, and issue was joined thereon. The case was submitted to a jury, and resulted in a verdict for the defendants Z. T. Vinson and T. H. Harvey, and against the defendants M. B. Mullins and W. E. Chilton, for the sum of \$2,160.94; and thereupon the plaintiff moved the court to set aside said verdict so far as it found a verdict for the defendants T. H. Harvey and Z. T. Vinson, and award it a new trial, on the ground that so much of said verdict was contrary to the law and the evidence, and because the court misdirected the jury, which motion was overruled by the court, and judgment was rendered in accordance with said verdict; and thereupon the plaintiff excepted to the rulings of the court, and tendered its bill of exceptions, which was signed, sealed, and made a part of the record in the cause.

After the testimony in the case was concluded, the plaintiff asked the court to give the jury the following instruction: "The court instructs the jury that if they find from the evidence that the note sued on was duly presented at the counter of the bank at which it was payable on the day it was due, and payment demanded, at the close of banking hours, and payment was refused, and it was on the same day duly protested by the notary who presented it, and the notices of protest were duly sent by the United States mail that day to the Big Sandy National Bank or M. H. Houston, the cashier thereof, and the cashier, Houston, on the same day he received the said notices, duly mailed them to T. H. Harvey and Z. T. Vinson, Huntington, W. Va. (their place of residence), and placed them so addressed in post-paid envelopes in the post office at Catlettsburg, Ky., then you should find for the plaintiff against the said T. H. Harvey and Z. T. Vinson." The defendants T. H. Harvey and Z. T. Vinson objected to said instruction, and the court sustained said objection, and refused to give said instruction, to which ruling the plaintiff

excepted. The said defendants Harvey and Vinson asked the court to give the following instruction to the jury: "The court instructs the jury that if they find from the evidence in this case that the defendants T. H. Harvey and Z. T. Vinson were indorsers of the note in suit, and were resident in the same city or town where demand for the payment of said note was made, and if they further find from the evidence that no notice of protest was personally given to or left at the dwelling house or place of business of said indorser, then said indorsers, Harvey and Vinson, are not liable, and the verdict of the jury must be for them." The plaintiff objected to the giving of said instruction to the jury. The court overruled said objection, and gave said instruction, to which ruling the plaintiff again excepted; and thereupon the plaintiff applied for and obtained this writ of error.

The sole question presented for our consideration is whether the defendants T. H. Harvey and Z. T. Vinson were legally and properly served with notice of the protest of the note sued upon, so as to bind them as indorsers of the same. The facts in regard to the protest and notice are as follows: On the day said note matured, it was presented at the counter of the First National Bank of Huntington, and payment thereof was demanded, and, being refused, was protested by E. B. Enslow, a notary public, who prepared notices of the protest, inclosed them all in one envelope, and mailed them to the cashier of the Big Sandy National Bank at Catlettsburg, Ky., which bank was the owner and holder of said note on the 13th of April, 1891, at 6 o'clock p. m., which notices were received by said cashier the next morning after the protest, and were mailed by him on the same day to Thomas H. Harvey and Z. T. Vinson, directed to Huntington, W. Va., but were never received by them. In considering the questions presented in this record, I shall first inquire what are the duties of a bank to which a negotiable note is indorsed by the holder for collection with reference to said note when the same matures. Daniel on Negotiable Instruments (volume 1, § 331) says: "Sometimes a bank holding indorsed paper for collection sends notice in the event of its dishonor to the indorser from whom it was received. Sometimes it sends notices, not only to him, but also to the drawer and to all the indorsers, addressed to their post offices, or delivered at their places of business, respectively. Sometimes it incloses notices for all the parties entitled thereto under one envelope, in company with notice to the last indorser, that he may thus be conveniently supplied with the means of transmitting notice to the successive indorsers, and to the drawer antecedent to him, if such there be. But how far the duty of the bank extends in this regard, and what it must do to discharge itself of liability, is a question upon which opin-

ion has divided. The weight of authority, however, is strongly to the effect, and the law may be assumed to be, that it is only necessary for the bank to notify its immediate predecessor,—that is, the party from whom it received the paper,—no matter what may be the nature of the title or interest of that party to or in it." So it was held in the case of Phipps v. Bank, 8 Metc. (Mass.) 79, that "a bank that receives from another bank for collection a note indorsed by the cashier of that bank is bound to present it to the maker for payment at maturity, and, if it is not paid, to give notice of nonpayment to the bank from which the note was received; but it is not bound, unless by special agreement, to give such notice to the other parties to the note." Edwards on Bills and Notes (volume 2, § 834) says: "The holder should give notice of dishonor to all the parties to whom he intends to look for payment, but it is enough for him to send or give due notice to his indorsers for the purpose of charging the party indorsing the bill over to him, and it is the business of each indorser to take care that the party responsible to him is duly notified." Again, in the case of Bank v. Goddard, 5 Mason, 366, Fed. Cas. No. 917, it was held that where a note is made payable at a particular place, and the indorser resides there, if the holder remits it to his agent at such place for payment, and it is dishonored, the agent is not bound to give notice of the dishonor to the indorser, but his duty is to give notice to his principal, who may then give notice to the indorser, and, if given in due time after the principal has received notice, the indorser is bound." In the case of Phipps v. Bank, supra, the court, in speaking of the case of Bank v. Goddard, says: "The case was thoroughly argued, and an elaborate opinion given by the learned judge of the circuit court of the United States, in favor of the plaintiffs, that the agent was not bound to give notice of dishonor to the indorser, even though living in the same place, but only to his principal." In the case of Howard v. Ives, 1 Hill, 263, "where H., an indorsee of a bill of exchange, indorsed it to a bank for the mere purpose of collection, and the notary employed by the bank transmitted notice of protest by mail to H. on the next business day after presentment, etc., who on the next day after receiving it mailed notice to his indorser, held sufficient to fix the liability of the latter, though, had the notice been sent directly to him, he would have received it sooner; and this semble whether the notary be regarded as H.'s agent or that of the bank." We also find it held in the case of Mead v. Engs, 5 Cow. 303, that "one to whom a bill or note is indorsed merely as agent to collect (e. g. a bank) is a holder for the purpose of giving and receiving notice of nonpayment; and he is not bound to give notice of nonpayment directly to all prior parties, but may notice his next im-

mediate indorser, who is bound to notice his indorser, etc., in the same manner as if the bill or note had been negotiated for a valuable consideration." And in this connection attention may be called to the fact that the Bank of Huntington is not a party defendant to this suit, and no effort is made in the case to fix responsibility upon it or to obtain judgment against it. And, again, in the case of *Phillipe v. Harberlee*, 45 Ala. 597, it was held that "notice of the protest of a note or bill of exchange may be given to an indorser through the post office, notwithstanding the place where payment was to be made, and where the demand and protest were made, was that of his residence, when the holder, who is the owner, lives elsewhere." And upon this question, in *New York, in the case of State Bank of Troy v. Bank of the Capitol*, 41 Barb. 343, it was held that "in the case of a bill or note sent to a bank as agent for collection merely, in the absence of an express contract or of commercial usage, it is not obligatory on the collecting bank to notify and duly charge all the prior parties to the paper, but only its own principal or immediate indorser." And, upon this question, see *Bank v. Smith*, 132 Mass. 227, and *Spencer v. Ballou*, 18 N. Y. 327; 3 Rand. Com. Paper, §§ 1240, 1241. In section 1240 it is said: "Notice may be transmitted from one indorser to another, and so back to the drawer of the bill, however circuitous the manner of giving notice may be. And such a notice is sufficient, although the holder and the remote party may live in the same town." And in section 1241 the law is stated to be that "an agent for collection is only required to give notice of dishonor to his principal." And in 2 How. 66, it is held, in *Burke v. McKay*: "Neither is it a necessary part of the official duty of a notary to give notice to the indorser of the dishonor of a promissory note."

Now, the evidence in the case under consideration shows that the note in controversy was discounted by the Big Sandy National Bank of Catlettsburg, Ky.; that it was presented there by W. H. Crum, who got the money on it; that said bank sent said note to the Bank of Huntington for presentment; that the defendant Z. T. Vinson was a resident of the city of Huntington; and that T. H. Harvey resided near the city of Huntington, W. Va., and received his mail at that place. When said note had been presented, on the day of its maturity, at the First National Bank of Huntington, and payment had been refused, said note was duly protested, as above stated, and notices sent to the Big Sandy National Bank; and, the same day said notices were received, they were placed in separate envelopes, properly stamped, and directed, one to Z. T. Vinson, and another to T. H. Harvey, at Huntington, W. Va.; and they state in their testimony that they never received either of said notices. It is true that the cashier of the Big Sandy National Bank

is uncertain as to the date when he received said notices, and says that it may have been the 17th or 18th of April. The protest was on the 13th of April, 1891, but he states on cross-examination that he received them the next morning after the note was protested, and that he mailed the notices of protest to said Harvey and Vinson on the same morning. Under this state of facts, did the circuit court err in refusing to give the instruction asked for by the plaintiff, and in giving the instruction asked for by the defendants, both of which are set forth above, and present in a few words the true controversy in this case? The defendants Harvey and Vinson contend that, under the circumstances, unless notice of protest was personally given to them, or left at their dwelling house or place of business, they were released from their liability as indorsers of said note; while the plaintiff, on the other hand, contends that it had a right to send the notice of protest as it did through the mail, and thereby hold them as indorsers, whether they received them or not. Parsons, in his work on *Mercantile Law*, at page 115, says: "Each party receiving notice has a day or until the next post after the day in which he receives it before he is obliged to send the notice forward. Thus, a banker with whom the paper is deposited for collection is considered a holder, and entitled to a day to give notice to the depositor, who then has a day for his notice to antecedent parties." Now, while it is true that a bank to which a note is indorsed for collection is such a holder that it may give notice to all prior indorsers upon the note, yet, as we have seen, it is not bound so to do. All that is required of such bank is to give notice to its immediate indorser; and in this instance the indorser to whom the Bank of Huntington was bound to give notice did not reside at Huntington, but at Catlettsburg, Ky. Therefore the notice could be given through the mail. When the bank at Catlettsburg received such notice, then the duty devolved upon it to notice the prior indorsers if it wished to hold them, which it did by placing notices in the mail the same day on which they received notice, to wit, the next day after the protest; and, if said bank had the right to do this, it bound said Vinson and Harvey, whether they received the notices or not. In 2 Rob. Prac. (New), at page 192, we find it stated that "It has been held by the supreme court of Pennsylvania and by the supreme court of the United States that notice to a party put into the post office of the town wherein the presentment and demand are made will be sufficient when he lives beyond the limits of the town, and it may be directed to him at that town if its post office be the nearest to his residence, and that at which his letters are received"; citing *Bank v. Lawrence*, 1 Pet. 580; *Jones v. Lewis*, 8 Watts & S. 14.

In the case we are considering, the indorser Harvey did not reside in the city of Huntington, but received his mail at Huntington.

The indorser Vinson, however, did reside in the city of Huntington, and the question is whether, so residing, he was entitled to personal service of notice; and, if there was any party in the city of Huntington who was bound to give him notice of the dishonor of said note, he, perhaps, would be entitled to personal service, either at his residence or place of business, although in the case of *Boyd's Adm'r v. City Sav. Bank*, 15 Grat. 501, it was held that where "an indorser of a negotiable note dies intestate before it falls due, and, when it falls due, it is regularly protested for nonpayment, and, no person having then qualified as administrator on the estate of the indorser, the notary on the same day deposits in the post office at Lynchburg, where the note had been made payable and discounted, the notice of protest, directed to the 'legal representative' of the indorser, Lynchburg, the indorser having lived in that place, and his family still living in the same house, the notice is sufficient." Moncure, J., in delivering the opinion of the court in that case, said: "While it has been long and well settled that, if the parties to give and receive notice reside in different places, the notice may be sent by mail, so in the other it seems to be well settled, at least as a general rule, that, if they reside in the same place, the notice must be personal; that is, must be given to the individual, or left at his domicile or place of business,"—citing 1 Am. Lead. Cas. (4th Ed.) 396, and notes, and 2 Rob. Prac. (New) 191. But of late the courts have strongly inclined to restrict the general rule referred to, and have established many exceptions to it, as may be seen by referring to the case of *Bank v. Lawrence*, 1 Pet. 578, cited in 1 Am. Lead. Cas. 402, 403, and the notes. The law is stated thus in the case of *Linn v. Horton*, 17 Wis. 157: "The holder of a bill or note may rely, if he chooses, on the responsibility of his immediate indorser, and need not give notice of protest for nonacceptance or nonpayment to any previous party." And in the case of *Griffith v. Assman*, 48 Mo. 66, that court held that, "when the notary making a protest knows the residence of all the indorsers, he may at once send the notice of protest to each one individually, when they will be holden in the order of their indorsements. But the holder is not supposed to know any of the parties except the one who has indorsed the paper to him, and each one is supposed to know the one from whom he has received it. The contract is direct, and the relation is immediate between each indorser and his immediate indorsee, and the notice is sufficient if it comes to each indorser from such indorsee as soon as he is advised of the protest. Nor does the rule vary although the parties live in different cities. The holder is only required to notify the one who indorsed to him, unless he desires to hold other parties who might escape responsibility if not notified in their town. Nor is there any difference if the last indorsement is for collection only."

In the case we are considering, the last indorsement was for collection only, and notice was given to the Big Sandy National Bank, that indorsed said note for collection, on the same day the note was protested. Story on Bills of Exchange (section 294) says: "Where there are numerous parties in succession on the bill as drawers or indorsers, who are entitled to notice, and may, as drawers or indorsers, be liable on the dishonor of the bill, not only to the holder, but to any intermediate indorser standing between him and themselves, it is apparent that, as each of such successive parties is entitled to a full day to give notice to any antecedent party in the bill, several days may elapse without any laches in any party, between the time of the dishonor and the time of notice thereof to the drawer or the other early indorsers. Nay, this may occur in respect to parties all of whom reside in the same town; and yet if the notice is communicated to them in regular succession, making an allowance of one day for each party who receives notice to give notice to the antecedent parties, they will all be held liable, and the notice be deemed sufficient to bind them." In this connection I refer also to the case of *Bank v. Taylor*, 34 N. Y. 128, where it is held that "the whole duty of the holder of a protested bill is discharged by notice to his immediate indorser, and all parties to the bill or note will be charged if they receive notice in due course from their immediate subsequent indorsers. When the collecting agent of the holder resides in the same city with one of the indorsers, it does not modify the rule as above stated." The opinion of the court in this case was well considered, and, in concluding, the following language is used: "The text writers and all the authorities I have examined concur in the doctrine that the whole duty of the holder is discharged by notice to his immediate preceding indorser, and that all prior indorsers are fixed if they receive reasonable notice of the dishonor of the bill or note from their immediate prior indorser. These rules have long been settled and familiar to those dealing in notes and bills of exchange. It is of the utmost importance that rules of this character, when once promulgated, should be adhered to, and we are not at liberty to depart from them if we would. I find no case where an exception has been made by reason of the circumstance that an intermediate indorser is a resident of the same town, city, or village with the holder. If he is not the immediate prior indorser of the holder at the time of protest, the whole duty of the holder is discharged by the notice to his immediate indorser, and all parties to the bill or note will be charged if they receive notices in due course from their immediate subsequent indorsers." See *Bank v. Taylor*, 7 Bosw. 466, where this question is carefully considered and numerous authorities cited; also, 34 N. Y. 128, where the last-named case was affirmed on appeal. See, also, the case of *Hill v. Bank*, 3 Humph.

670, in which it appears that "an agent resident New Orleans. Held, that this notice was for collection, and which was protested for nonacceptance, gave notice to the principal, resident at Nashville, and the principal thereupon gave notice to the indorser, resident at New Orleans. Held, that this notice was good." In the case at bar the evidence shows that the notices to Harvey and Vinson were in due time placed in prepaid envelopes, and delivered in the post office at Catlettsburg, a town about 12 miles from Huntington, between which towns the mail is carried twice a day. On this point, Parsons on Bills and Notes (page 478) says: "In other words, the sender is bound to use due diligence; and on this point it is sufficient diligence if the letter be put into the regular post office, for it cannot be asked of any sender that he should have any oversight of or interference with the public service of the post office; and therefore he is held to no liability for accident there, however it may happen,"—citing numerous cases in note. Now, it is true that in the case of *Insurance Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888, Woods, J., in delivering the opinion of the court, on page 546, 29 W. Va., and page 888, 2 S. E., says: "When a negotiable note is dishonored, it is the duty of the holder to give immediate notice of such dishonor to the indorser;" and that, "when the indorser resided in the same town where the demand is made, the notice must be personal, or left at his dwelling house, or place of business." And the same is held, in substance, in the case of *Bowling v. Harrison*, 6 How. 248. It is there held that, "where the holder of a protested note and the party entitled to notice reside in the same city or town, notice should be given to the party entitled to it, either verbally or in writing, or a written notice must be left at his dwelling house or place of business." A party, however, to be entitled to such notice, must be one to whom the holder residing in such city or town was bound to give notice; and in the case of *Insurance Co. v. Wilson*, supra, speaking of the mode of service upon an indorser, what indorser is intended and referred to? Surely, it was and is intended that the indorser to be so personally served with notice is one that the holder was bound to serve notice upon; but, as we have seen, the Bank of Huntington, which was the holder in the city of Huntington, which held the note by indorsement from the Big Sandy National Bank for the purpose of collection, was not bound to serve notice upon either Harvey or Vinson, but was only bound to give notice to its immediate indorser, the Big Sandy National Bank; and, when that was done, its whole duty with reference to said note was performed, and the duty then devolved upon the Big Sandy National Bank to give notice to the prior indorsers in due time, if it wished to hold them. This last-named bank was the holder for value, the real owner of the note having discounted it; and when it undertook to give notice to

the prior indorsers, and among them Harvey and Vinson, residing in a different town from the location of said bank, all that was required of it was to properly mail such notice in due time, directed to said Harvey and Vinson, respectively, addressed to each of them at Huntington, where they receive their mail; and, having done this, said indorsers would not be released as such, although the notice was never received. In the case of *Bowling v. Harrison*, supra, it is also held that the term "holder" includes the bank at which the note is payable and the notary who may hold the note as the agent of the owner for the purpose of making demand and protest. In this case the note was sent, as is the almost uniform custom, to the bank at which it was payable for collection; and, as we have seen, the bank to which a note is thus sent is a holder to such an extent that it may give notice to the indorsers; and, if it undertake to do so, an indorser residing in the same city or town is entitled to personal service, but it is not bound to give such notice, and, as I think the weight of authority shows, it is only bound to give notice to its immediate indorser, and, if such indorser wishes to give notice to prior indorsers, he may do so through the mail if such indorser resides at a different place, even though such indorser may reside in the same town in which the bank is located to which it was sent for collection; and, as to the duty of the notary, in the case of *Burke v. McKay*, 2 How. 66, it is held that "It is not a necessary part of the official duty of a notary to give notice to the indorser of the dishonor of a promissory note."

I therefore think the circuit court erred in rejecting the instruction asked for by the plaintiff, and in giving the instruction asked for by the defendants, and in rendering the judgment complained of, releasing and exonerating said Harvey and Vinson as indorsers upon said note. The judgment complained of is therefore reversed as far as it exonerates said Harvey and Vinson from liability as indorsers upon said note, and the verdict of the jury is set aside so far as it finds for the defendants T. H. Harvey and Z. T. Vinson. A new trial is awarded as to them, and the case is remanded to the circuit court of Cabell county, for further proceedings to be had therein, with costs to the plaintiff in error.

On Rehearing.

(April 13, 1895.)

This cause was submitted at the January term, 1894, and the foregoing opinion was handed down at the spring special term, 1894, and a rehearing was then awarded, since which time no additional brief or argument has been submitted by the defendants in error. A brief, however, has been filed by the plaintiff in error; and although I have carefully gone over the case and the authorities cited, and to which I have had access, I

see no cause to alter my opinion. The true rule as it appears to me is stated in *Bank v. Taylor*, 7 Bosw. 466, where it is held that "there is no rule requiring that the indorser residing in the same town as the acceptor shall be notified the next day after the presentment, where the banker at whose instance the bill is protested, and to whom notices of protest are sent, does not reside in said town. It is enough to charge him that the true owner mails notice to him by the first mail of the day next after that on which he in due course receives notice of dishonor, such owner and indorser residing in different towns." That case was taken to the court of appeals of New York, and the report of the result is found in 34 N. Y. 128, where it is held: "The whole duty of a protested bill is discharged by notice to his immediate indorser, and all parties to the bill or note will be charged if they receive notice in due course from their immediate subsequent indorsers. When the collecting agent of the holder resides in the same city with one of the indorsers of the bill, it does not modify the rule as above stated." In the case of *Bowling v. Harrison*, 6 How. 248, if the Planters' Bank of Vicksburg had sent notice of protest to Bowling, who resided in Maryland, which it had a perfect right to do, it would then have done all that was required of it to hold Bowling and relieve itself from responsibility, and then Bowling would have had a perfect right to send notice through the mail to Harrison at Vicksburg; but the bank having elected to serve the notice directly upon Harrison, the indorser, who resided in the same city, service had to be made personally. My conclusion is that the judgment of the circuit court must be reversed so far as it exonerates said Harvey and Vinson from liability as indorsers upon said note; the verdict of the jury must be set aside so far as it finds for the defendants T. H. Harvey and Z. T. Vinson. A new trial is awarded as to them, and the cause is remanded to the circuit court of Cabell county, for further proceedings to be had therein, with costs to the plaintiff in error.

BRANNON, J. On first impression I was of opinion last term that the judgment discharging Harvey and Vinson was right, but further reflection and examination have brought me to the same conclusion announced by Judge ENGLISH. Point 13 in *Insurance Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888, correctly states the rule as it was before section 8, c. 99, Code, was amended by chapter 4, Acts 1891, so as to read as found in the edition of 1891 of our Code. Said point says: "Where the indorser resides in the same city or town where the demand of payment is made, the notice to the indorser must be personal, or left at his dwelling house or place of business." But which indorser is here meant? Does it mean that if any one of several indorsers, immediate or remote, lives in

the town where the demand of payment is made, he must be given personal notice? Or does it only mean that, if the immediate indorser live there, he must have personal notice? That depends on whether the collecting bank must notify all or only its immediate indorser. Some banks notify all; some, only the party sending the note. 1 Daniel, Neg. Inst. § 331. Some authorities hold that the collecting bank must notify all indorsers, so as to hold all bound; some other authorities hold that notice given by the collecting bank to its principal in time to enable him to give reasonable notice to those to whom he intends to look is sufficient, the bank being regarded as the real holder so far as giving and receiving notice is concerned. Id.; note in *Allen v. Bank*, 34 Am. Dec. 311. I think that the bank, to discharge itself from liability, need only give timely notice to its indorser, and that if that indorser give, within the time allowed by law, notice to the prior indorser, he is bound. Judge Moncure properly says: "While, on the one hand, it has been long and well settled that, if the parties to give and receive notice reside in different places, the notice may be sent by mail. So, on the other, it seems to be well settled, at least as a general rule, that, if they reside in the same place, the notice must be personal." *Boyd's Adm'r v. City Sav. Bank*, 15 Grat. 505. Who are the parties to give and receive notice? is the question. I have with some hesitation concluded that, to start out, the collecting bank is a holder for this purpose. It gives notice to him who indorsed the note to it. If that indorser live in the same town with the bank, the notice must be personal; if he does not live there, notice may be sent by mail; and, though a remote indorser may live in the place where the bank is, that does not require the bank to give him notice, personal or otherwise. *Bank v. Taylor*, 34 N. Y. 128. If it does give notice to him, it ought to be personal. *Ransom v. Mack*, 38 Am. Dec. 610. This is because the law only required the bank to give notice to its indorser. When the bank gives its immediate indorser notice, he has a certain time to give notice to the party who indorsed the note to him, by personal service, if living in the same town, or, if not, he may use the mail. So on through the line of indorsement. Thus, the place of common residence shifts with each indorsement. One who is an indorser to another is the person to receive notice, and the other is the one to give notice; and in the next step he who received this notice becomes the one who is to give notice to some one who indorsed it to him. In this case the Bank of Huntington was holder, and gave notice to the Catlettsburg bank by mail, as it resided in another town. And the Catlettsburg bank must give notice to Crum by personal service, if living in Catlettsburg, otherwise by mail; and so on through the line of indorsements. Any one in the line has right, being a holder entitled to look to all preced-

ent indorsers, to give notice to all of them, giving personal notice or by mail, according as they live in the same town or not. Whether personal notice or by mail shall be given is according to whether the particular party required to give notice lives in the same town with the one to whom the notice is to be given. If he undertakes to notify all, he must conform to this. The law says that he who is to give notice must give personal notice to a person residing in the same town with him. That does not mean some one living in the same town who is an indorser, but not indorser to the person giving the notice. If that indorser is not notified according to law, he is released, and therefore any holder ought to have a right to notify all prior indorsers, by notice proper, according as it is between him and them; but if he notifies only his indorser, trusting that his indorser will notify his own indorser so as to hold him, he need not give personal service to any one but his own indorser living in his own town; and having done this, if his indorser gives notice, proper as between himself and his immediate indorser, the latter is bound to any holder subsequent. It is only a question of notice of a fact,—that is, nonpayment; and, come from whom it may, unless a stranger, it is enough. See *Bank v. Taylor*, 34 N. Y. 123. If the above be true, if A. make a note to B., resident at Charleston, payable at a Charleston bank, and B. indorse to C., of New York, and C. indorse it to D., of Melbourne, and D. sent it to the Charleston bank for collection, notice of dishonor need not be given to B., though living at Charleston, but to D., of Melbourne; and if he, in due time after receiving notice, send notice by mail to C. at New York, and then, in due time, send notice to B., at Charleston, by mail, B. will be bound, though he get notice months after nonpayment. This consideration largely induced me to the first opinion I entertained,—that personal notice from the bank, or its agent, the notary, must be given at once to B., because living at Charleston; but it seems that, while it may be so, it need not. The many cases relating to this subject are calculated to confuse and mislead, especially the generality of the language that, when the indorser lives in the same town, he must have personal notice. The change by the act of 1891, dispensing with the necessity of personal notice of nonpayment, renders the matter of little importance, save as to cases before its passage.

(40 W. Va. 521)

DEWING et al. v. HUTTON et al.

(Supreme Court of Appeals of West Virginia.  
April 13, 1895.)

LIEN OF MANAGER FOR EXPENSES OF BUSINESS—  
ENFORCEMENT—TRUSTS—REPORT OF REFEREE.

1. An agent with unrestricted management of a mercantile farming and general trading business, carried on in his name, with the right to buy, sell, and exchange, has a lien on all the

property accumulated in such business, and in his possession, for all advancements made, expenses and liabilities incurred, proper, necessary, or incident to such business, which is superior in right to any lien which may be created on such property by the reputed owner thereof; and while he may not, without the consent of those interested, transfer or assign such lien to another, yet he has the right to sell a sufficient amount of such property to satisfy such liabilities, or may transfer the possession thereof to a trustee, to be held by him until such liabilities are fully discharged, and the lien thereby extinguished.

2. The possession of the trustee under such circumstances is the possession of the agent, and the lien is not released or waived.

3. Such trustee, with the consent of the interested parties, may sell the property and extinguish the lien.

4. When a commissioner to whom a cause is referred to settle large and intricate matters of account, containing many contested items, returns a report showing only an aggregation of items in accordance with his conclusions, and the report is excepted to for this reason, and the circuit court overrules such exceptions and confirms the report on appeal, this court will reverse the decree of confirmation, and remand the cause, that a proper itemized statement of such accounts may be made.

(Syllabus by the Court.)

Appeal from circuit court, Randolph county.

Action by W. S. Dewing and others against Elihu Hutton and others. Plaintiffs had judgment, and defendants appeal. Reversed.

Butcher & Harding, John Brannon, John W. Mason, L. D. Strader, and Brown, Jackson & Knight, for appellants. W. T. Ice and E. D. Talbott, for appellees. Ewing, Melvin & Ewing, for creditors.

DENT, J. Appeal of Elihu Hutton and others from a final decree rendered by the circuit court of Randolph county in a certain chancery cause therein pending at the suit of W. S. Dewing & Sons. The circumstances which gave rise to this litigation are as follows, to wit: The plaintiffs, citizens of Kalamazoo, state of Michigan, in the year 1885, sent defendant Winchester, an experienced timber man, into the state of West Virginia, with authority, as their general agent, in whom they reposed great confidence, to buy timber lands for them. His agency was to be kept a secret, at least for a time, and purchases were to be made in his name; they to furnish the means, and pay him a salary of \$25 per week. Winchester, on the 26th day of May, 1885, entered into a written contract with defendant Hutton—a man of wide experience and influence, and already in the business—to make purchases for him according to the stipulations and conditions contained in such contract. This was certainly within the scope of Winchester's agency, and inured to the benefit of the plaintiffs, who, by their many acts of acceptance, etc., fully ratified what Winchester had done in this regard. This contract embraced lands within a certain boundary on the head waters of Cheat river, in the



counties of Randolph and Pocahontas. A large territory was thus purchased, and passed into the possession and control of the plaintiffs, who, through their agent, began to cut and market the timber thereon. In the meantime Winchester and Hutton entered into a partnership to buy lands on Gauley river and its tributaries; Hutton to do the buying, and Winchester to do the selling, at a minimum price of two dollars per acre; expenses to be deducted, and the profits to be equally divided between them. Afterwards B. L. Butcher was taken into the partnership, to assist in doing the work, in a legal capacity, and to have a share in the profits. Winchester wrote to the plaintiffs, telling them of this partnership arrangement, and proposing to them that they should take the lands at two dollars per acre,—they to take his share of the profits, and pay for the land, including expenses and the profits that would be coming to the other members of the partnership; that this arrangement was to be kept a matter of secrecy between themselves. The plaintiffs at first declined to enter into the arrangement, but finally consented, with the understanding that Butcher was to be bought out, which was done, and he was retired from the partnership. Afterwards Hutton was informed that the lands had been sold to the plaintiffs at two dollars per acre, and plaintiffs furnished the money to pay for the lands, the expenses, and one-half the profits to Hutton. It was the consideration of the fact that they were to have one-half the profits that induced plaintiffs to purchase these lands. In the meantime Winchester and Hutton had entered largely into the store and farming business at Huttonsville, in Randolph county, which was principally managed by Winchester, through his agent, John C. Arbogast, in whose name such business was run, and by him conducted as manager. The fact that Winchester and Hutton were tacitly understood to be behind him gave him standing and credit, and a large amount of property was accumulated in his name. Winchester used the money of the plaintiffs in this business, pretending to them that it was going into the land purchases, but with the understanding with Hutton that if his earnings and interest in the land sales were sufficient to cover the Arbogast investments, in a final wind-up, Hutton was to have all the Arbogast property. Being speculative and visionary, no other result was ever contemplated by them, especially Winchester, but how he was to derive any benefit from the arrangement is not made to appear. W. S. Dewing, becoming aware of the extravagant notions and transactions of Winchester, and the wild chase he was leading Hutton, and fearing that his firm was about to lose some money, owing to the fact that they advanced, as he believed, a much larger sum than they had or would receive a return from, induced Hutton, without the knowl-

edge or consent of Winchester or Arbogast, to execute a deed of trust on all his property, including the Arbogast property, for the purpose of securing the "payment of the account of Dewing & Sons against said Elihu Hutton, which approximately aggregates the sum of \$25,000, which sum is made up of cash advances to said Hutton by said Dewing & Sons, through their agent, A. H. Winchester, in the purchase in real estate in W. Va., subject, however, to settlement and adjustment hereafter by the parties in interest, as to credits." This deed was executed the 16th, and recorded the 17th, day of November, 1888. John C. Arbogast, learning of said trust deed, strenuously objected thereto, and refused to be bound thereby, in so far as the property under his control was concerned,—claiming that such property was not the property of Elihu Hutton, but was the property of Winchester, whose agent he was, and insisting at least that all debts contracted by him in relation to the business were entitled to be first paid out of the proceeds of the property. He saw W. S. Dewing, who agreed that his claim was just, and admitted to the various creditors in Wheeling and Baltimore that their debts against Arbogast ought to be paid, but refused to enter into any writing to this effect. On the 26th day of November, 1888, Hutton and Arbogast, understanding that it was with Dewing's consent, so expressed in the deed, executed another deed of trust, conveying the Arbogast property, in trust, to secure the claim of Dewing & Sons against Hutton and the Arbogast creditors, on an equal footing. This deed was objected to, and never recorded. Finally, on the 3d day of December, 1888, a third deed of trust was executed by John C. Arbogast and Arthur H. Winchester, trustee, conveying to Joseph F. Harding, trustee, all the Arbogast property, to secure the Arbogast creditors, pro rata, and was admitted to record the 5th day of December, 1888. The trustee under this last deed took possession of all said property, and was proceeding to administer the same, and pay the debts thereby secured, when the plaintiffs filed their bill, obtained an injunction, and had said property taken charge of by a receiver of the court, and sought to have their trust debt declared a first lien thereon. Defendant answered said bill, claiming that he owed plaintiffs nothing, but on a fair settlement they would be justly indebted to him, and prayed for such a settlement, and a decree for any amount that might be due him against plaintiffs. John C. Arbogast and his creditors answered, claiming that their debts should be first paid out of the trust funds, in accordance with the last deed. Other answers were filed, and general replications thereto, and special replications to affirmative matters. Plaintiffs also filed an amended bill, seeking further relief against defendant Hutton and others. The cause was referred to a

commissioner to ascertain and settle the various controverted matters between the parties. The commissioner returned his report, to which the defendants excepted, but the court overruled the exceptions, and entered a decree in favor of plaintiffs, granting the relief sought; and from this decree defendant Hutton and the Arbogast creditors appeal.

The following is the assignment of errors: "First. The court erred in allowing the said injunction, or, if not error in allowing the same, it was error not to dissolve the same upon the hearing of the cause. Second. It was error to attempt, under the pleadings in the cause, to make a general statement and settlement of the accounts between the plaintiffs and the petitioner, as the proceeding had for its object, as the plaintiffs allege, the execution of the trust, and the correction of an alleged misapplication of the funds of the personal estate conveyed in trust. Third. It was error to attempt a settlement of the partnership account between the plaintiffs and the petitioner, as was done by Commissioner Ward, who finds that there was a partnership between petitioner and A. H. Winchester, agent for the plaintiffs, as to the 'Gauley purchases.' This partnership could be settled only upon proper proceedings and for the purpose, to which B. L. Butcher would be a necessary party; and for that purpose a proper suit is now pending in the said circuit court wherein the petitioner is plaintiff, and the plaintiffs herein, B. L. Butcher and others, are defendants. Fourth. It was error to decree in said cause, in favor of the plaintiffs, more than \$25,000, with interest from November 16, 1888, as a lien under the deed of trust of that date, because the said trust deed only secured that sum of money 'subject to settlement as to credits.' Fifth. It was error to decree the proceeds of the sale of the merchandise, live stock, and other property of the business at Huttonsville carried on in the name of J. C. Arbogast, to the plaintiffs, to the exclusion of the creditors of said business, because the social assets of said business should be applied first to the social creditors thereof. Sixth. It was error not to have settled said business at Huttonsville as a partnership, independent from the accounts and transactions between the plaintiffs and petitioner on account of other matters. Seventh. It was error in the court below to overrule the several exceptions taken by petitioner, being Nos. 1 to 9, inclusive, to Commissioner Ward's report of date December 16, 1892, and to confirm said report as to the matters excepted to, for the reason stated in said exceptions, and now referred to and asked to be read herewith, found on page 141, etc., of record. Eighth. It was error to confirm said Commissioner Ward's report, dated as aforesaid, because the account raised and stated by him between the plaintiffs and the petitioner embraced items of charges against the petition-

er not secured by his said trust deed, which was intended to secure any indebtedness which might exist from him to the plaintiffs, 'made up of cash advances in the purchases of real estate' only. Ninth. It was error to decree any sum of money to the plaintiffs against said petitioner, because from the proofs taken by said commissioner, filed with his report and made part of the record, it will appear that petitioner is not indebted to the said plaintiffs in any sum of money, but, on the contrary, they are largely indebted to him. Tenth. It was error to confirm Commissioner Ward's said report because the proofs taken before him at the instance of said plaintiffs clearly show that petitioner is entitled to credits on account of transfers of land made to them under his said contract with their agent, A. H. Winchester, of May 26, 1885, in excess of that allowed by commissioner by said report, aggregating a sum exceeding \$16,000, a part of which was allowed petitioner in plaintiff's account filed herein. Eleventh. And because the conclusions and determinations of the commissioner in making up his said report are not sustained either by law or the evidence in this cause, as appears from the record thereof herewith presented."

The following are the exceptions to the commissioner's report: "The defendant Elihu Hutton excepts to the report of Commissioner J. B. Ward in this cause, to be filed for the January term of the circuit court of Randolph county, 1893, and now in the office of said commissioner for examination, for the following reasons: Second. Because by said report said commissioner finds that a partnership existed between the exceptor, Elihu Hutton, and A. H. Winchester, the agent of Dewing & Sons, in the matter of the Gauley land transactions, and therefore, in equity, between Hutton and Dewing & Sons (a fact which is clearly proven in this cause by the evidence which should be filed with said report), and then, upon the hypothesis that said partnership has been dissolved, proceeds to settle said partnership matters upon the theory that a dissolution of a partnership is a settlement of that partnership, and, in casting the accounts between the parties, has so intermingled said partnership items with items of conceded personal matters of account that it is impossible for exceptor or his counsel to distinguish between them,—a proceeding not warranted by the pleadings and proof in this cause. All of which, exceptor insists, is illegal, inequitable, and erroneous, and again asks that all proof taken by said commissioner touching the matter hereinbefore set forth be filed with said report. Third. Because by said report said commissioner, without regard to the various items which go to make up the account of plaintiffs against exceptor filed in this cause, finds that exceptor has received from plaintiffs, upon certain commingled accounts growing out of partnership and personal matters between them, an aggregated balance of \$132,-

660.28, in such manner as to render it impossible for exceptor to know which items of said account are carried into said aggregate, and which are not, thus rendering it impossible for exceptor to compare the commissioner's findings with the proof in the cause; to all of which exceptor objects and protests, and asks that said commissioner be required to file an itemized statement of account, composing said aggregate so found by him, with his said report as part thereof. Fourth. Because by said report said commissioner, contrary to the pleadings and proceedings in this cause, and the rules of law and equity applicable thereto, has carried into the aggregate aforesaid certain items of account between plaintiffs and exceptor, growing out of the said Gauley partnership reported by him, when the proofs filed before him clearly show that said partnership is wholly unsettled; and further because by said report said commissioner carries said items of partnership accounts into the aggregated credits reported to exceptor, and into the balance reported due from exceptor to plaintiffs, when the proof shows that, exclusive of said partnership matters, said plaintiffs are largely indebted to exceptor; and further because of the attempted settlement of said partnership matters by said commissioner, when said proofs clearly show that one B. L. Butcher, Esq., was a member of said partnership, that partnership is unsettled, and that said Butcher is not before the court as a party to this suit; and further because said commissioner, by said report, assumes that the sale of said Gauley lands by A. H. Winchester, while acting in his dual capacity of partner of said exceptor and agent of Dewing & Sons,—a fact now known to said Hutton at that time, as shown by the evidence before the commissioner,—to said Dewing & Sons, was made with the consent of said exceptor, or is in any manner binding on him, because the evidence taken before said commissioner in this cause wholly fails to warrant such assumption or finding. And to sustain this exception reference is again made to the proofs and papers aforesaid, which are asked to be filed with said report, as a part thereof. Fifth. Because by said report said commissioner finds that exceptor, Hutton, does not deny that he received from the plaintiffs the several sums making the said aggregate of \$132,660.28, when in fact the pleadings and evidence in this cause not only clearly show that said exceptor denies owing any part of said sum to said plaintiffs, but that he also denies that he received any such sum from them on all accounts, and because said commissioner further finds by the finding of said report last aforesaid, in effect, that the items of plaintiff's account not disproved by exceptor stand proven simply because they appear on said account. Sixth. Because by said report said commissioner aggregates the credits to which he finds exceptor entitled, as against the account of the plaintiffs so aggregated as above at the sum of \$100,748.93, without reporting the

items of exceptor's account filed in this cause which go to make up said aggregate, thus making it impossible for exceptor to compare said commissioner's findings with the proofs in said cause; to all of which exceptor objects, and asks that said commissioner be required to file an itemized statement of account composing said aggregate so found by him. And said exceptor further objects to said last-named finding of said commissioner because said report shows on its face that the items considered by him in making up said aggregated credits were taken both from partnership and personal accounts. Seventh. Because by said report said commissioner disallows a large number of items appearing on exceptor's account filed in this cause against the plaintiffs, when the same are clearly proven by the evidence taken and filed before said commissioner, and because, under said findings of said commissioner in this particular, it is practically impossible for exceptor to tell which of the items of this said account have been allowed by said commissioner, and which disallowed. Seventh. Because by said report said commissioner, after properly finding that exceptor is entitled to credit for certain items appearing on his account filed in this cause against the plaintiffs by virtue of and under the contract of May 26, 1885, for the purchase of the Cheat lands, disallows all the residue of the items of exceptor's said account claimed by him under said contract, because the lands for which said items were charged, respectively, were purchased, either after six months from the date of said contract, or were purchases made and conveyed by special warranty deeds, when said contract itself shows, when construed as a whole, that purchases thereunder were not limited to a period of six months; and further because the proof taken and filed before said commissioner clearly shows that the provisions of said contract were extended by parol agreement for sufficient length of time to include all the items of exceptor's account for lands purchased on Cheat; and further that the plaintiffs accepted said deeds of special warranty without objection, paid the purchase money therefor, took possession of the lands so conveyed, and have held, occupied, and used them continuously since. Eighth. Because said commissioner by said report finds that said exceptor, Hutton, is indebted to said Dewing & Sons in the sum of \$31,911, exclusive of interest, when the proofs taken by said commissioner, and papers filed with him (all of which should be filed with said report), clearly show that nothing is due the plaintiffs from this exceptor under the pleadings in this cause, or under trust deed of November 16, 1888. Ninth. Because by said report said commissioner finds that the supposed debt so found by him to be due from exceptor to plaintiffs is a lien first in priority upon the personal property named in the trust deed of November 16, 1888, when the proofs in this cause clearly show that said property belonged to a partnership composed of said

Ellhu Hutton and A. H. Winchester, the agent of said Dewing & Sons, run in the name of John C. Arbogast, at Huttonsville, W. Va., and that it was so understood by the parties thereto at the time of the execution of said trust deed; and exceptor insists that all partnership debts shall first be paid out of said partnership effects, and further excepts to said last-mentioned finding of said commissioner because he does not report that the legal title to said personal property passed to the trustee under the trust deed of December 3, 1888, instead of by the trust deed of November 16, 1888, and that the proceeds of the sale of said property should be applied to the discharge of the costs of executing the said trust of December 3, 1888, and the debts secured thereby, as, according to said proof, he should have done, and does not find that said personal property belonged to the partnership last aforesaid, and that said partnership was a part of the said Gauley partnership reported by him, as is clearly shown by the proofs and evidence, taken in this cause."

The exceptions of the Arbogast creditors and others are similar to the ninth exception above, and therefore they are an unnecessary incumbrance, if here copied.

It is a matter of impossibility, in any reasonable space of time, to take up these prolix and extremely lengthy assignments of error and exceptions to the commissioner's report, and dispose of them in rotation. The attention of the learned counsel in this and other similar cases is respectfully called to the rules of this court, to be found in volume 23 of the West Virginia Reports. If the counsel would acquaint themselves with, and endeavor to observe, these rules, it would be a concession for which the court would be truly grateful.

The two questions of main importance presented for consideration by this record are: (1) Are the Arbogast creditors entitled to priority of payment out of the proceeds of the Arbogast property? (2) Has the commissioner made a proper statement and settlement of the accounts between the plaintiffs and the defendant Hutton?

For some reason, best known to themselves, neither plaintiffs nor defendants took the testimony of Arthur H. Winchester, and it is quite conspicuous by reason of its absence. Sometimes it was needed, and its suppression must operate against the plaintiffs, and at other times against the defendant Hutton, as Winchester appears to have been the mutual friend and the dual agent,—seeking, with truly altruistic disinterestedness, to advance the interests of both without injury or detriment to the other. He wanted the plaintiffs to become rich off of their purchases through the defendant Hutton, and he wanted Hutton to thrive magnificently off of his income from the plaintiffs, while for himself he had no thought, except to rejoice in the success of his friends, brought about by his labors. In his zeal to serve two friends whose interests

were at times adverse, he overreached himself, and managed to get their business affairs in such a tangle as to lose the confidence of both, and involve them in a legal conflict, for the solution of which his evidence ought to have great weight and bearing, yet it is rejected by both alike. From the pleadings and the evidence, and the lack of evidence, it is plain that there was no partnership existing between defendants Hutton and Winchester, either in his own right, or as agent for plaintiffs, as to the Arbogast property. If such a partnership existed, defendant Hutton should have alleged it in his answer, and have been in position to prove it, as the burden was on him to do so. In this he utterly fails. On the contrary, it is perfectly apparent that no such partnership existed; that the truth with regard to this property is that A. H. Winchester started all the Arbogast business with the money furnished by plaintiffs to buy lands, with the understanding that he was to control and manage all such business through his agent, Arbogast, until a final settlement of plaintiffs' affairs with Hutton, and then, if the amounts coming to Hutton from the land transactions were sufficient to cover the investments in the Arbogast store and farming business, the same was to belong to Hutton. In the meantime the title to such property was to remain in abeyance, apparently in Arbogast, under the control of Winchester, as the agent of the plaintiffs, to secure them from any loss by reason of the investment of the plaintiffs' funds in such property for the ultimate benefit of Hutton. March 12, 1888, Winchester, by letter, notified the plaintiffs of the true condition of this property, as the following extracts show, to wit: "In Arbogast's name, owing to fact I could put him in possession, while in my own name I could only hold it constructively. I hold not less than \$10,000 personalty,—everything he has,—and not less than same amount of his store." "Second (Gauley). While, as between you and myself, I am your agent, as between him and myself I am his legal partner, and, before the law, would be your trustee to hold a partnership with him. This was formed first on basis of half and half. Then, my only mistake, two to him and one to me,—you,—he carrying all risks. Then last winter changed back to half and half, but in consideration of our not only carrying the risk that no longer existed, but, if essential, to carry his private affairs to extent of his prospective earnings. Third. Out of both the above grew an element of risk to you, to protect from which I, as commissioner, hold all the outside matter mentioned on other page, and am to do so until final settlement of each of the first two accounts, after which anything left is his, but nothing before the fact is ascertained." In this letter Winchester informs plaintiffs, in words that cannot be misunderstood, of the condition of the Arbogast property; yet they make no attempt to repudiate the arrangement in any way, but it appears to be perfect-

ly satisfactory to them until W. S. Dewing, becoming dissatisfied with his firm agent, without consulting him or obtaining his consent, secretly, by inducements and promises, obtains from defendant Hutton the deeds of trust of the 16th November, 1888, attempting to convey the Arbogast property to secure an approximate balance, to be afterwards ascertained, of \$25,000 due plaintiffs from Hutton. As the extracts from the letter above show, plaintiffs knew the condition of this property, and under whose possession and control it was, and that it was held in trust as security for the payment of the very claim, if any secured, by the trust deed, and so held by his firm's authorized agent. The effect of the acceptance of this deed of trust by the principals was to abrogate the arrangement made by their agent with regard to said property, except in so far as the rights of third parties had attached; one of the objects clearly being to oust the agency of Winchester with regard to said property, and turn the same over to another and different trustee. Mr. Dewing could have accomplished the same purpose by going to Winchester, and telling him that his agency was at an end, and that he himself would take charge of the Arbogast property and business. But he preferred to do indirectly what might be unpleasant for him to do directly; and he hoped, to some extent, by so doing, to repudiate the acts of Winchester, or at least avoid their ratification. If Winchester was holding this property as a private security for his own benefit, nothing could pass by the trust deed, except Hutton's possible future contingency, which might never happen. Therefore it was only by recognizing the agency of Winchester, in so far as the advancements to Hutton were concerned, that the deed of trust could effect the purpose for which it was executed, in any degree. In either event the Arbogast debts must be first paid. If it was Winchester's private holding, Hutton could have no interest therein, and could convey none in trust without Winchester's consent. And if held by Winchester as agent either for Hutton or Dewing & Sons, or both, he was entitled to retain the same until his debts and expenses incurred in relation to such property were fully paid off and satisfied. Being an unrestricted agent, with power to sell, he would have the right to sell the same for the purpose of paying such debts. Arbogast, the agent of the trustee, would have the same rights, especially when sustained therein by his immediate principal. Arbogast was the general agent of Winchester, and known so to be, both to the plaintiffs and the defendant Hutton, neither of whom ever raised a particle of objection to his agency; but he was permitted, in his own name, to carry on the business of trader, merchant, and farmer, buying and selling and contracting debts, all in connection with such business. And under section 13, c. 100, of the Code, all the property, choses in action, stock, etc., acquired or

used in such business, are made liable for the debts of such person. And any conveyance of such property by the agent to secure the debts of the principal not contracted by the agent, and for which he is in no wise liable, would be on consideration not deemed valuable in law as to him, and therefore null and void as to the creditors of the agency business. And any conveyance made by the principal would be abortive, to the same extent, and for a similar reason. Otherwise the grossest fraud could be perpetrated by the hidden principal and his agent, the ostensible owner of property, upon those innocently dealing with such owner in relation to such property. An agent has a lien on the funds and property of the principal in his possession and under his control for moneys advanced or liabilities incurred, when proper, necessary, or incident to his agency. *Mechem, Ag. § 684; Ruffner v. Hewitt, 7 W. Va. 585; 1 Am. & Eng. Enc. Law, 428; 3 Am. & Eng. Enc. Law, 333; Story, Ag. § 376.* Having such lien, he has the right to pledge the property to the amount of the lien. *Warner v. Martin, 11 How. 209.* "Where an agent purchases goods in his own name, he is clothed with all the indicia of ownership, and has the right to either sell or pledge the goods." *Leet v. Wadsworth, 5 Cal. 404.* An agent cannot be deprived of his lien, without his consent, by any act of the principal. Arbogast had possession of the property in controversy, with every indicia of ownership, acting as the agent of Winchester. The plaintiffs and defendant Hutton deny any interest in the property, except such as the plaintiffs may have by virtue of Hutton's trust deed. If these separate pretensions be accepted, the property must be regarded as belonging to Winchester, and Hutton's deed passed no title to the trustee. And the deed of Arbogast and Hutton, having been made without Winchester's consent or knowledge, is invalid in so far as it secures any debts other than those belonging strictly to the agency. And, in any event of ownership, to such extent the last-mentioned deed was invalid, for the reason that Arbogast, in executing it for such purpose without the consent of Winchester, as owner or trustee, exceeded his authority. But the trust deed of the 3d of December, 1888, executed by Arbogast to secure the agency creditors, was rendered valid, beyond controversy, by Winchester's consenting thereto and uniting therein. On the other hand, treating the property as conditionally Hutton's under the management and control of Winchester, as trustee, through Arbogast, as his agent and the ostensible owner, both Arbogast and Winchester have a lien on said property for all liabilities contracted in the management thereof, with the right to retain possession, and, being clothed with the power, the right to sell a sufficiency thereof to pay such liabilities, superior to the rights of Hutton, or plaintiffs, claiming through him. And, with the consent of all interested parties, they had

the right to execute the trust for the continued security of the liabilities incurred, and thus merge their lien and possession in the trustee, Harding, for their use and benefit. To this disposition of the property the evidence, by a decisive and convincing preponderance, shows that both plaintiffs and defendants consented. And this disposition was in accordance with the law.

Admitting that plaintiffs did not consent, then the possession of the trustee Harding remained the possession of Winchester and Arbogast, for the security of their liabilities, and continues in the receiver, for the reason that they have never surrendered their legal right to hold the property for any other purpose than the trust aforesaid; and if such trust, for any reason, should not prove effective, they are entitled to a restoration of their possession and lien aforesaid. While an agent may not transfer or assign his lien to another, it being personal to himself, yet he may make another his agent or trustee to hold the property to which the lien attaches, for his benefit, until the lien is legally satisfied. *Bigelow v. Walker*, 58 Am. Dec. 164. Equity never requires an honest grantor to surrender a right not contemplated or included within the terms of an ineffective grant, and when the plaintiffs seek its aid they must be prepared to do equity. Plaintiffs may complain that their funds, through their agent, formed the basis of the property in controversy. When they repudiated and ignored the act of their agent in holding the property as a security for them, and charged the funds directly to Hutton, they waived the right to seize the property on the grounds of a misapplication and breach of trust, and affirmed the advancements made in excess of the land purchases. Any loss they may incur by reason thereof they may charge to their attempt to rid themselves of their agent, Winchester, by an indirect, instead of a straightforward, course. If he had the "big head," their letters of praise and conduct of faith and trust lie at the basis of it. There is nothing in this case to indicate that he was acting otherwise than zealously, in good faith, in attempting to promote the respective interests of both the plaintiffs and defendant Hutton. He may have made mistakes and incurred losses. Such things are not uncommon. "It is human to err, but it is divine to forgive." Plaintiffs trusted him, and if, by giving him their confidence and allowing him the use of their means, they led others to trust him, they should not expect to escape the consequences of their conduct to the injury of innocent parties misled thereby. Of two innocent sufferers, the one least to blame has the better equity.

The sole question for us to decide is whether the agency lien of Winchester and Arbogast is entitled to priority, as to this property, over the lien acquired by plaintiffs by virtue of the deed of trust from Hutton. To this there can be but one answer, and that

is that the Arbogast creditors, under the circumstances of this case, must be first paid out of the Arbogast property, and that the plaintiffs' trust lien, when rightly ascertained, must be postponed and made second in priority, as against such property. As a case of partnership in some respects analogous, see *Darby v. Gilligan*, 33 W. Va. 246, 10 S. E. 400; also *Baer v. Wilkinson*, 35 W. Va. 422, 14 S. E. 1,—which cases would be pointedly applicable if there was a partnership between Hutton and Winchester. The only interest, then, that plaintiffs have in the Arbogast property by virtue of the deed of the 16th November, 1888, is the right to the residuum after the payment of the agency creditors. They therefore had such an interest in the property as justified the filing of their bill, and if losses are sustained by reason of the injunction, the removal of the trustee, and the appointment of a receiver, it will probably fall most heavily upon themselves. As the amount secured by the trust was indefinite, and subject to settlement, it could not be properly ascertained and fixed without a complete adjustment of all the transactions between the plaintiffs and defendant Hutton. B. L. Butcher is not a necessary party to this suit, for the evidence shows that he long since parted with his interest in the Gauley partnership to his co-partners. This partnership was first formed between Winchester and Hutton. It was for a specific purpose. Lands were to be bought as low as possible, and Winchester was to sell the same for not less than two dollars per acre, and the net proceeds were to be divided between them. Winchester induced the plaintiffs to purchase the lands at the price named by agreeing that they should have his share of the profits, and thereby ostensibly led them to take his place in the partnership. Defendant Hutton was satisfied with the price of two dollars per acre, as it realized a very handsome profit. One partner has the right to sell out to the other, and thus close the relation; and there appears to be no unsettled question, except as to the division or proper amount of the profits. It is true that defendant Hutton claims that this Gauley partnership had some connection with the Arbogast business, but the evidence fails to sustain any such claim, and his own conduct disproves it, supplemented as it is by the allegation of his answer. There are a great many disputed items controverted by both plaintiffs and defendant Hutton in each other's accounts, and yet the commissioner, without making an itemized statement, charges defendant Hutton with a total sum of \$132,660.28, and credits him with a total sum of \$100,748.93, finding a net balance of \$39,910.41, including interest. The defendant excepted to the report for this reason, as he was unable to tell what items entered into these aggregate amounts, and therefore he could not intelligently except to the allowance or disallow-

ance of any special item. This exception should have been sustained, and the report recommitted, with direction to the commissioner to make an itemized statement, showing item by item the credits, debits, and all sums disallowed. In no other way can the court examine and pass upon such report, unless it accepts as a finality the action of its commissioner. Such, however, is not the law. A commissioner is intended to aid the court. This court has no such officer, and, when this duty has not been properly performed, there is no alternative but to reverse the case, and send it back to be recommitted. To pursue any other course would be to try the whole controversy de novo, impose on this court the duties of a commissioner, and the determination of the litigation as in a court of original, instead of appellate, jurisdiction.

There is one other exception to the commissioner's report worthy of notice at the present time, and that is that the commissioner rejected from the defendant Hutton's credits all lands which were not purchased within six months of the date of the contract of the 26th May, 1885, or which were conveyed with covenants of special warranty. If plaintiffs obtained such lands and conveyances under and by virtue of said contract by extension of time or otherwise, and have possession and control thereof, without repudiating the same, they should be charged therewith; but each case must be determined in and of itself, which can only be done when a proper report is made. For the foregoing errors the decree complained of is reversed, set aside, and annulled, and this case is remanded to the circuit court, to be recommitted to the commissioner, with direction, without regard to his former reports, to make a complete itemized statement of all transactions between the defendant Hutton and the plaintiffs, by themselves or through their agent, Winchester, giving and showing all proper credits and debits, and each item disallowed, and to be further proceeded in according to the foregoing opinion and rules of equity.

(116 N. C. 570)

# STATE ex rel. EWART v. JONES.

(Supreme Court of North Carolina. May 7, 1895.)

## CREATION OF COURT—VACANCY IN OFFICE OF JUDGE—APPOINTMENT BY GOVERNOR.

The general assembly, under authority of Const. art. 4, § 30, providing that the general assembly shall prescribe the manner of electing the presiding officers and clerks of inferior courts which they shall establish, in passing Act 1805, c. 75, creating a criminal court with one judge, provided that the general assembly should "elect a person to fill the vacancy in said office which shall be caused by the ratification of this act." The act was ratified February 23d. and on February 27, 1895, the general assembly elected a person to fill the office. *Held*, that between the time of the ratification of the act and the election of the person to fill the office no constitutional va-

cancy existed, so as to authorize the governor to appoint a judge, under authority of Const. art. 3, § 10, providing for the appointment by him of all officers whose offices are established by the constitution and whose appointments are not otherwise provided for; and article 4, § 25, providing that all vacancies occurring in offices provided for by that article shall be filled by appointment of the governor, unless otherwise provided for. Avery, J., dissenting.

Appeal from superior court, Buncombe county; Graham, Judge.

Action of quo warranto upon the relation of Hamilton G. Ewart against Thomas A. Jones, to determine defendant's right to be judge of the criminal circuit court. From a judgment for defendant, plaintiff's relator appeals. Reversed.

F. H. Busbee and T. R. Purnell, for appellant. W. W. Jones, F. A. Sondley, Shepheru & Busbee, and T. F. Davidson, for appellee.

FAIRCLOTH, C. J. Under our form of government, the sovereign power resides with the people, and is exercised by their representatives in the general assembly. The only limitation upon this power is found in the organic law, as declared by the delegates of the people in convention assembled from time to time. In the constitution of 1868, these limitations are found, bearing upon judicial questions, mainly in article 4, and in section 4 the judicial power is vested in a court for the trial of impeachments, a supreme court, superior courts, courts of justices of the peace, and special courts; and the power of such special courts, as defined in section 19 of the same article, was declared in *State v. Pender*, 66 N. C. 313. In the same article, § 25, it was provided that the governor should fill all vacancies occurring in the offices provided for by this article of the constitution, "unless otherwise provided for," and it was held by this court that the words "unless otherwise provided for" meant unless otherwise provided for in this constitution. In the constitution of 1868, no criminal court, nor any other court than those provided in article 4, § 4, could be established by the legislature; and it is expressly provided in article 3, § 10, that the governor shall appoint all officers whose offices are established by this constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the general assembly. Thus it was according to the decisions of this court, cited under the appropriate sections in the present constitution.

The convention of 1875 revised and amended the constitution of 1868 in several respects, and in the following, bearing on the present question: (1) In article 3, § 10: "The governor \* \* \* shall appoint all officers, whose offices are established by this constitution, and whose appointments are not otherwise provided for"; omitting the words, "and no such officer shall be appointed or



elected by the general assembly," found in the corresponding article and section of the constitution of 1868. (2) In article 4, § 2: "The judicial power of the state shall be vested in a court for the trial of impeachments," etc., "and such other courts inferior to the supreme court as may be established by law." (3) In article 4, § 25: "All vacancies occurring in the offices provided for by this article of the constitution shall be filled by the appointments of the governor, unless otherwise provided for. \* \* \* If any person elected or appointed to any of said offices shall neglect and fail to qualify, such office shall be appointed to, held and filled as provided in cases of vacancies occurring therein." (4) In article 4, § 30: "In case the general assembly shall establish other courts inferior to the supreme court, the presiding officers and clerks thereof shall be elected in such manner as the general assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years." Upon this last section (30) the plaintiff's right to the office sued for depends.

From this review we find that under the constitution of 1868 the governor filled all vacancies provided for therein not otherwise provided for, and that no such officer could be appointed or elected by the general assembly, and that the legislature had no power to establish other courts. And we find in the constitution of 1875, § 30, *supra*, that the legislature is invested with power to establish other courts inferior to the supreme court, and to prescribe the manner of electing the presiding officers and clerks thereof, and this power excludes any authority in the executive to fill such an office, under the provisions of the constitution to fill vacancies. This seems to be the plain and natural meaning of the language of sections 30, 31, and other sections. In further support of such construction and of the intention, we were furnished with the Convention Journal of 1875, pp. 175, 176, showing by a direct vote that the convention refused to incorporate the words, "and no such officer shall be appointed or elected by the general assembly," as it was in section 4 of the constitution of 1868. The intent of the convention in making those changes is too plain to require further comment. The general assembly (Act 1895, c. 75), in pursuance of article 4, § 30, *supra*, established a criminal circuit, composed of Buncombe, Madison, Haywood, and Henderson counties, providing for one judge, and prescribing the powers, jurisdiction, etc., of said court. Section 7: "That such judge may be removed from office for the same causes and in the same manner as a judge of the superior court, and all vacancies in said office shall be filled by appointment of the governor, and the person so appointed by the governor shall hold his office until the next general election: provided, that the general assembly now in session shall elect a person to fill the vacancy in said

office, which will be caused by the ratification of this act. Ratified Feb. 23, 1895."

On February 27, 1895, the legislature elected the plaintiff, by the requisite majority, a judge of said criminal circuit to fill the office, as provided in said act. On March 12th following, the plaintiff applied to the governor for his commission, which was refused, and on the next day the governor nominated, appointed, and commissioned the defendant as judge of said criminal circuit, who is now in possession thereof. This exercise of power by the governor was without authority in the constitution or the act of assembly. There was no vacancy in the office, such as is contemplated by the constitution, to be filled by the governor. There was in fact no vacancy. It was simply the short interim between the establishment of the office and the election of the person to fill it. Was it necessary for the legislature to elect the officer in the same breath that created the office, in order to prevent a constitutional vacancy to be filled by the executive, when the act itself declared the purpose of that body to elect the officer? The question seems to furnish the answer. The fact that the word "vacancy" is used in the proviso does not affect the question. Suppose the legislature had declared that the interim of four days should or should not be a vacancy, that would not help the matter; for it is not the province of that body to determine the legal effect and consequences of its own action. It is manifest that the purpose was to prevent a constitutional vacancy. The case of *People v. Wilson*, 72 N. C. 155, has been invoked on this question. There, D. H. Starbuck had been duly elected judge of the eighth judicial district, and after long delay he declined to accept, and so notified the governor. This court held that to be a vacancy to which the governor should appoint, ex necessitate, as the legislature was forbidden to fill the place by article 3, § 10, and on the further ground that the public would suffer without a judge for the district. Here the legislature had the constitutional power to create the office and fill it, and the plaintiff was ready, and tried to enter promptly. There is no analogy. Our opinion, then, is that the plaintiff is entitled to the office sued for, and that the judgment below is erroneous. Reversed.

AVERY, J. (concurring). The power to fill by appointment all vacancies occurring in the offices provided for by the article devoted to the judicial department was conferred upon the governor of the state, both by section 31 of article 4 of the constitution of 1868, and by that section as amended by the constitutional convention of 1875 (Const. art. 4, § 25), unless otherwise provided for. The provisions added to the original section were manifestly made in view of the decision of this court in *People v. Wilson*, 72 N. C. 155, and were intended to limit the tenure of the appointees of the chief executive, whether to



fill a vacancy by the death or resignation of an incumbent, or by the refusal of a person elected to qualify in the time intervening between the making of the appointment and the next regular election for members of the general assembly, together with a reasonable interval for qualification. The constitution, as amended in 1875, added to the list of tribunals, to which the judicial power of the state was delegated, in addition to superior courts and courts of justices of the peace, "such other courts inferior to the supreme court as might (may) be established by law." After giving to the legislature, in section 12, art. 4, the power to allot and distribute the jurisdiction not pertaining to the supreme court among the courts established, or which might be established, by law, the convention of 1875 made specific provision for filling the office of judge of any new tribunal which might be created by the legislature, in pursuance of section 30, art. 4, upon the construction of which this controversy mainly depends, and which is as follows: "In case the general assembly shall establish other courts inferior to the supreme court, the presiding officers and clerks thereof shall be elected in such manner as the general assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years." The office of judge of "the criminal circuit court of Buncombe, Madison, Henderson and Haywood counties" is the subject-matter of this controversy, and was created by a statute (Laws 1895, c. 75) ratified February 23, 1895. It is provided in section 7 of the act that an election shall be held for the first full term of four years at the next general election, and that vacancies in the office shall be filled by the governor, subject to the condition, however, "that the general assembly now in session shall elect a person to fill the vacancy in said office, which shall be caused by the ratification of this act"; and that "said person shall hold his office until his successor shall be elected by the qualified voters of said counties of Buncombe, Madison, Haywood and Henderson at the next general election, and the person so elected shall hold his term of office as provided in section 8" (for a term of four years). On the 27th of February, 1895, the general assembly proceeded to elect a person to fill the office till the next general election, and the relator, Ewart, received the requisite majority of both houses. The governor subsequently sent the name of the defendant, Jones, to the senate for confirmation, and, on failure of that body to act on his recommendation, issued a commission to the defendant, and by virtue of this appointment he is the present incumbent.

The right of the governor to exercise the power of appointment conferred by section 25, art. 4, is contingent upon the occurrence of a vacancy, and the absence of any other express provision for filling it. Conceding that a vacancy occurred immediately on the ratification of the act, on February 23d, and

existed at least till February the 27th, the controversy is narrowed down to the point whether the general assembly was vested with authority to provide by the act that such vacancy should be filled by the subsequent election during the same session. The warrant of authority for electing the relator is to be found, as his counsel contend, in the provision of section 30, art. 4, of the constitution, that the "presiding officer and clerk shall be elected in such manner as the general assembly may from time to time prescribe." The constitutional amendments, made in 1875, were ratified by the people in 1876, and took effect, in accordance with the ordinance of the convention, on the 1st day of January, 1877. On the 10th day of the following March, a criminal court for Wake county was created by statute, and it was provided, in sections 6, 9, and 11 of the act (Laws 1876-77, c. 271), that the judge, solicitor, and clerk should be elected by the general assembly. In the case of *State v. Gales*, 77 N. C. 283, brought by the clerk of the superior court to test the right of the clerk of the new criminal court, elected by the legislature, to take from the plaintiff the emoluments inuring to the former from the criminal business theretofore cognizable exclusively in the superior court, it was held that the act establishing the tribunal was constitutional, and that the plaintiff accepted his office in contemplation of the legislative authority, under section 19, art. 4, of the constitution of 1868, authorizing the creation of special courts, to diminish its emoluments as an incident to the transfer of the criminal business to any other court which it had the power to create. The court said: "He [Bunting] took his office, therefore, with a knowledge that the legislature might establish a criminal court substantially the same with that which they did establish by the act of 1876-77, c. 271, under the amended constitution, and of which they made the defendant clerk." The authority of the legislature of 1876-77 to elect a clerk was derived, if it existed, from section 30, art. 4, of the amended constitution, and could not be sustained without holding by an unavoidable implication that the "presiding officer," whose office is coupled with that of clerk in that section, could likewise be rightfully chosen by the same body. While the question was not discussed, yet in order to reach the conclusion announced the court must have been of opinion, not only that the legislature had the power to create the court, but to elect the clerk whose right to the fees was sustained. If the legislature of 1876-77 had the power to elect a clerk, how can it be contended that, in coupling "the presiding officers and clerks," the same authority was not conferred as to the judge both of that court and of the criminal circuit created by the act of 1895?

It is insisted that the power of appoint-

ment is vested in the governor by section 10, art. 3, of the constitution, which empowers him to "nominate and by and with the advice of the senate to appoint all officers whose offices are established by this constitution and whose appointments are not otherwise provided for." The section (Battle's Revisal, p. 42; Const. 1868, art. 4, § 10) for which this was substituted, by the convention of 1875, contained, in addition to what is preserved in the present section, the inhibitory provision that "no such officer shall be appointed or elected by the general assembly." It was in construing the section, as it then stood, and when there was no conflicting provision elsewhere in the instrument, that it was held in *People v. Bledsoe*, 68 N. C. 457; *People v. McKee*, Id. 429; and *People v. McIver*, Id. 467,—that the legislature was not only not empowered, but was expressly prohibited, from appointing trustees of the university and the other officers, the validity of whose elections was the question involved in those controversies. Section 13, art. 9, of the constitution of 1868, was subsequently amended so as to give to the general assembly "power to provide for the election of trustees of the University of North Carolina." After this alteration in the organic law, an act (Laws 1873-74, c. 64) was passed empowering both houses of the general assembly, by joint ballot, to elect 64 trustees of the university, and under its provisions the legislature proceeded to elect. In *Trustees v. McIver*, 72 N. C. 76, Justice Bynum, in an able opinion delivered for the court, and Chief Justice Pearson, in a concurring opinion, reached the conclusion, in spite of the prohibitory clause which then remained as a part of section 10, art. 3, that the amendment of 1873 did provide, within the meaning of the constitution, another mode of selecting trustees than by appointment by the governor, and that the act of the legislature, in pursuance of which the trustees were elected, was constitutional.

If the grant of power to the legislature to provide for electing trustees was properly held to authorize the election by the general assembly, subject to the same qualification ("unless otherwise provided for") which is found in article 4, § 25, and despite an additional prohibition against legislative appointment, it would seem unreasonable to allow the same qualification to restrict the delegation of authority to elect judges in language equally as clear. The subtle distinction, which counsel contend may be fairly drawn between the grant of the power to provide for the election of an officer and the authority to prescribe the manner of electing him, does not seem to exist, or is entirely immaterial for the purposes of this discussion. The analogy between the case of *Trustees v. McIver* and that at bar is obvious and striking. It must be noted that all of the cases cited from our own Reports to sustain the right of the defendant were

opinions in support of the executive power of appointment when the express grant was made to the governor, and there was no conflicting constitutional provision to bring the qualification into operation.

It is conceded that the constitution of 1868 vested the general power of appointment to fill vacancies, occurring both in judicial and executive offices, in the governor, subject only to any express provisions in the organic law itself for filling them otherwise, and the authority of the legislature has been extended from time to time, since that constitution was framed, by express delegation of authority as to some of both classes of officers, and by removing the express restriction in article 3. But before any such express power was given or limited to the chief executive, when by the constitution as amended in 1835 no express grant of authority to appoint or elect was conferred upon either of the co-ordinate departments, the residuary power of the people to provide for filling offices already existing, and to create others, was exercised by their representatives in the general assembly. As an instance of this kind, it seems that the general assembly, at its session of 1866-67, passed an act (chapter 27) providing for the establishment of a criminal court for the city of Newbern, and for the election by the two houses of a presiding judge, and that in pursuance of the act Judge Green was duly elected, and it is a part of the judicial history of the state that the authority of the court was recognized by this court as a part of our judicial system. By my silence, I must not be understood as conceding the soundness of the legal proposition of counsel that section 37, art. 1, of the constitution, was intended as a restriction upon the power of the general assembly, as the direct representatives of the people. Another construction of the same clause is based upon the idea that the representatives of the people are vested with a delegated authority, restricted only to the extent of the express grants in the state constitution to the other co-ordinate departments and by the authority delegated to the federal government. Under that interpretation, "all power not delegated" in the constitution "remains in the people," to be exercised through their representatives, and is not to be considered as in abeyance, so that it cannot be exercised, however urgent the necessity for its exercise for the public benefit, except when the people assemble by their delegates in convention. I do not decide this interesting question, because it is not essential that we should do so, but we present both sides of it to exclude a conclusion that might be drawn from a failure to notice the contention of counsel. For the reasons given, the judgment of the court below is reversed.

The foregoing opinion was submitted tentatively, only as an embodiment of my own views before that of the court was prepared. It encountered objection on the part of my

brethren upon the ground that it conceded the existence of a vacancy between the time when the act took effect and the election of the relator. It was intended only to admit, for the sake of the argument, that when the legislature provided for filling "the vacancy in said office, which shall be caused by the ratification of this act," the construction which they plainly put upon the constitution might by possibility have been correct, but not that it was an interpretation adopted by the court. It is entirely unnecessary, in the decision of the points involved in this case, to determine whether a vacancy, within the meaning of article 4, § 25, for which the governor can in any event designate the first incumbent, occurred on the ratification of the act, since every member of the court concurs in the view that the legislature, in the exercise of the power granted by article 4, § 30, had provided otherwise. I deeply regret that the majority of the court deem it proper to define "a vacancy," when without raising that question we might have had the advantage of entire unanimity in our opinion, with such additional weight as the fact is generally considered as giving to the deliverances of appellate courts. I shall not enter upon the discussion of the soundness of the doctrine that an office can be created and remain unfilled without causing a vacancy. When that question shall be fairly presented, I shall take occasion to give at length my reasons for dissenting from the views of the majority of the court. Meantime I venture to express my regret that such a barrier to united action has been, as it seems to me, unnecessarily interposed. Concurring in the conclusion of the court, I dissent from the proposition that there was no vacancy between the ratification of the act and the election of the relator.

(116 N. C. 337)

**KLINE v. BRYSON CITY MANUF'G CO.**  
(Supreme Court of North Carolina. May 7, 1895.)

**CHANGE OF VENUE—ACTION AGAINST FOREIGN CORPORATION.**

1. A domestic corporation has no residence, within the meaning of Code, § 192, providing that, where the action does not have to be brought where the cause of action arose, it shall be tried in the county in which one of the parties to the action resides, and if the plaintiff is a nonresident, and defendant resides within the state, then in any county which the plaintiff may designate, and an action may therefore be brought against it by a nonresident plaintiff in any county.

2. Where a defendant obtains a change of venue under Code, § 195, in order to promote "the convenience of witnesses and the ends of justice," and fails at the next term to docket the transcript in the county to which transfer is made, the order is properly stricken out by the court granting it.

3. The residences of officers and directors of a corporation cannot be imputed to the corporation.

Appeal from superior court, Buncombe county; Boykin, Judge.

Action by Lewis F. Kline against the Bryson City Manufacturing Company. From a

judgment for plaintiff, defendant appeals. Affirmed.

Fry & Newby, for appellant. J. H. Merri-  
mon, for appellee.

**CLARK, J.** In *Fisher v. Mining Co.*, 105 N. C. 123, 125, 10 S. E. 1055, it is said that if, after obtaining an order for the removal of a cause to another county, the party obtaining the order does not docket the transcript at the next term of the court to which it is removed, the court from which it has been ordered to be removed can at the first term held thereafter, on proof of such failure, strike out the order of removal. This is in analogy to an appeal to this court, in which, if the transcript is not docketed here at the next term, the court below, on proof of that fact, may, on proper notice, adjudge the appeal abandoned, and proceed accordingly. *Avery v. Pritchard*, 93 N. C. 266. The defendant insists, however, that, this being a case where the removal was a matter of right, and not resting in the discretion of the judge, it was incumbent upon the opposite party, and not on itself, as the mover, to have the transcript docketed in the court to which it was ordered to be removed. Whether such distinction exists is not before us now, because the removal was not imperative, but it rested in the sound discretion of the court whether "the convenience of witnesses and the ends of justice would be promoted by the change." Code, § 195 (2). Code, § 194, applies to foreign corporations. The defendant is a domestic corporation, and for the purposes of venue may be sued in the county where the plaintiff resides, or, if he is a nonresident, in any county, subject to the power of the court to change the venue. Code, § 192.<sup>1</sup> There is no statute requiring that a domestic corporation shall be sued in the county where it has its principal place of business. If this were so, fire insurance companies could be sued upon their policies only in the county where their principal office is located, and actions for damages against railroad corporations, for the same reason, could only be brought in three or four counties in the state. There was a statute (Acts 1868-69, c. 257) for a brief period which provided that a railroad corporation could only be sued in some county in which part of its track was located. *Graham v. Railroad Co.*, 64 N. C. 631. But this was soon repealed by Acts 1870-71, c. 281. *Kingsbury v. Railroad Co.*, 66 N. C. 284. A corporation has a principal place of business, but it has no "residence,"

<sup>1</sup> Code, § 192, provides that actions other than those which are to be tried in the county where the cause of action arose shall be tried in the county in which a party to the action at the commencement thereof resides, and, if none of the parties reside within the state, then in any county which the plaintiff shall designate, subject to the power of the court to change the place of trial in the cases provided by statute

within the meaning of section 192 of the Code, and the residence of its officers and directors cannot be imputed to the corporation. The defendant having failed to docket the transcript in Swain superior court at the next term after it obtained the order of removal, the judge at the next succeeding term of Buncombe superior court which was held thereafter properly struck out the order. No error.

(116 N. C. 587)

**BANK OF NEW HANOVER et al. v.  
ADRIAN et al.**

(Supreme Court of North Carolina. April 30,  
1895.)

**ISSUE AS TO FRAUD—QUESTION FOR JURY—EQUITY  
JURISDICTION.**

In an action of foreclosure against the assignee of an insolvent mortgagor, the complaint disclosed that the mortgage was given to secure notes payable in three years, at 4 per cent. per annum, and was not filed till the mortgage became insolvent; and to the answer, which alleged that the mortgage was given under an agreement and with intent to defraud the mortgagor's creditors, plaintiff demurred. *Held*, that neither party was entitled to equitable relief, and the issue as to the fraudulent character of the mortgage should be tried by a court of law and a jury. Avery, J., dissenting.

Appeal from superior court, New Hanover county; Brown, Judge.

Action by the Bank of New Hanover and Junius Davis, its receiver, against E. K. Bryan, as assignee of Adrian & Vollers, to foreclose a mortgage. From a judgment for plaintiffs, defendant appeals. Reversed.

On February 27, 1893, Adrian & Vollers executed their notes to the Bank of New Hanover in the sum of \$90,000 payable three years after date, bearing 4 per cent. interest, payable quarterly, and on the same day executed a mortgage to secure the payment of said sum, which was registered June 19, 1893, the day on which said bank closed its doors and ceased to do business. On June 20, 1893, said Adrian & Vollers made an assignment to the defendant E. K. Bryan in trust for their creditors, conveying all their property, including the property described in said mortgage deed. On June 19, 1893, an action was duly instituted and pending in the superior court of New Hanover county, wherein Gabriel Holmes and J. H. Waters, who sue in behalf of themselves and all other creditors of said bank, are plaintiffs, and the Bank of New Hanover and others are defendants, in which proceeding plaintiff Davis was appointed receiver of said bank. The present action to foreclose said mortgage was commenced September 12, 1893, and the defendant E. K. Bryan, as assignee of said mortgagors, filed an answer, alleging that said notes and mortgage were made and delivered under an agreement and with intent to hinder and delay the creditors of said Adrian & Vollers, and prays to have said

mortgage deed declared void, and that plaintiffs convey to defendant, etc. The plaintiffs demurred to said answer, which was sustained, with judgment of foreclosure in favor of plaintiffs, and defendant appealed.

D. L. Russell, for appellant. George Rountree and E. S. Martin, for appellees.

FAIRCLOTH, C. J. It is conceded that, ordinarily, a court of equity will not interfere between parties to a covinous agreement, but will leave them to their strict legal remedies; also, as it has been held, that either party in pari delicto may, by complaint, answer, or proof, bring to the attention of the court any fraudulent transaction to prevent the other from recovering the fruits of such transaction. *Turner v. Eford*, 5 Jones, Eq. 108, and subsequent cases. Our view is that in such cases a court of equity will stay its hand, and leave the parties where they are, to exercise their rights as they may be permitted in a court of law. As no equity to either party can arise out of an inequitable and illegal agreement, we fail to see how this court, in the exercise of its equitable jurisdiction, can aid either party to such dealings. It is a court of conscience, and within the scope of its powers will be governed by its own rules. We are not aware of any decision of this court in which it is held that it is moved or restrained by the statute of frauds (Code, §§ 1545, 1546). It is true that in some respects equity follows the law, but never to the extent of aiding in the consummation of an illegal, immoral, or fraudulent contract. Lord Kenyon once said: "It is safest to preserve the ancient landmarks of the law;" and Pearson, C. J., said: "If the dividing line between law and equity be destroyed, the science of law will be in utter confusion, and no one will be able to see his way." *Turner v. Eford*, 5 Jones, Eq. 106, was a bill to compel a conveyance on a parol trust, but it appeared that the agreement was fraudulent, and the court declined interfering to compel a conveyance of the legal title. In *Triplett v. Witherspoon*, 74 N. C. 476, the court said: "Equity will not interfere to set up any transaction founded in fraud, certainly not against a purchaser for value, but will leave the parties to their legal rights." In *Ellington v. Currie*, 5 Ired. Eq. 21, upon a bill to avoid a deed made to defraud creditors, the court said: "Equity will not interfere with the operation of the statute at the instance of either party to a fraudulent conveyance." In *York v. Merritt*, 77 N. C. 213, the action was by the grantee against the grantor for possession of the land conveyed to defraud creditors. The court said: "When the parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, or which is against public policy, or contra bonos mores, the courts will not enforce it against either party." Again, in same case (80 N.

C. 285, 290), it was held "that the plaintiffs could recover [meaning in a court of law], as they were in *pari delicto*, and this court [equity], in the exercise of its equitable jurisdiction, cannot interfere to give relief." *State v. Bevers*, 86 N. C. 588, was a case in which defendant perpetrated a fraud on the state by purchasing land which he knew had been previously granted; and in the opinion, Ruffin, J., said, on page 592: "There is no principle better established than that it is the duty of every court to withdraw its countenance from every contract or other act the direct object or probable tendency of which is injurious to good morals, or contrary to public policy. \* \* \* No court will lend assistance to one who founds his cause of action upon an illegal act, to which he was himself a party. As soon as the court perceives that the action proceeds *ex turpi causa*, and that the plaintiff's hands are polluted, it withholds its aid; not out of any consideration for the defendant, but because it will not, on the score of example and public policy, give countenance to such a plaintiff." In *Brookover v. Hurst*, 1 Metc. (Ky.) 665, the court held: "A court of equity will not relieve the mortgagor from the consequences of his own fraudulent act, nor will it aid the mortgagee in securing him in the enjoyment of the property, when its interpretation is necessary for that purpose. The mortgagee is left to his legal remedies." In *Creath's Adm'r v. Sims*, 5 How. 204, the following explicit language is used: "The following principles of equity jurisprudence may be affirmed to be without exception: Whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith. \* \* \* A court of conscience touches nothing that is impure, and the answer to the party is: 'However unworthy may have been the conduct of your opponent, you are confessedly in *pari delicto*, \* \* \* and precisely, therefore, in the position in which you have placed yourself. In that position we must leave you.'" We think all the cases cited can be reconciled with the foregoing general principles. We assume nothing unfavorable to either party, except as it appears from the allegations and admissions.

The complaint alleges that the mortgagors, Adrian & Vollers, are insolvent; that they executed their notes and mortgage for \$90,000 to the plaintiffs, payable three years after date, bearing interest at 4 per cent. per annum. Would not a few such transactions close the doors of any bank in the state? It also alleges that said mortgage was recorded in five several counties, giving book and page in each, but failing in each instance to state the day on which it was registered; alleging, also, that the mortgagee failed in business in less than four months, and that the mortgagors, on the day after the bank failure, conveyed all their property to defendant E.

K. Bryan in trust for their creditors. Now, do not these badges of fraud disclosed in the complaint, with the positive allegations of fraud found in the answer, and admitted by the plaintiffs for the purposes of this action, coupled with the secret existence of the mortgage nearly four months, and until the mortgagee itself is found to be insolvent (all subject to be explained and obviated, of course, by either party), present a question, to wit, the intent of the parties in the execution of the notes and mortgage, proper to be heard by a jury upon the proofs? But it is urged that the creditors of Adrian & Vollers are not parties to this action, and their rights cannot be considered. We answer that their trustee, E. K. Bryan, is here resisting plaintiffs' claim. But, again, he is a subsequent purchaser with notice, and St. 13 and 27 Eliz. postpones his to the plaintiffs' claim. We answer that those are legal questions, to be tried by a court of law and a jury upon the evidence, specially as to the intentions of the parties, and that a court of equity is not concerned therewith, and will not extend its aid to either party, but leave each in the full exercise of his legal rights as he may be advised. Then, in a case like the present, in which one party alleges fraud, and the other admits it, this court is asked by each party for equitable relief, but, for reasons already stated, we cannot extend it to either party. The demurrer is overruled, and the cause remanded. Judgment reversed.

AVERY, J. (dissenting). It is the universal rule, to which the search to find an exception in cases adjudicated in our own court or elsewhere will be in vain, that the grantor in a fraudulent deed, whether it be absolute in form or a mortgage, is not allowed in courts of law or equity to impeach his own conveyance for covinous conduct, in which he has been a participant, and has been equally guilty. Such deeds are declared to be good *inter partes* in the sense that neither can ask to set them aside for fraud, in equity, because of the necessity, as a general rule, of disclosing his own turpitude, and, in law, because the grantor is estopped to impeach his own deed. This proposition is supported by a consensus of opinion in all courts that administer the principles of law and equity as derived from England. *Brady v. Ellison*, 2 Hayw. (N. C.) 583; *Vick v. Flowers*, 1 Murph. 321; *Jackson v. Marshall*, Id. 323; *Pinckston v. Brown*, 3 Jones' Eq. 494; *Powell v. Ivey*, 88 N. C. 256; *York v. Merritt*, 77 N. C. 213, 80 N. C. 285; *Westfall v. Jones*, 23 Barb. 9; *Brookover v. Hurst*, 1 Metc. (Ky.) 665; *Miller v. Marckle*, 21 Ill. 152; *Blsp. Eq. § 244*; *Swan v. Scott*, 11 Serg. & R. 155; *Evans v. Dravo*, 24 Pa. St. 62; *Williams v. Williams*, 34 Pa. St. 312. In the case of *York v. Merritt*, supra, at page 290, the court say: "They are in *pari delicto*, and this court, in the exercise of its equi-

table jurisdiction, cannot interfere to give relief." That was an action brought by the plaintiff for the possession of land, where the defendant sought to set aside the deed on the ground that it was intended as a mortgage, but was executed to defraud the defendant's creditors. The court said (page 289): "If the intent of the parties in making the deed was to defraud the creditors of the defendant, it would make no difference whether the deed was intended as a mortgage or an absolute conveyance." In the case of *State v. Bevers*, 86 N. C. 595, this court announced the general principle that where a plaintiff alleges an equity that entitles him to relief, without disclosing any turpitude on his part, then, *prima facie*, he is entitled to recover; but where it becomes necessary to state, as a part of his cause of action, that it originates in or is dependent upon the enforcement by the court of an illegal or fraudulent contract, the maxim, "*Ex turpi causa non oritur actio*," applies, and the court withholds its aid. *Bish. Eq.* § 248; *Bonesteel v. Sullivan*, 104 Pa. St. 8; *Gill v. Henry*, 95 Pa. St. 388; *Bigelow, Frauds*, p. 206; *Hawes v. Leader*, *Cro. Jac.* 270; *Findley v. Cooley*, 1 Blackf. 262. *Bigelow*, in his work on *Fraud* (pages 206 and 207), says: "And the test whether a demand connected with an illegal transaction is capable of being enforced has often been said to be whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him. If, on the contrary, the plaintiff can establish his [*prima facie*] case without showing the illegality of the acts of the parties, he can recover. \* \* \* There is, however, according to other courts, a marked distinction between executed and executory contracts of a fraudulent character, where both parties are guilty. \* \* \* The principle is the same that the courts will not lend their aid. The executed contract must therefore stand executed, because the courts will not interfere; while the executory contract must fall for the same reason." "By common law," says *Waite*, in his work on *Fraudulent Conveyances* (section 429, p. 593), "no person is permitted to take advantage of his own wrong. In such cases the doctrine in *pari delicto* applies, and, where property has been fraudulently conveyed to a grantee, he will be permitted to retain it as against the grantor, not from any merit of his own, but because the law will not lend its aid to a party seeking to set aside his own fraudulent act. So equity will not decree a specific performance of an agreement by a fraudulent grantee to reconvey the property to the debtor." In *Williams v. Williams*, *supra*, it was held that "in a suit upon a mortgage against the administratrix of the mortgagor, the latter will not be permitted to set up as

a defense that the mortgage was given with the fraudulent intent of covering the property from creditors in case of embarrassment of either of the parties to it."

The doctrine, when fully and properly stated, is that, whenever it becomes necessary for either of the parties to an executed conveyance to invoke the aid of a court of equity on the ground that it was executed for a fraudulent purpose, in which it appears both were equally guilty participants, the court will refuse the aid asked, and will leave the parties in the same position as to the enforcement of their rights that they would have occupied had there been no disclosure of the fraud. In our case, had not the defendant set up the fraud and asked the interposition of the court on that ground, the plaintiff, having established, as *Bigelow* says, his *prima facie* case, without disclosing his guilt, was entitled to recover. To leave the bank as it stood before the court prior to the introduction of the fraudulent transaction was to concede its right to a decree of foreclosure. The principle is substantially stated in two cases relied upon by the plaintiff's counsel on the argument,—*Bonesteel v. Sullivan*, *supra*, and *Gill v. Henry*, 95 Pa. St. 388. In the former case (*Bonesteel v. Sullivan*) the court held that, the deed being good *inter partes*, a mortgagor could not defeat the recovery of the mortgagee in a bill for foreclosure by disclaiming for the first time in the answer a common intent of both parties to defraud other creditors of the mortgagor. In the case of *Gill v. Henry*, *supra*, the court declared that upon the same principle the mortgagor, where the mortgagee did not in his bill for foreclosure disclose the fraud, could not set up or prove on the trial an agreement between the parties, like that relied on in the answer here, that the deed should be withheld from registration in order to defraud other creditors. "The person who attempts to cheat others has no right to complain if he himself is cheated." *Waite*, *supra*, p. 207. *Adrian & Vollers* executed a contract upon which the plaintiff has shown *prima facie* its right to the judgment demanded. The defense attempted to be set up by the assignee (who, as will presently appear, stands in the same relation to the plaintiff as the assignor) involves the first averment of the turpitude, out of which no right can arise in law or equity. As it does not lie in his mouth, after taking with notice of the mortgage, to avail himself of such a plea, the court must deal with the cause as though the fraud had never been mentioned. When *Bryan*, the assignee, seeks to avoid the deed by showing its fraudulent character, he is confronted by the rule laid down in *Ellington v. Currie*, 5 Ired. Eq. 21, that a court of equity allows only creditors, and not "the party, or those claiming under him," to impeach them under 13 Edw. It

is plain that, unless the assignee has some right conferred by statute, he stands, both in a court of law and a court of equity, in the shoes of his grantor or assignor, and is estopped, both in law and in equity, as effectually from impeaching the deed of his assignor as his own prior deed for the same property. The case of *Turner v. Eford*, relied upon by the defendant's counsel, falls to come within the principle which is decisive of that at bar, for the reason that there the heirs of *Turner*, who filed a bill to enjoin the execution of a writ of possession, claimed under no deed; but the heirs at law of *Eford* had recovered upon the conveyance to their ancestor in an action of ejectment. They were not precluded, as are *Adrian & Vollers* and their assignee, by their own deed or their answer, from setting up and proving the fraud. Having the right to avail themselves of that defense, when the allegations of their answer were admitted, the court of equity left the parties as they stood,—the defendants with judgment for possession and a writ in the hands of the sheriff. The confusion that seems to have arisen about the application of the principle to actions for foreclosure seems to be due to the erroneous idea that either party forfeits his claim to relief by simply going into equity, when in reality a party is entitled to demand any judgment in law or equity to which he can establish his right without relying upon the fraud as a ground of the relief sought.

The only remaining question is whether he is at liberty to attack as a purchaser under 27 Eliz. The statute, Code, §§ 1545, 1546, which is substantially the same as 13 and 27 Elizabeth, except that the act of 1860 so amended the latter as to limit its operation to purchasers both for full value and without notice, gives to creditors of bargainors or mortgagors, and to such purchasers of their interests, but not to the bargainors or mortgagors themselves, the right to impeach conveyances on the ground that they were executed to hinder, delay, or defeat or defraud creditors of such purchasers. The controversy is narrowed down, therefore, to the question whether *E. K. Bryan*, the assignee, is a purchaser for value and without notice of the claim of the plaintiff under the older conveyance. None of the creditors are parties, though they might have been made, or might have asked to be made, defendants in the cause. It may be true that the rules defining the relative rights of mortgagor, mortgagee, and trustee or assignee of the equity of redemption have been somewhat modified by recent decisions of this court. *Wallace v. Cohen*, 111 N. C. 106, 15 S. E. 892; *Southerland v. Fremont*, 107 N. C. 565, 12 S. E. 237; *Cown v. Withrow*, 112 N. C. 736, 17 S. E. 575. But the doctrine that such an assignee in a general deed to secure creditors is "a purchaser within 13 and 27 Elizabeth," and takes subject

only to such equities as attached to or bound land in the hands of the debtor, has remained undisturbed since it was first formally announced. *Potts v. Blackwell*, 3 Jones, Eq. 449; *Small v. Small*, 74 N. C. 16; *Wallace v. Cohen*, and *Southerland v. Fremont*, supra; *Brem v. Lockhart*, 93 N. C. 191; *Branch v. Griffin*, 99 N. C. 173, 5 S. E. 393, 398. If *Bryan* is to be deemed a purchaser, subject only to the restriction mentioned, what superior equities to those of the creditors, whom he represents, are shown to have attached before the conveyance to him? The averments of the answer being admitted by the demurrer, the bank cannot be deemed to have acquired any equitable rights, either as against creditors or such purchasers, by the covinous conspiracy to give to *Adrian & Vollers* a false credit, and then to deprive those who should fall into the trap of the right to subject the property, which was the basis of the credit extended to them. Some more rigid rule than any founded upon the benign principles of equity must be invoked in order to postpone the claims of these creditors, represented by *Bryan*, to those of the plaintiff, admitted to have been acquired, if at all, by a conveyance intended by both parties to perpetrate a gross fraud upon the rights of subsequent purchasers as well as subsequent creditors. But, however reprehensible in any aspect, and violative of the rights of the creditors represented by *Bryan*, the admitted covinous arrangement between the bank and the defendants *Adrian & Vollers* may have been, we find a difficulty that seems insuperable in the way of conceding to him, as subsequent assignee, the right to attack the mortgage deed. *Bryan* admits in his answer that it was "registered on the 19th day of June, 1893, and that the deed of assignment is correctly set out in the complaint, where plaintiff alleges that it bears date June 20, 1893." The mortgage deed having been registered on the day before the deed of assignment was executed, *Bryan*, as assignee, took with constructive notice of it, and of everything contained in it. *Robinson v. Willoughby*, 73 N. C. 53; *Parker v. Banks*, 79 N. C. 480; *Wharton v. Moore*, 84 N. C. 481; 2 Pom. Eq. Jur. §§ 692, 655 (4). In *Triplett v. Witherspoon*, 70 N. C. 595, *Pearson, C. J.*, cites *Hiatt v. Wade*, 8 Ired. 340, and quotes from the opinion of *Rufin, C. J.*, as follows: "The statute 27 Eliz. enacts that conveyances of land made with intent to defraud purchasers shall, only as against purchasers for good consideration, be void. Under that act it was, of course, held that notice of the fraudulent deed did not impeach the title of the purchaser, because the bad faith of the deed vitiated it, and with the notice of the deed the purchaser had also notice of the fraud. But the legislature thought proper, in 1840, to alter the law, and declare that no person shall be deemed a purchaser within the meaning of the former act, unless he purchase the land for full value

thereof, without notice at the time of his purchase of the conveyance alleged by him to be fraudulent." *Triplett v. Witherspoon*, 74 N. C. 476. The distinction which the learned counsel for the defendant attempts to draw between the rights of the assignee in a court of law and in a court of equity, has not been recognized by this court. The rule as laid down in a court of equity in *Ellington v. Currie*, *supra*, and as applying to cases where such relief is asked under the Code practice in *York v. Merritt*, *supra*, is that, not only are parties estopped from attacking their own deeds as fraudulent, but those in privity, or holding under them, which is a synonymous expression, are also as fully concluded as the grantor. Bryan, assignee, claims title to the equity of redemption by virtue of the deed from Adrian & Vollers, and therefore comes within the general rule in courts of law and

equity, unless such deeds are declared void as to him by the statute (Code, § 1546). We have seen that he is not such a purchaser as can claim the right to attack under that section. Having taken "before and at the time of purchase," with notice of the mortgage deed, it is clear, then, that Bryan is not at liberty to impeach it. The other creditors secured by the assignment not being parties, we think there was no error in granting the decree of foreclosure. Why they have not been made parties to this cause, or have not instituted another suit, we are not informed. Unless the admission of the allegations of the answer by demurrer was merely a pro forma act, intended to raise the question, it would seem that the mortgage deed might have been successfully assailed by them, either as defendants in this or plaintiffs in an independent action. No error.



(116 N. C. 712)

## SLEDGE v. ELLIOTT et al.

(Supreme Court of North Carolina. April 30, 1895.)

## SALE BY ADMINISTRATOR — ORDER OF COURT — TERMS OF SALE—COLLATERAL ATTACK—TRUTH OF RECITALS—PRESUMPTION.

1. Under Rev. Code, c. 46, § 44, providing that the property of a decedent, in case of insufficiency of assets to pay debts, may be sold by the administrator on obtaining a license for the sale from the court, the court granted an administrator "license" to sell all the real estate described in his petition, and set out the terms of sale. A subsequent order, without setting out the terms of sale, granted the administrator "leave to dispose of" one of the tracts described in the original order. *Held*, that the last order related back to the original order for terms of sale, and a sale made thereunder was valid.

2. Where a statute vested a court with power to grant an administrator "license" to sell real estate to procure assets, an order granting one license to sell "if, in the settlement of the estate, it would be found necessary," is not void as being a conditional judgment, or as attempting to vest the administrator with judicial power.

3. After 30 years, the recital in a decree of court that service had been made on all the parties to the action, some of whom were minors, will be presumed true, on collateral attack; it appearing that the guardian ad litem of the minors was clerk of court, and that rights of third parties have intervened.

Appeal from superior court, McDowell county; Shuford, Judge.

Action by M. L. Sledge against J. S. Elliott and others for the possession of land. From a judgment for plaintiff, defendants appeal. Affirmed.

E. J. Justice, for appellants. Shepherd & Busbee, Battle & Mordecai, and English & Morris, for appellee.

AVERY, J. The right of the plaintiff to recover in the action for title and possession of a lot was made to depend upon the question whether a record of an administrator's petition for sale for assets, with the decree and sale under which the plaintiff claimed title, were open to attack, and were shown to be invalid, and subject to collateral impeachment by the heirs at law of the decedent. The petition was filed in the court of pleas and quarter sessions of McDowell county at the fall term, 1864, in accordance with the provisions of Rev. Code, c. 46, § 47 et seq., and not under the act of 1868 (Battles' Revisal, c. 45, § 61 et seq.). The form of the petition is verbatim, in all material respects, that laid down in Eaton's Forms (p. 529), and universally used by the profession at that time. At the spring term, 1865, of the court, there was an order for the sale of several other tracts of land, and the terms of sale were prescribed therein. Under a proper construction of this order, entered at the ensuing fall term, in connection with that referred to above, it is manifest that the lot in controversy was to be sold, if at all, upon the terms prescribed in the former order for the sale of the real estate generally. It would be sticking in the bark to hold otherwise, when

in fact the terms adopted were precisely those prescribed as to the sale of the other property, and no possible jeopardy to the rights of the defendants could have resulted therefrom. The statute (Rev. Code, c. 46, § 44)<sup>1</sup> from which the court derived its authority, permitted the granting of a "license" to sell the real estate, and accordingly the first order also declared that the administrators of Elliott should have "license"—not that they should be required—to sell certain other property. The subsequent order that they "should have leave to dispose of the town lot described in the petition, if in the settlement of the estate it should be found necessary," was not, in our opinion, what is termed a conditional judgment, or a judgment void as an attempt to vest in the administrators judicial power. The court unquestionably granted leave to sell the town lot just as it had given its sanction in advance to the sale of the other land for assets. If, after obtaining the license, by reason of finding some personal assets, of which they previously had no knowledge, or because of some claim against the estate supposed to be just proving invalid, the approximate estimate of indebtedness had proved incorrect, it will not be contended that the administrators would not have been authorized to desist in their discretion from selling before disposing of even all the tracts described in the first order of the court. They were empowered, not compelled, to sell; and the proviso in the second order gave them no new authority, but was merely in affirmance, not only of what was their discretionary power, but of their duty as ministerial officers of the court, acting for the best interest of the heirs as well as the creditors. The statute authorizing the sale of land for assets is in derogation of common law, and the courts would not be inclined to deny to the administrators the right to desist from selling when they had manifestly attained the object for which the law had clothed them with power to sell. The converse of that proposition, that they could continue to sell such lands as were embraced by the license as long as the necessity apparently existed for raising additional assets, must be likewise founded upon reason and principle. *Adams v. Howard*, 110 N. C. 15, 14 S. E. 648. If so, why should the validity of an order be questioned, when it was merely in affirmance of a right which they already had? We think, therefore, that the sale of the lot in controversy was authorized by the court.

There were four terms of the court held every year, though jury trials may have been had at only two of them. The order granting the license under which the lot was sold was not made till the spring term, 1865,—the second term after the filing of the petition at the fall term, 1864,—and it recites that sub-

<sup>1</sup> Rev. Code, c. 46, § 44, provides that, when the assets of the estate are insufficient to pay the debts, the administrator shall sell the real estate, upon obtaining a license therefor.

poenas had been served upon all of the parties in accordance with the equity practice, either actually or by publication. Shall a purchaser, who buys under such a decree, be subjected to the hazard of losing, after 30 years, a tract of land for which he has paid, because either by accident or design a summons or an order has been lost out of the record? In *Hare v. Hollomon*, 94 N. C. 14, this court held that both under the earlier practice of bringing in the heirs at law by scire facias, and that prevalent before the Code was adopted, of filing a petition in the county courts in order to subject real estate for assets, the proof of service of notice or subpoena upon infant heirs was not essential to the validity of a decree of sale, and that such decrees could not be impeached for want of such service unless it appeared that no real defense was made for them, and that they had suffered thereby. It appears from the record that A. M. Finley, clerk of the court, was appointed guardian ad litem for the infants. In *Sumner v. Sessoms*, Id. 376, Smith, C. J., for the court, said: "A guardian ad litem was appointed for the infant defendant, whose acceptance and presence in court must be assumed, in the absence of any indication in the record to the contrary, from the fact that the court took jurisdiction of the cause, and rendered judgment. It is true that the record produced does not show that notice was served on the infant or her guardian, nor does the contrary appear in the record, which, so far as we have it, is silent on the point. The jurisdiction is presumed to have been acquired by the exercise of it, and, if not, the judgment must stand, and cannot be treated as a nullity, until so declared in some impeaching proceeding." The effect of the recitals in a decree such as that in question, that service has been made upon all of the parties, is the same whether the proceeding was one under the provisions of the Code or the Revised Code. In either case, a title acquired under the decree cannot be invalidated by a collateral attack upon it; and an additional reason for upholding the decree is that the clerk of the court, who made out the record and was always present, was the guardian ad litem. *Fry v. Currie*, 91 N. C. 437; *Williamson v. Hartman*, 92 N. C. 236; *Spillman v. Williams*, 91 N. C. 483; *Williams v. Woodhouse*, 3 Dev. 257. In our case, the rights of third parties having intervened, the courts would not set aside the judgment, even in a direct proceeding, unless it should clearly appear that the infant had been injured or defrauded. It is of the utmost importance that purchases in good faith and for value should be upheld, and that the confidence of the public in the stability of judicial decrees should be maintained. *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480. Purchasers at judicial sales are bound only to see that the court had jurisdiction, and that it ordered the sale. *Fowler v. Poor*, 93 N. C. 466. The recital in the decree that service had been made was

sufficient to protect him in this case, both as to the claims of adults and infants. After the expiration of 30 years, the recital in the deed that the sale was made in pursuance of a decree of the court entered in this cause must be presumed to be true, notwithstanding the fact that the record is not full. *England v. Garner*, 90 N. C. 197. In any aspect of the case the final decree was entered, and the proceeding cannot be impeached for irregularity (*England v. Garner*, 84 N. C. 212); and in the face of the recitals in the decree and deed the court would, only upon proof that the infants had been wronged or defrauded, allow the decree and sale to be disturbed, even in an action brought to vacate it. After it has remained unimpeached for nearly 30 years, the burden of overcoming a presumption of fairness and regularity in the original record rests upon any one who seeks to disturb a title founded on it. In the exercise of the discretionary power of this court, we deem it best to refuse the motion based upon newly-discovered testimony. *State v. Mitchell*, 102 N. C. 347, 9 S. E. 702. It is needless to cite authority to sustain the proposition that the decree was sufficient in form, and that it was not essential to its validity that it should have been signed. For the reasons given, we hold that the judgment must be affirmed.

(44 S. C. 110)

HARTSFIELD et al. v. CHAMBLIN et al.  
(Supreme Court of South Carolina. April 15, 1895.)

JUDGMENT OF APPELLATE COURT—AMENDMENT—  
CONSENT OF PARTIES—WRITTEN CON-  
TRACT—MERGER.

1. The appellate court has the right to reconsider its judgment, upon good cause shown, before the remittitur has issued.

2. A decree of the probate court which was reversed on appeal stands of force as to those parties who did not appeal.

3. The judgment of the appellate court should conform to a written notice by the appellees to the appellants consenting to an amendment in the decree appealed from, so as to meet an objection contained in one of appellant's exceptions.

4. A writing signed by the parties merges in it all parol contracts which precede it relating to the same subject-matter.

On rehearing. Modified.

For previous opinion, see 19 S. E. 959.

POPE, J. On the 26th day of July, 1894, the judgment of this court was rendered by Associate Justice McGowan, as the organ of the court. On the 29th day of July, 1894, Mr. Justice McGowan vacated his office as one of the justices of this court, by reason of the termination of his term of office. The judgment of this court is set out in 19 S. E., at pages 959 to 963, inclusive. Within the 10 days ensuing after the 26th July, 1894, and before our judgment had been remitted to the circuit court, the appellants A. D. Chamblin and M. Lou Chamblin obtained an order for the stay of the remittitur until their pe-

tion for a rehearing of the appeal in this court could be had. An order of this court was then passed by this court for a rehearing of the appeal at the March term, 1894. At that term such rehearing was had. The grounds relied on in such rehearing were: (1) That this court, in its judgment, had overlooked the facts that it was consented to, on the record, that if the judgment of the circuit court was affirmed it must be noted in our judgment therefor that certain defendants must be excluded from any benefit of the judgment of the circuit court herein; and, secondly, that one of the defendants, A. B. Woodruff, had conveyed all his interest in the estate of Mrs. Eliza J. A. Woodruff, deceased, to A. D. Chamblin and M. Lou Chamblin, his wife, after the circuit judgment had been rendered. (2) That this court, in its judgment, had overlooked the fact that Mrs. Eliza J. A. Woodruff, deceased, after the death of her husband, Dr. C. P. Woodruff, had ratified the previous gift of their joint property after death of them, or the survivor, to said A. B. Chamblin and M. Lou, his wife. (3) That this court, in its judgment, had mistaken the fact of the testimony by parol to prove that Dr. C. P. Woodruff and his wife, Mrs. Eliza J. A. Woodruff, in order to induce the said A. D. Chamblin and M. Lou Chamblin, his wife, to forego their own plans for life, and as the consideration for such change of plans of life by them, the said A. D. Chamblin and M. Lou, his wife, had bargained with them that all their property should belong to said Chamblin and wife at the death of the said Charles and Eliza, if Chamblin and wife would remove to and live upon their property in the village of Woodruff, in this state, and take charge of, sustain, maintain, protect, and care for the said Charles and Eliza, and the survivor of them, until death, which contract had been faithfully and scrupulously observed by each party thereto. We will now notice these grounds for a reversal or modification of our former judgment.

It may be remarked that the respondents question the right of this court to reconsider its judgment. In *Pringle v. Sizer*, 3 S. C. 337, this court held, "There is no doubt of the power of this court to correct its judgment founded on a misconception of facts, while it has control over the cause." Again, in same case, just cited, the court observes: "Strictly speaking, after a cause has once been remitted this court loses all jurisdiction of it; but if, before the remittitur has in fact issued, an error as to figures is made apparent or any obvious mistake of fact is shown, the court would reform its judgment in conformity to the truth of the matter." Rule 20 of this court is intended to supply the machinery necessary for this reconsideration by this court. An admissible recognition of this power and duty of the court to reconsider its judgment, upon good cause shown, is furnished by the two cases of Til-

linghast v. Lumber Co. and *Moore v. Machine Co.* (S. C.) 18 S. E. 120. This court has no doubt of its power and duty, so far as this suggestion of respondents is concerned.

First, did this court err in the matters contained in the first suggestion of error made by appellants? Let us see what the case discloses, bearing upon these disputed matters. When the judge of probate for Spartanburg rendered his judgment, on the 24th October, 1893, by the express terms thereof, "It is therefore ordered and decreed that A. D. Chamblin, administrator of E. J. A. Woodruff, deceased, first pay the costs and disbursements of this action, a bill of which is hereto attached, and that he then turn over all the balance of said estate to A. D. Chamblin and Lou Chamblin, and that then he be discharged from all liability as administrator as aforesaid." From this decree of the judge of probate the plaintiffs and the defendants A. B. Woodruff, A. D. Chamblin, and Lou Chamblin alone appealed. As to all the other defendants except A. B. Woodruff, A. D. Chamblin, and Lou Chamblin, therefore, the decree of said judge of probate stands of force. This fact the circuit judge failed to notice and provide for in his decree. The appellants, in the eighth ground of appeal, alleged that the circuit judge was in error in this regard. And the plaintiffs, who are before this court as respondents, gave written notice to the appellants, as appears in the case, that they "are willing, and, so far as they are concerned, consent, that the said decree be so amended as to meet the objections raised in said exception." Our judgment failed to provide for this change or modification of the circuit court decree, and, to that extent, must be modified. So, too, as to the right of A. B. Woodruff, under the circuit court decree. He has made a deed since its rendition whereby he conveys to A. D. Chamblin and Lou Chamblin, his wife, all the interest he may have in the estate of Eliza J. A. Woodruff, deceased. This fact was disclosed to this court at the first hearing before us. Our first judgment did not mention this fact, nor provide for a modification of the circuit court decree in respect to the same. Hence our judgment must be modified so as to provide that all the rights of A. B. Woodruff in the property in controversy here shall rest in A. D. Chamblin and Lou, his wife.

The matters referred in the second and third suggestions of error in our former judgment have occasioned us to carefully review the facts, as presented in the case. We cannot feel the slightest doubt, after reflecting upon the testimony of the witness, that these two old people, Dr. C. P. Woodruff and his wife, Mrs. Eliza J. A. Woodruff, thought that they had provided for all their property to go, after the death of the survivor of them, to Mr. Chamblin and his wife. Dr. Montgomery is very clear in his testimony on this point. He seems to have been chosen by Dr. Wood-

ruff and his wife to convey their wishes to Mr. Chamblin and wife, and to ask their acceptance of the terms. In our state it is distinctly recognized that such an agreement is enforceable. In the case there appear but two contradictions: One, the testimony of Mrs. Rogers, who says that at the body of Dr. C. P. Woodruff, just after his death, when, no doubt, Mrs. Chamblin was giving expression to her grief at his death, and enlarging upon his kindness to her and hers, testifies that Mrs. Chamblin told her "Uncle Pink [Dr. Woodruff] had given them everything, except \$1,500 they had to pay for the place after Aunt Eliza [Mrs. Eliza J. A. Woodruff] was dead, but I don't know who it was to be paid to." Mrs. Chamblin, in her testimony, when questioned as to the testimony of Mrs. Rogers, said: "I don't remember. I guess I did, or she would not have said so; but I have no recollection of it." The other contradiction is one in law, namely, the execution of a paper signed by Dr. Charles P. Woodruff and A. D. Chamblin, on the 14th October, 1872, which was after the date on which Dr. Montgomery had conveyed to Mr. and Mrs. Chamblin the proposition of Dr. and Mrs. C. P. Woodruff, and after their acceptance of said proposition by removing to and accepting the residence of Dr. Woodruff. This deed, after the formal parts, wherein 100 acres of land is conveyed by Dr. C. P. Woodruff to A. D. Chamblin in fee simple, has this remarkable stipulation: "It is, however, to be taken and understood as a part of this indention, and as limiting and controlling the grant hereby made, that the said C. P. Woodruff hereby retains and reserves the use, occupation, rents, issues, and profits of said premises upon the following terms, to wit: The said Anderson D. Chamblin is to move with his family into the house upon the said premises now occupied by said C. P. Woodruff, the said C. P. Woodruff retaining for his use and for the use of his wife, E. J. A. Woodruff, during their joint lives, and the survivor during his or her life, two rooms, of his choice, the said Anderson D. Chamblin and family occupying the other rooms in said house. The said A. D. Chamblin is to take charge of and cultivate the plantation, and manage the same as he thinks best, relieving the said C. P. Woodruff of all care of the same. *He is to look after the interest of the said C. P. Woodruff, and provide for the wants and necessities of himself and wife, E. J. A. Woodruff, during the lives or life of both or either of them, so far as he may be able.*" (Italics ours.) "To keep the place in good condition by making all the necessary repairs to the fences and buildings. And, furthermore, the said Anderson D. Chamblin agrees and binds himself to cultivate, or cause to be cultivated, the plantation on said premises during the life or lives of the said C. P. Woodruff and E. J. A. Woodruff, and to pay to him annually during his life, or to his wife, should she survive him,

during her life, the customary rent of the country, and in consideration thereof the said Anderson D. Chamblin is not to pay any interest on the purchase money of the same. A. D. Chamblin has three years to pay this after C. P. Woodruff and E. J. A. Woodruff's death." The obligation executed by Anderson D. Chamblin for the purchase price (\$1,500) of this land was in this form: "\$1,500. One day after date I promise to pay C. P. Woodruff or bearer fifteen hundred dollars, for value received. This obligation not to be paid until three years after the death of said C. P. Woodruff and wife, E. J. A. Woodruff. Interest to be paid annually by the rent of the place where I now live." In view of the existence of these two writings, the circuit judge held that the probate judge had erred in admitting parol testimony as to the contract between the parties. The circuit judge based such decision upon the well-recognized rule that a writing signed by the parties merges into such writing all parol agreements which precede it, relating to the same subject matter. Our first judgment held this view of the circuit judge to be correct, and that as the result thereof the judgment of the probate court must be reversed. Very reluctantly we must adhere to our views there expressed on this branch of the case. Nor can we find anything in the testimony going to show that Mrs. Eliza J. A. Woodruff, after the death of her husband, did any more than to mistake—unwittingly, of course—this effect of the previous writing signed by her husband and A. D. Chamblin. If it had been made to appear in the testimony that Mrs. Woodruff had made with these parties a distinct agreement of her own touching the care and attention she was to receive from A. D. Chamblin and wife after the death of her husband, one difficulty might have been removed. But, as it is, we can only see that she was carrying out and recognizing her husband's contract with these parties. It is the judgment of this court that the judgment of the circuit court must be modified by allowing the judgment of the probate court to control, in denying any share of the estate of Eliza J. A. Woodruff, deceased, to any of the defendants, except A. D. Chamblin and his wife, and vesting thereunder in the said A. D. Chamblin and his wife all the share in the estate of Eliza J. A. Woodruff which belonged to A. B. Woodruff and his codefendants named in the caption of this opinion, and that after this modification is made the said circuit court judgment be affirmed.

(44 S. C. 95)

CUNNINGHAM et al. v. CAUTHEN et al.  
(two cases).

(Supreme Court of South Carolina. April 15,  
1895.)

ACCOUNTING BY ADMINISTRATOR—REMAND ON  
APPEAL—DUTIES OF REFEREE.

1. An administrator who took gold notes for cotton belonging to his intestate's estate, when

gold was at a premium, will not be chargeable with such premiums merely because, at the time of accounting, currency has become convertible at par into specie, unless it be shown that he actually collected the premiums.

2. Where an action for an accounting was remanded for the purpose of having the account restated in accordance with the decision of the supreme court, and the referee made a finding which, under such decision, was irrelevant, the circuit court did not error in refusing to enforce it.

3. When the testimony has been reported by a referee, to whom the cause is remanded for the purpose of correcting some of his former conclusions, additional testimony is inadmissible.

4. Where an administrator has been charged with interest on funds in his hands up to the time of accounting, interest should be charged the distributees, on amounts previously advanced to them, from the several times of payment.

5. The concurrent findings of the circuit judge and referee will not be disturbed on appeal, where there is testimony to support them.

6. The decree of the chancellor as to payment of costs will not be reviewed on appeal, unless manifest error is shown.

Appeal from circuit court, Lancaster county; Ernest Gary, Judge.

Action for an accounting by W. J. Cunningham and others against Lewis J. Cauthen, as administrator of A. J. Kibler, deceased. From a decree confirming the referee's report, both parties appeal. Modified.

Following are the exceptions to the circuit decree:

"(1) For that the circuit court therein erred in concluding that the estate of the defendant's intestate is not chargeable in the accounting herein, under the decree of the supreme court herein, with the premium collected by the said Andrew J. Kibler on the notes taken by him for the cotton originally belonging to the estate of Joseph A. Cunningham, deceased.

"(2) For that the circuit court, having confirmed the finding by the referee that the defendant's intestate collected on the said cotton notes premiums on gold amounting in the aggregate to the sum of \$2,063.71, erred in concluding that the estate of the said Andrew J. Kibler, under the decree of the supreme court, was not chargeable with the premium so collected.

"(3) For that the circuit court, having confirmed the finding by the referee that the defendant's intestate collected on the said cotton notes premiums on gold amounting in the aggregate to the sum of \$2,063.71, erred in failing to conclude that such collection of the premium on the cotton notes was in effect a conversion of the gold of the estate into currency, and erred in failing to conclude that, under the decree of the supreme court herein, the estate of the said Andrew J. Kibler is liable to account to the plaintiffs for the premiums so collected.

"(4) For that the circuit court, having confirmed the finding by the referee that the cotton bid off at the sale of the personality of the Cunningham estate, by the said A. J. Kibler was worth 39 $\frac{1}{2}$  cents in currency, erred in failing to conclude that, under

the decree of the supreme court herein, the estate of the said Andrew J. Kibler is chargeable therewith at the said currency value, in the face of the holding by the supreme court herein that 'the administrator, having bid off the cotton at the estate sale, became liable to the estate for the actual value thereof.'

"(5) For that the circuit court therein erred in concluding that there was no error by the referee in excluding further testimony offered by the plaintiffs as to the receipt by the said Andrew J. Kibler of the premium on gold upon sales of property, and upon sale notes belonging to the estate of his said intestate.

"(6) For that the said circuit court erred in concluding that, under the decree of the supreme court herein, no error was committed by the referee in so stating the accounts between the defendant's intestate and the several distributees of the estate of Joseph A. Cunningham as to charge each of said distributees with interest on the several amounts paid to or for the said several distributees by the said Andrew J. Kibler.

"(7) For that the said circuit court erred in concluding that, under the decree of the supreme court herein, no error was committed by the referee in so stating the accounts between the defendant's intestate and the several distributees of the estate of Joseph A. Cunningham as to charge each of said distributees with interest on the several amounts paid to or for the said several distributees, there being at the time of such payments surplus interest belonging to the estate of the said Joseph A. Cunningham in the hands of the said Andrew J. Kibler, upon which surplus interest no interest is charged against him in the accounting.

"(8) For that the circuit court erred in concluding that, in stating the accounts between the several distributees and the estate of the defendant's intestate under the decree of the supreme court herein, interest was properly chargeable against each distributee upon advances made out of idle interest moneys in the hands of said defendant's intestate, as administrator; said conclusion being contrary to the principles announced by the decree of the supreme court herein, that interest could only be charged on such advances so far as the same should be necessary to reimburse the administrator for such interest as had been charged him on the advances.'

"(9) For that the circuit court erred in concluding that, under the decree of the supreme court herein, no error was committed by the referee in charging the several distributees with interest upon payments made by the administrator of Joseph A. Cunningham to such distributees, while interest moneys belonging to said estate were at the same time lying idle in the hands of the said administrator.

"(10) For that the circuit court erred in

concluding that, under the decree of the supreme court herein, no error was committed by the referee in stating the accounts between the said Andrew J. Kibler, administrator, and William J. Cunningham, a distributee, in charging interest up to June 1, 1893, on payments made by the said Andrew J. Kibler to and for the said William J. Cunningham, as below stated, there being at the several dates below named surplus interest in the hands of the said administrator larger in amount than the payments below stated, and upon which no interest is charged against the said administrator; that is to say, in charging interest on \$21.40 from January 1, 1869; on \$588.99 from January 1, 1870; on \$410.25 from January 1, 1871; on \$2.40 from January 1, 1872; on \$306.86 from January 1, 1877; on \$1,081.44 from January 1, 1880; on \$100 from January 1, 1881, and on \$150 from January 1, 1882.

"(11) For that the circuit court erred in concluding that, under the decree of the supreme court herein, no error was committed by the referee, in stating the accounts between the said Andrew J. Kibler, administrator, and Mary C. Dunlap, a distributee, in charging interest up to June 1, 1893, on payments made by the said Andrew J. Kibler to and for the said Mary C. Dunlap, as below stated, there being at the several dates below named surplus interest in the hands of the said administrator larger in amount than the payments below stated, and upon which no interest is charged against the said administrator; that is to say, in charging interest on \$305.08 from January 1, 1867; on \$71 from January 1, 1868; on \$1,803.50 from January 1, 1869; and on \$150 from January 1, 1882.

"(12) For that the circuit court erred in concluding that, under the decree of the supreme court herein, no error was committed by the referee in stating the accounts between the said Andrew J. Kibler, administrator, and Thornwell K. Cunningham, a distributee, in charging interests up to June 1, 1893, on payments made by the said Andrew J. Kibler to and for the said Thornwell K. Cunningham, as below stated, there being at the several dates below named surplus interest in the hands of the said administrator greater in amount than the payments below stated, and upon which no interest is charged against the said administrator; that is to say, in charging interest on \$27.50 from January 1, 1868; on \$12.75 from January 1, 1869; on \$259.74 from January 1, 1870; on \$98.57 from January 1, 1871; on \$68.47 from January 1, 1872; on \$114.95 from January 1, 1873; on \$59.15 from January 1, 1874; on \$6.50 from January 1, 1875; on \$1,120.53 from January 1, 1880; on \$107.45 from January 1, 1881; and on \$200 from January 1, 1882.

"(13) For that the circuit court erred in concluding that, under the decree of the supreme court herein, no error was committed by the

referee in stating the accounts between the said Andrew J. Kibler, administrator, and Nannie C. Vanlandingham, a distributee, in charging interest up to June 1, 1893, on payments made by the said Andrew J. Kibler to and for the said Nannie C. Vanlandingham, as below stated, there being at the several dates below named surplus interest in the hands of the said administrator greater in amount than the payments below stated, and upon which no interest is charged against the said administrator; that is to say, in charging interest on \$5.40 from January 1, 1869; on \$173.32 from January 1, 1870; on \$191.84 from January 1, 1871; on \$112.25 from January 1, 1872; on \$151.33 from January 1, 1873; on \$295.31 from January 1, 1874; on \$513.08 from January 1, 1875; on \$423 from January 1, 1878; on \$1,107.35 from January 1, 1880; on \$100.00 from January 1, 1881; and on \$150 from January 1, 1882.

"(14) For that the circuit court erred in concluding that, under the decree of the supreme court herein, no error was committed by the referee in stating the accounts between the said Andrew J. Kibler, administrator, and Beauregard Cunningham, a distributee, in charging interest up to June 1, 1893, on payments made by the said Andrew J. Kibler to and for the said Beauregard Cunningham, as below stated, there being at the several dates below named surplus interest in the hands of the administrator greater in amount than the payments below stated, and upon which no interest is charged against the said administrator; that is to say, in charging interest on \$7 from January 1, 1869; on \$127.07 from January 1, 1870; on \$178.82 from January 1, 1871; on \$62.36 from January 1, 1872; on \$72.08 from January 1, 1873; on \$25.72 from January 1, 1874; on \$113.66 from January 1, 1875; on \$25.20 from January 1, 1876; on \$206.03 from January 1, 1877; on \$441.80 from January 1, 1878; on \$500 from January 1, 1880; on \$370 from January 1, 1881; and on \$740 from January 1, 1882.

"(15) For that the circuit court erred in allowing the charges of interest on the items of payments or advances against the said several distributees, mentioned in the above exceptions numbered 11 to 14 inclusive, when said payments were made out of idle interest in the hands of the said administrator, in disregard of the conclusion by the supreme court herein that such interest could only be charged upon advances made to the several distributees so far as to reimburse the administrator for so much interest as had been charged to him on the advances.

"(16) For that the circuit court erred, in any view, in allowing interest to be charged upon the said advances mentioned in the above exceptions numbered 11 to 14 inclusive, when said advances were made out of idle interest in the hands of the said administrator, up to June 1, 1893, instead of up to August 1, 1890, the date of the former report and the date thereby fixed for striking a balance.

"(17) For that the circuit court erred in concluding that there was a balance due by the estate of Nannie C. Vanlandingham, deceased, to the estate of Andrew J. Kibler, deceased.

"(18) For that the circuit court erred in failing to conclude that there was a balance still due upon the accounting by the estate of Andrew J. Kibler, deceased, to the plaintiff William J. Cunningham, as administrator of the said Nannie C. Vanlandingham.

"(19) For that the circuit court erred in concluding that there was no error by the referee in charging interest against the estate of Nannie C. Vanlandingham after payment in full to her or her personal representative (if payment in full was ever so made), especially as between her estate and Kibler, administrator.

"Ernest Moore,

"M. J. Hough,

"Attorneys for Plaintiffs (Appellants).

"And the plaintiffs (appellants) will move the said supreme court, at the hearing of this appeal, to reverse the said decree of the circuit court in the particulars complained of in the above exceptions.

"Ernest Moore,

"M. J. Hough,

"Attorneys for Plaintiffs (Appellants).

"The defendant gave timely notice of appeal from the said decree of Judge Gary to the supreme court of the state; and now proposes the foregoing as the case for the hearing of the appeal to reverse or modify the circuit decree on the following grounds or exceptions:

"(1) Because, it is respectfully submitted, the circuit judge erred in sustaining the first finding of fact by the referee, to wit, 'that the premium on gold was collected by Kibler, the defendant's intestate, upon the estate sale, and the sale notes, including the cotton, except in the cases stated in his said finding.

"(2) Because the circuit judge erred also in sustaining finding of fact by the referee 'that the collection of the premium, except in the cases (stated by him), seems to have been admitted by the defendant's intestate, the said A. J. Kibler, upon his examination.'

"(3) Because the circuit judge erred in sustaining the finding of the said referee that the finding of fact above referred to is corroborated by the testimony of other witnesses.

"(4) Because there is no testimony whatever to sustain the finding of the referee on the point above referred to. The follos of the testimony referred to by him do not sustain his finding, and the circuit judge has erred in sustaining these findings referred to in the foregoing exceptions.

"(5) Because the circuit judge has erred in sustaining the findings of fact by the referee, when he attempts to stir matters that have already been adjudicated by the supreme court. His findings upon the cotton and the cotton notes are res adjudicata, and it was error to bring these cotton notes or any part of them again into the report; and the circuit judge should have sustained the exceptions to the referee's report as to these cotton notes.

"(6) Because the circuit judge erred in sustaining the finding of the referee 'that the aggregate amount collected in coin, or upon which no premium was collected, was \$2,152.78.' There is no evidence whatever to show a premium collected of more than \$137.78.

"(7) Because he erred in sustaining the finding of the referee that the said A. J. Kibler collected a premium of \$2,910.14 on \$7,275.37. There is no evidence to support such finding. And besides, these figures '\$7,275.37' refer to the cotton notes, which are res adjudicata.

"(8) Because he erred in sustaining the findings of the referee, without evidence, that the said A. J. Kibler collected a premium of 40 per cent. on more than \$314.35.

"(9) Because he has erred in sustaining the referee in going outside of the matters left open by the supreme court decree, and bringing in matters that were finally adjudicated thereby; for instance, he reports a premium collected on all the cotton notes and the price of the cotton in currency, when these cotton notes have been adjudged to belong to the said A. J. Kibler in his own right.

"(10) Because he has erred, in his decree, in confirming the charge of a 40 per cent. premium en bloc on \$2,116.09, when there is no evidence as to the time when collected, or as to the notes or items upon which this alleged premium was collected, contrary to the decree of the supreme court. He has manifestly overlooked the main point left open in the decree, where the court held 'that Kibler was not chargeable with the whole premium en bloc, but with a premium only on gold, or gold notes due the estate, which, it can be shown, he actually received.

"(11) Because the referee has erred in charging without evidence a premium of \$846.33 on other notes than the cotton notes, and the circuit judge erred in his decree in sustaining and confirming this charge, without evidence to sustain the same.

"(12) Because, on the second page of the general account (manuscript), the referee has erred in adding up the column of disbursements made in the year 1866. He has made the aggregate \$702.33, whereas it should be \$712.36; and the circuit judge has erred in not correcting this mistake.

"(13) Because in stating the accounts between A. J. Kibler, the administrator of Joseph A. Cunningham, deceased, and the distributees, the referee has failed to conform to the principle laid down in the decree of the supreme court, in that he has failed to charge each distributee with interest on each sum paid out or advanced to the distributees, respectively, from the date of such payment or advancement. The referee has charged interest only from the 1st day of January next following each payment, and the circuit judge erred in confirming the report of the referee in this particular.

"(14) Because, under all the facts and circumstances of this long litigation, the circuit

judge erred in requiring the costs of the case to be paid out of the estate of Andrew J. Kibler, deceased.

R. E. & R. B. Allison,  
"Attorneys for Defendant (Appellant)."

M. J. Hough and Ernest Moore, for appellants. R. E. & R. B. Allison and R. W. Shand, for respondents.

POPE, J. A former appeal, which is reported in 37 S. C. 123, 15 S. E. 917, having necessitated a restatement of accounts of A. J. Kibler, as administrator of the estate of Joseph A. Cunningham, deceased, the action was remitted to the circuit court for that purpose. When the circuit court took action thereon, it was to pass an order on the 10th of October, 1892, referring it to D. A. Williams, Esq., as referee, "to state the accounts of A. J. Kibler as administrator of Joseph A. Cunningham, deceased, in conformity to the instructions contained in the decree of the supreme court herein, and according to the principles therein enunciated, and to do all other acts and things therein required." On the 1st day of June, 1893, this referee made his report, wherein he reported that on the 1st day of June, 1893, the said A. J. Kibler was indebted to his intestate's estate in the sum of \$35,670.93, which was divisible in equal portions between the five plaintiffs, so that the share of each therein was \$7,134.18  $\frac{2}{5}$ . But he also found that said administrator had paid to each of the plaintiffs large sums of money on account, so that on the 1st of June he owed the plaintiff William J. Cunningham \$860.23  $\frac{2}{5}$ ; to the plaintiff Thornwell K. Cunningham, \$2,512.30  $\frac{2}{5}$ ; to the plaintiff Bearegard Cunningham, \$1,003.93  $\frac{2}{5}$ ; to the plaintiff R. T. Dunlap, \$321.17  $\frac{4}{5}$ ; and to the plaintiff J. A. Dunlap, \$321.17  $\frac{4}{5}$ . It may be well to state that the two last are the distributees of the deceased, Mrs. Mary C. Dunlap, née Cunningham, but that the plaintiff Mrs. Nannie C. Vanlandingham had overdrawn her share by the amount of \$108.85%. To this report of the referee both sides freely excepted, the plaintiffs exhibiting 18 exceptions, and the defendant presenting 15 exceptions. The cause was heard before his honor, Judge Ernest Gary, at the spring, 1894, term of the court of common pleas for Lancaster county, in this state, and on the 6th day of May, 1894, he filed the following decree: "The facts of this case will be found in 37 S. C., at pages 123-145, 15 S. E. 917. The supreme court recommitted the cause to the circuit court for the purpose of having the account restated in accordance with the decision of the supreme court. The referee has recast the account, and filed his report in the cause. Plaintiffs and defendant have both filed numerous exceptions to the report, and the cause was heard by me upon the exceptions and argument of counsel engaged in the cause. From a careful reading of the decree of the supreme court,

there are very few matters left open for adjudication. It appears to me the referee was only directed to recast his original report in the following particulars: (1) By correcting his former report as to commissions. This he has done. (2) By omitting to charge a premium on the specie on hand at the death of the intestate. This correction has been made. (3) By giving the administrator credit for the items on page 123 of the case. This has been done. (4) By allowing credit for certain items of board. This has been done. It therefore appearing that the referee has followed the directions of the supreme court in restating his accounts, it is ordered that the report be confirmed, and the exceptions thereto overruled. The supreme court in its decree reversed the decree of the circuit court as to the costs of the case without prejudice, as the cause would have to be sent back. In a case like this, costs are largely in the discretion of the presiding judge. After considering the facts, I agree with Judge Witherspoon that the costs of this action should be paid out of the estate of Andrew J. Kibler, and I so decree."

From this decree the parties plaintiff and defendant appeal, and these grounds of appeal will be reported.

We will try to bestow the proper care in disposing of these sets of exceptions. It is always well to remember that it is a matter of no little difficulty to divest the mind of previous impressions, and we apprehend that no little of the trouble with the counsel of this case has arisen in this way.

Let us first examine the grounds of appeal presented by plaintiffs. The first exception imputes error to the circuit judge in his conclusion that, under the decisions of the court, the defendant's intestate is not chargeable with the premium collected by the administrator on notes taken by him for cotton originally belonging to the estate of Cunningham, deceased. The amount involved in this exception is considerable, and we have considered it carefully. A. J. Kibler, in his first return as administrator, charged himself with \$9,428.15 as the amount of the sale bill for property, including cotton, sold off his intestate's estate in January, 1866. This administrator contributed very largely to create the confusion in regard to this first return by loose references to the cotton on said sale bill at 28 cents a pound in gold coin, as still belonging to the estate of his intestate. But by the previous decision of this court we decided that the administrator having charged himself with this cotton at 28 cents in gold coin on the sale bill, and this being established as its actual value, "the plaintiffs are not entitled both to the value of the cotton and the securities taken for it, or any part of it, at the second sale made by the first purchaser"; and, further, it not being shown that the administrator had even changed his relation to the estate of his intestate for the value of this cotton



as of gold, for the new relation as of currency, there was no principle of law whereby, when one is convertible for the other, at par, this administrator should be required to add any per cent., 40 or any other, in his accounts for such cotton. Let our position be understood. We mean that if this administrator had charged himself with this cotton at 39 cents in current bills or money, and had not converted this into gold coin, we would have held him to this 39 cents per pound, notwithstanding at this time such currency would have been equal to gold. This exception is overruled.

2. So far as the second exception is concerned, it is intended thereby to suggest the difficulty that when a referee makes a finding of fact, not only irrelevant to the controversy, but which the supreme court has so decided to be irrelevant, and which decision of the supreme court is obeyed by said referee in making up the accounting, the circuit judge is in error in not enforcing such error by his decree, notwithstanding the decision of the supreme court. We think the circuit judge was entirely correct, even if his attention had been called to this matter, for he was bound to enforce the judgment of this court. *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, and 16 S. E. 770. Judgments are not based on irrelevant testimony.

3. We do not feel at liberty to canvass the suggestion of error herein embodied, for if our former decision fixed the charge of the cotton at 28 cents in gold as a proper charge against the administrator, and also decided that it made no difference as to whom and for what the cotton was afterwards sold by its purchaser, we are not concerned with such matters. The court has already canvassed these matters over, and our decision thereon rendered. It is enough to state that fact as the basis for now overruling this exception.

4. The fourth exception is disposed of under what is said in passing upon the second and third exceptions.

5. This next exception is not altogether free from difficulty. By our previous decision, the cause was remanded to the circuit court, in order that, if it could be shown that A. J. Kibler, as administrator, actually received the premium on gold or gold notes due the estate, such referee might alter his accounts as affected thereby. When the plaintiffs applied to the referee to be allowed to introduce new and additional testimony, the referee declined to hear it, and now this refusal is assailed as erroneous. In cases where new trials are ordered, of course such trials are de novo. But in a cause in equity, when the testimony on all the issues has been fully taken and reported to the court by the very referee to whom the duty is confided of correcting a few among the many of his former conclusions, it does not seem that additional testimony could be admitted without the usual incidents to new testimony, namely, first questions, etc.

We might have been more explicit in our former judgment, but, as it is, we think the referee correctly construed our decision. We did not mean thereby to open afresh all these matters. This exception must therefore be overruled.

6. Error is imputed in this exception to the circuit judge in holding that, under the first decision of this case, the supreme court determined that, in making the accounts of the administrator with the several plaintiffs as distributees of the estate of his intestate, interest was to be allowed the administrator on all the payments made to or in behalf of such distributees. The circuit judge correctly construed our decision. The language of this court, at the top of page 141, 37 S. C., and page 917, 15 S. E., is: "The children advanced, however, being required on final settlement to account for interest on their respective advances from the time they were received, and thus reimburse the administrator for so much interest as had been charged to him on the advances."

7. This exception partakes somewhat of the character of the sixth, and might be said to have been disposed of by the language used by us under No. 6, but for the intimation that, at the time of such interest being charged against the distributees in favor of the administrator, the latter had a surplus of interest upon which no interest was paid. We think the very theory of the law on this subject is outlined in the remarks of Mr. Justice McGowan in our former decision in this case, when he said: "The amounts paid to the distributees, from time to time, were not, as we think, 'expenditures,' in the sense of *Dixon v. Hunter*, 3 Hill (S. C.) 206. They did not, in reality, diminish the volume of the estate in the hands of the administrator, the whole value of which it was necessary to ascertain, to make a fair division among those equally interested. The payments were rather in the nature of advances or loans, still parts of the whole estate, and to be accounted for as such," etc. (the latter part has already been quoted). There was no error here.

8. It is true that this court in rendering its former opinion did use the language quoted in the eighth exception but it was not intended by us to couple the accounting by the administrator so as to depend upon advances made to the distributees or vice versa. The fact is, nothing should be said or done in judgments of courts by which any idea of delay in the settlements of estates by administrators beyond the limits fixed by law should be encouraged. Both administrators and distributees, respectively, should have no reason for delay,—we mean unnecessary delay. In this case, no guardians were appointed for the infant children of the intestate, and they were motherless. Hence the administrator did make advances from time to time to every one of them. They had to live, be clothed, and educated. All these the administrator provided for from the estate of their father;

and, of course, each child must account for the moneys advanced to him or her, just as they would if the administrator held notes given by a child to the intestate. In the latter case the administrator has the right to pay off such child pro tanto with its own paper. This is all that was meant by this court in the language used by it; and therefore the circuit judge was not in error, as is here complained.

9. Our answer to the ninth exception is furnished by what we have said touching the eighth exception.

10. The exceptions 10, 11, 12, 13, 14, 15, 16, and 17, being merely used to point out the individual instances of the application of the rule set out in our consideration of exception 8, are fully answered by what we have held on that subject, and are therefore overruled.

We will next consider the allegations of error embodied in the exceptions preferred by the defendant:

1. The first exception will be seen to have no practical effect, when it is stated that, although the referee did make the finding of fact therein complained of, yet, when he came to apply the law of the case as fixed by our former decision, the referee was careful to follow the latter and discard the former.

2. The second exception is overruled, for there was testimony to sustain it. Under our rule, when there is testimony to support the concurrent findings of fact of the circuit and referee, this court will rarely disturb such finding.

3. And so, too, as to the third exception. We find testimony to support such concurrent finding of the circuit judge and referee, and we will not, under the rule, disturb it.

4. We cannot agree with the defendant in his fourth exception. It seems to us that the testimony was stated by the circuit judge and referee correctly.

5. We do not understand that the circuit judge and referee interfered practically with the conclusions of this court in its former decision.

6. We cannot agree with the defendant in his sixth, seventh, eighth, and ninth exceptions.

7. In the tenth exception the defendant seeks to impugn the charge of 40 per cent. premium on \$2,116.09. There was testimony in the case on this subject, and, if there was such testimony, this conclusion is not at variance with our former decision.

8. Nor can we sustain the eleventh exception, for there was testimony upon which such conclusion, as therein assailed, might have been based.

9. The error of \$10.03 pointed out in the twelfth exception is easily corrected.

10. It is urged by the defendant in his thirteenth exception that the circuit judge has not enforced the former judgment of this court when it directed that interest be allowed the administrator upon the sums advanced

by him to the respective distributees of the estate of the intestate, Cunningham, from the time the same were paid. The former judgment of this court, in its use of the words, "from the date of such payment or advancement," designed that the yearly allowance of interest on such payments or advancements took place so as to correspond with the yearly balance upon which interest was charged against the administrator. We are satisfied that such an arrangement is all that is required in this case, and we therefore overrule this exception.

11. Lastly, we will consider the fourteenth exception, wherein it is insisted that the circuit judge was in error in adjudging that the estate of A. J. Kibler, deceased, should pay all the costs of this action. It is usual to uphold the chancellor in his decision as to the payments of costs, except some error is clearly pointed out. *McCrary v. Jones*, 36 S. C. 136, 15 S. E. 430. Here there is no error pointed out. But, apart from this time-honored practice in this matter of decreeing what party is liable for costs, if we refer to the pleadings in this case when the plaintiffs demanded an account of A. J. Kibler, as administrator of their father's estate, we find that, in his answer, he denied that he owed them anything, and, on the contrary, averred that he had paid them more than they were entitled to receive; yet, now that the litigation is about ended, we find that these distributees are entitled to a judgment against such administrator for several thousand dollars. If the losing party is to pay costs, then it should be the estate of the said A. J. Kibler, deceased. We cannot, therefore, sanction this ground of appeal.

It is the judgment of this court that the judgment of the circuit court be affirmed, on the condition that the plaintiffs, who are entitled to judgment, will first reduce their claims in 20 days hereafter by giving a credit to the estate of A. J. Kibler, deceased, for the sum of \$28.58 on the 1st day of June, 1893. But, in the event the plaintiffs fail to give this credit of \$28.58, then the judgment of the circuit court shall be modified by requiring the plaintiffs to give to the estate of the said A. J. Kibler, deceased, the said credit of \$28.58 on the 1st day of June, 1893; and for that purpose the cause is remanded to the circuit court.

(44 S. C. 556)

#### STATE v. JOHNSON.

(Supreme Court of South Carolina. April 24, 1895.)

#### CRIMINAL LAW—ESCAPE OF APPELLANT—DISMISSAL OF APPEAL.

Where a convicted murderer has, pending an appeal to the supreme court, escaped from its jurisdiction, the appeal will be dismissed, upon motion of the solicitor, but without prejudice to the fugitive's right to move to have his appeal reinstated, providing such motion be made at the first ensuing term after the court has reacquired jurisdiction.

Appeal from general sessions circuit court of Edgefield county; W. C. Benet, Judge.

Tom Johnson was convicted of murder, and appealed to the supreme court. After the appeal he escaped from jail, and the case was continued. This is a motion by the solicitor to have the appeal dismissed. Motion granted without prejudice.

I. Wm. Thurmond and Croft & Tillman, for the prisoner. P. H. Nelson, for the State.

McIVER, C. J. In this case the solicitor moves to dismiss the appeal upon the ground that the appellant has, since this appeal was perfected, escaped from the jail of Edgefield county, and thus placed himself beyond the jurisdiction of this court, and this statement is verified by affidavit. It is well settled that this court will not hear an appeal where the appellant has voluntarily put himself beyond the jurisdiction of the court. *State v. Murrell*, 33 S. C. 83, 11 S. E. 682, and the cases there cited. Hence, when this case was called, and the fact made apparent to the court that the appellant had escaped from custody of the law, the case was marked "Continued," as it could not now be heard, under the well-settled rule; but, in ordering the continuance, the court distinctly announced that such order would not affect the right of the solicitor to make this motion to dismiss the appeal, which the court has determined to grant. But as the issue involved is of the gravest character, involving the life of the appellant, the court is unwilling to entirely preclude the appellant from having his appeal heard, if hereafter the court should acquire such jurisdiction of the person of the appellant as would enable the court to render an effective judgment. It is therefore ordered that the continuance of this case, heretofore ordered, be opened, and the appeal be dismissed, without prejudice, however, to the appellant's right to move to have his appeal reinstated, if he hereafter shall place himself, or be brought, within the jurisdiction of the court: provided, such motion be submitted to this court at the first ensuing term of this court after jurisdiction has been reacquired by this court.

(44 S. C. 325)

#### STATE v. RHODES.

(Supreme Court of South Carolina. May 6, 1895.)

#### CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

A motion to suspend an appeal in a criminal case, so that the defendant may move for a new trial on the ground of newly-discovered evidence, will not be granted when the motion is based upon affidavits that since the trial a statement was made by the principal witness for the state, an ignorant girl of 17, bound to defendant, that her testimony at the trial was false, and improper means were used to induce her to so testify.

Appeal from general sessions circuit court of Anderson county; O. W. Buchanan, Judge.

Jasper N. Rhodes was convicted of arson, and appealed to the supreme court. This is a motion to suspend the appeal so that he may move the circuit court for a new trial on the ground of newly-discovered evidence. Motion denied.

B. L. Bonham and G. E. Prince, for appellant. C. P. Townsend, Asst. Atty. Gen., for the State.

McIVER, C. J. This is a motion to suspend the appeal now pending in the court, in order to enable the appellant to move before the circuit court to grant him a new trial upon the ground of after-discovered evidence. The principles which govern this court in disposing of this motion have been so often stated in recent cases that it surely cannot be necessary to repeat them here. It is sufficient to now say that a careful examination of the affidavits submitted in support of the motion fails to disclose any ground which would justify this court in granting the motion. We, however, avail ourselves of this opportunity to say that the universally recognized doctrine is that applications of this kind should be scrutinized with great caution, in order to avoid delays, and prevent any obstructions to the administration of justice. As was said by the late Chief Justice Simpson in the case of *State v. David*, 14 S. C., at page 432, "There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up, and also because it tends to perjury; and as was said in the case of *State v. Harding*, 2 Bay, 268, it would have a mischievous tendency, after all the evidence on the part of the state had been fully disclosed, to allow one, with his life in danger, an opportunity, by the assistance of confederates, to procure unprincipled witnesses to contradict the evidence on the part of the state, and thereby defeat the ends of justice." Now, in this case the motion is based upon the allegation, supported by affidavits, that since the trial a statement has been obtained from an ignorant colored girl, about the age of 17 years, who had been bound by her mother to the appellant, and who was the witness principally relied upon by the state at the trial, to the effect that her testimony on the trial was false, and that improper means had been used to induce her so to testify. When it is remembered how easy it would be, in many cases, by working upon the fears, or exciting the hopes, of persons of the class to which this witness belongs, to obtain such promises of new testimony as is relied upon in this case, it must be obvious to every person of experience and observation that it would be dangerous to the administration of justice to allow such a showing as is here made to operate as a sufficient ground for granting a new trial, as it would tend to encourage efforts to tamper with witnesses,

and thus open the door to perjury. Of course, we must not be understood as even intimating that any of the counsel in the case had anything whatever to do with obtaining the statement above referred to, as there is not the slightest evidence to that effect; and, besides, the well-known character of the counsel would be amply sufficient to repel any suspicion, even, that they had acted improperly in the matter. It is ordered that the motion to suspend the appeal for the purpose of enabling the appellant to move before the circuit court for a new trial upon the ground of after-discovered evidence be refused.

#### BORST v. NELSON et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 18, 1895.)

##### REVIEW ON APPEAL—WEIGHT OF EVIDENCE.

On an issue as to the price at which land was sold at commissioners' sale, the finding of the lower court will not be disturbed, if sustained by the evidence.

Appeal from circuit court, Culpeper county. Lucy J. Borst appeals from a decree against her, and in favor of Lewis P. Nelson. Affirmed.

J. C. Gibson, for appellant. G. D. Gray, for appellee.

HARRISON, J. This is a controversy about the price agreed to be paid for a tract of land bought at a commissioners' sale.

On the 3d day of March, 1891, Lucy J. Borst filed her bill in the circuit court of Culpeper county, making A. McD. Green and George D. Gray, commissioners of the circuit court of Culpeper, and Lewis P. Nelson, parties defendant thereto. She alleges that on the 31st day of October, 1885, she became the purchaser of a tract of land in the county of Culpeper, containing 431 acres, sold on that day by A. McD. Green and George D. Gray, commissioners in the cause of Nelson v. Taylor; that through her husband she bid for said land \$8.50 per acre, and it was knocked down to her at that price; that she was not prepared to make the cash payment, which was one-third of the purchase money, on the day of the sale, and executed her three bonds in equal amounts, at one, two, and three years, for the whole purchase money, and afterwards paid the commissioners \$1,100, to be credited on her first bond, which represented the cash payment. She further alleges that this purchase was reported to the circuit court of Culpeper county in the cause of Nelson v. Taylor, and a decree entered confirming the sale to her; that various sums were afterwards paid at different times to Green, the acting commissioner, on her said bonds; that the property was ad-

vertised for sale for default in the payment of her purchase money; that the commissioners were demanding more as a balance on the land than complainant owed; and praying for an injunction to restrain the commissioners from selling, and for an account to ascertain the true amount due on said land. The injunction was granted, and the cause referred to a master. The defendant A. McD. Green, who had been the active commissioner, making the sale, filed his answer, stating that the land was sold as 432 acres; denies that it was bought by Mrs. Borst at \$8.50 per acre; and states that C. M. Borst, the husband of the plaintiff, had some time before become the purchaser of the property in question, at a judicial sale under a decree in Nelson v. Taylor, and that at the time of Mrs. Borst's purchase it was being resold for default in the payment of the purchase money due from said C. M. Borst; that the understanding and agreement was that the land should be knocked out to the plaintiff, Lucy J. Borst, at \$11.02½ per acre,—a sum sufficient to cover the amount her husband then owed on the land, which was at that time \$4,763.09; that the \$1,100 paid by Mrs. Borst, though not one-third of the purchase money, as required by the decree, was accepted by the commissioner as the cash payment, and three bonds given by the plaintiff for the residue, each for the sum of \$1,221.03, payable in one, two, and three years, with interest from date.

This is a sufficient statement of the allegations of the bill and answer to bring out the point at issue in this case, which is briefly this: Did the appellant agree to pay for the land in question \$8.50 per acre, as charged in her bill, or did she agree to pay \$11.02½ per acre, which was the amount necessary to cover the balance then due on the land from her husband, as stated in the answer of the commissioners? After all the evidence had been taken, the parties waived the incoming of the master's report, and submitted the whole question of law and fact to the court. On the 19th day of September, 1891, the circuit court entered a final decree, holding that the price agreed to be paid for the land was that claimed by the commissioner, and that the balance due was \$3,279.05, as of March, 1891. It is this decree we are now asked to review.

The appellant assigns no error of law in her petition, but insists that, upon the evidence, she was entitled to a decree.

We find, after a very careful consideration of the evidence, that it sustains the view taken of the case by the circuit court. All the record evidence clearly shows that the land was sold for \$4,763.09. There is some conflict in the testimony of the witnesses examined in the case. We deem it unnecessary, however, to review this evidence; for, if the decision of the question at issue depended alone upon the weight to be attached to the testimony of these witnesses, we

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

would be unable to say that the court below had reached an erroneous conclusion.

For the foregoing reasons, we think there is no error in the decree complained of, and it is affirmed.

# CURRIE et al. v. CHOWNING.<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 25, 1895.)

## RES JUDICATA.

A judgment rendered by a court of competent jurisdiction in a former suit between the same parties, and involving the same subject-matter, is conclusive.

Appeal from circuit court, Lancaster county.

Bill by one Currie and others against one Chowning. From a decree for defendant, complainants appeal. Affirmed.

Thos. Ball, for appellants. Howard Hathaway, for appellee.

RIELY, J. E. A. Currie, the father of the appellants, except G. G. Hall, sold and conveyed by deed on November 2, 1853, to John S. Chowning, the father of the appellee, a certain tract of land known as "Water View," and on February 22, 1854, before the grantor had acknowledged or delivered the deed, he and the grantee made and executed an agreement which is as follows: "This agreement between E. A. Currie and John S. Chowning, appended to a deed from said Currie to said Chowning, for the sale of a farm called 'Water View,' in Lancaster county, and to be entered of record in the clerk's office of said county along with said deed, witnesseth: That whereas, the said Chowning has purchased of said Currie the said farm, on which there is not sufficient firewood for the use of said farm, the said Currie agrees to allow said Chowning to get so much firewood as may be needful and sufficient for the use of said farm, and for ordinary purposes of making fires in the buildings properly appertaining to said farm, from his, the said Currie's, lying on the north side of the public road leading to Merry Point, or from his woods on West Point, lying along the west branch of the Corrotoman river; and the said Chowning agrees that he will not allow any tree or trees to be cut that are fit for timber or rails, and that he will not allow the young growth of trees to be injured. In witness whereof the said parties hereunto set their hands this 22d day of February, 1854. E. A. Currie. John S. Chowning." This agreement expresses on its face that it is appended to the deed, and to be entered of record in the clerk's office along with it. The deed was afterwards, on May 15, 1854, acknowledged in open court by E. A. Currie,

and ordered to be recorded. It was thereupon duly recorded, and the agreement along with it. The plaintiffs claimed in their bill that the defendant never purchased or inherited any rights under the said agreement, and prayed that he be enjoined from cutting timber and getting wood from the land referred to therein, and that the agreement be canceled and annulled. In the petition for the appeal it was claimed by their counsel that the agreement was not a part of the deed, and that the certificate of the clerk of the acknowledgment of the deed by E. A. Currie did not include an acknowledgment of the agreement, so that the latter was not legally recorded, and its recordation not notice; and that, as the appellants had bought the land to which the agreement referred at the sale made thereof by the court after the death of E. A. Currie, they took the same unaffected with notice of the agreement. To the bill the defendant filed a plea averring that the same matter sought to be litigated by the plaintiffs in this suit had been litigated in a former suit brought by them and finally determined in his favor by the same court, and vouched the record thereof in support of his plea. He also filed his answer to the bill, in which he relied on the said agreement, and claimed the right under it, as heir of his father, to take as much firewood from the land as was needful for the farm bought by his father of E. A. Currie, and denied the cutting and hauling away of timber or wood for any other purpose.

An inspection of the record of the former suit shows that it was between the same parties; that it was brought for the same purpose, in a court of competent jurisdiction, and involved the same subject-matter; and that at the hearing the bill was dismissed by the court. The bill in the present suit is based upon the very same matter as the bill in the former suit, and is substantially a copy of it, which is also true of the answer. The injunction in the present suit is asked for upon the identical ground set forth in the former. The agreement which was appended to and recorded with the deed was filed as an exhibit with both the bill and the answer, and its validity and effect directly put in issue. It constituted the gravamen of the former suit as well as of the present; and the relief sought in the present suit is precisely the same, and based upon the same ground, as in the former. The decision of the former suit upon the bill and answer made by the dismissal of the bill was necessarily a determination of the very issue presented in the present suit. The bill in the former suit could not have been dismissed by the court without deciding the issue presented by the bill and answer, and determining it adversely to the claim of the plaintiffs. The matter of the present suit was, therefore, clearly *res adjudicata*, and not open to a new contention. 7 Rob. Prac. c. 3, subsec. 6, p. 172; *Freem. Judgm.* §§ 252-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

256; Black, Judgm. § 504; Wells, Res Adj. §§ 6, 252; and Diehl v. Marchant, 87 Va. 447, 12 S. E. 803. The decree appealed from is plainly right, and must be affirmed.

(91 Va. 430)

**FARISH et al. v. WAYMAN et al.**<sup>1</sup>  
(Supreme Court of Appeals of Virginia. April 25, 1895.)

**CONSTRUCTION OF DEVISE — LIFE ESTATE WITH POWER OF SALE—FEE SIMPLE—LACHES.**

1. An estate for life, coupled with the absolute power of alienation, either express or implied, comprehends everything, and the devisee takes the fee.

2. A devise in trust to A. for life, followed by the words, "should the said A. die and leave no child, in that case the property devised as above, or what may remain of the same, I give to N.," vests in A. the absolute estate.

Appeal from circuit court, Fauquier county; James Kelth, Judge.

Bill by one Farish, trustee, and others, against one Wayman, trustee, and others. From a decree in favor of defendant Wayman, plaintiffs appeal. Affirmed.

Rixey & Barbour, for appellants. Eppa Hunton, Jr., for appellee.

**HARRISON, J.** The language of the fourth clause of the will of Joseph B. Redd is as follows:

"I give to my brother William Redd and my brother-in-law James A. Colbert one share of my real estate, to be held by them in trust and for the benefit of my niece Agnes Priscilla Redd, daughter of my brother James A. Redd, during the natural life of said Agnes Priscilla Redd; and, should the said Agnes Priscilla Redd die and leave no child, in that case the property devised above, or what may remain of the same, I give to my sister Nancy J. Massie."

The question to be determined is, did Agnes Priscilla Redd take a fee simple in the trust fund created by the clause quoted, or did she take only a life estate therein?

It cannot be longer doubted that the law is settled by courts and text writers everywhere, of the highest authority, that an estate for life, coupled with the absolute power of alienation, either express or implied, comprehends everything, and the devisee takes the fee. So firmly fixed is this principle of law that it may now be regarded as a canon of property.

In this view of the law, the real question to be determined, in construing the language under consideration, is this: whether or not the devise in trust for the benefit of Agnes Priscilla Redd is coupled with the unrestrained power in her to dispose of the property. In this connection, the language to be interpreted is as follows: "Should the said Agnes Priscilla Redd die and leave no

child, in that case the property devised as above, or what may remain of the same, I give," etc.

This language cannot be reasonably construed otherwise than that the devisee under it has not only the power to use this property, but to consume it, if she will. The gift over at her death of what "may remain of the same" shows that the testator intended, notwithstanding the direction that the property was to be held by the trustees named, during her natural life, that she should have the power to dispose of, consume, or spend it in her lifetime, which she could only do by being invested with the fee simple. What might remain of the same was all that was to go over. The language forcibly implies an unlimited and unqualified power of disposition. The devisee could acquire no greater estate, nor exercise greater power over it. To put any restriction upon her absolute dominion over it would be to say that the whole, or some part of it, should go over to the second taker, when the will expressly says that only "what may remain of the same" shall pass to the second taker.

In 2 Minor, Inst. 969, 970, it is said: "Although a devise be expressly for life of the devisee, yet if the devisee be, by other clauses of the will, permitted to use and dispose of the subject absolutely at his pleasure, or if so much as may remain undisposed of by him at his death (which implies a power of unqualified disposition) be given over at his decease, the devisee is construed, by a necessary implication of the testator's intention, to take a fee simple."

It was said by Judge Green in *Madden v. Madden*, 2 Leigh, 377, in an able review of the cases on the subject, that it was settled law that "whenever there is an interest given, coupled with an absolute power of disposition in respect to all property of every description, real and personal, the first taker would have the absolute property, and that there was no distinction between a case of a gift for life, with a power of disposition added, and a gift to one indefinitely, with a superadded power to dispose by deed or will."

In *May v. Joynes*, 20 Grat. 692, the testator gave his whole estate, real and personal, to his wife, for life, with full power to dispose of it, and use the purchase money for investment, or any purpose that she pleased, with this restriction: that whatever remained at her death should be divided among his children and grandchildren. Though the gift was to the wife expressly for life, it was held that she took a fee simple in the real estate, and an absolute estate in the personalty, and that the gift over was void for repugnancy and uncertainty. See, also, *Shermer v. Shermer*, 1 Wash. (Va.) 266; *Riddick v. Cohoon*, 4 Rand. 547; *Melson v. Cooper*, 4 Leigh, 409; *Brown v. George*, 6 Grat. 424; *Society v. Calvert's Adm'r*, 32

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Grat. 357; Carr v. Effinger, 78 Va. 197; Cole v. Cole, 79 Va. 251; Hall v. Palmer, 87 Va. 354, 12 S. E. 618; Bowen v. Bowen, 87 Va. 438, 12 S. E. 885. The cases cited clearly establish that whenever it is the intention of the testator that the devisee shall have an unrestrained power of disposition over the property devised, whether such intention be expressed or necessarily implied, a limitation over to another is void, because it is inconsistent with, and repugnant to, the estate given to the first devisee, although the will shows that it was the testator's intention, in respect to the property given to the first taker, that "what may remain of the same," or "whatever may remain at his death," or "so much thereof as may be in existence at his death," or "such part as he may not appropriate," or "what may be on hand at his death," should go to another. Such intention must fall on account of its uncertainty, and the first taker acquires the absolute property.

It follows from the foregoing statement of the law that Agnes Priscilla Redd took a fee simple in the estate devised for her benefit, under the fourth clause of the will of her uncle Joseph B. Redd.

It appears that in August, 1870, James A. Colbert, acting trustee, had a settlement with his cestui que trust, then Mrs. Agnes P. Farish,—a widow with a number of children,—as a result of which he conveyed to her a tract of land containing 109 acres, and improvements, in full settlement of her estate derived under the will of Joseph B. Redd, which was about \$1,500. Mrs. Farish took possession, and has lived on the land ever since. James A. Colbert, the trustee, is now dead, and his estate is being settled in this case. Mrs. Farish and her children—all now grown—file a petition, and insist that Colbert's estate must be charged with this \$1,500, and credited by the true value of the land conveyed to her in 1870. Some evidence is taken tending to show that the land was not worth \$1,500, but very much less. If Mrs. Farish had rights which were violated in this transaction, her laches would now preclude the assertion of those rights. A time must come when the transactions of life can be regarded as closed. Mrs. Farish has quietly enjoyed the fruits of her bargain, as a home, for a quarter of a century. She was never heard to utter a word of complaint, until the petition was filed in this case by herself and children, 20 years after the purchase of the land. There is no charge of fraud in the petition. James A. Colbert is unable to speak, and give any explanation of the circumstances which led to the transaction. Mrs. Farish was sui juris,—as capable of contracting as Colbert; and though she were to succeed in showing, as far as it was possible to do after such a lapse of time, that the property was not worth what she gave for it, she could not be permitted now to repudiate a contract

solemnly entered into, and acquiesced in as this has been.

For the foregoing reasons the court is of opinion that there is no error in the decree complained of, and it must be affirmed.

KEITH, P., not sitting.

(91 Va. 378)

CREWS' ADM'R v. HATCHER et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 25, 1895.)

CONSTRUCTION OF WILL—VESTING OF ESTATE.

1. Testator devised part of his real estate to his wife for life, and, "at the death of my wife, I direct that the remaining portion of my estate shall be equally divided among" E., H., and S., "or their heirs, respectively, upon which final division" E. and S. shall account to H. "for one-third of the real estate" previously devised to them. E. died after the testator, and before the wife. *Held*, that E.'s estate vested at the testator's death; the words "or their heirs" being the same as "and their heirs," although the word "and" had been employed in a previous clause in this connection.

2. A vested remainder is one limited to a certain person on a certain event, so as to possess a present capacity to take effect in possession, should the possession become vacant.

Appeal from corporation court of Danville.

Bill for the construction of the will of A. S. Updegraff. From a decree in favor of Edward M. Hatcher's heirs, Crews' administrator appeals. Reversed.

Berkley & Harrison, for appellant. Peatross & Harris, for appellees.

KEITH, P. This case is before us upon an amended and supplemental bill filed in the corporation court of the city of Danville, Va., asking the construction of the will of A. S. Updegraff. The will, or so much of it as need be here quoted, is as follows: "I give and bequeath to my beloved wife, Maria Updegraff, for and during her natural life, the lot or parcel of land upon which I at present reside, fronting on Craghead street, in the town of Danville and state of Virginia, comprising the whole of the land heretofore purchased by me of Dr. William G. Craghead, deceased, as is evidenced by his deed of conveyance to me, which is of record, together with, all and singular, the buildings and other improvements situate thereon, and at her death to be disposed of as hereinafter provided." The will goes on then to say that: "I give and bequeath the residue of my real estate fronting on Craghead street, in the town of Danville, Va., to Edward M. Hatcher and Sarah E. Clark, widow of Michael Clark, deceased, to them and their heirs forever, to be equally divided between them, with reference to the value of each share; that of the said Sarah E. Clark to be laid off next to the lot upon which I at present reside." The only other

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

clause of the will which need be referred to is as follows: "At the death of my said wife, Maria Updegraff, I direct that the remaining portion of my estate shall be equally divided among the said Edward M. Hatcher, Henry C. Hatcher, and Sarah E. Clark, or their heirs, respectively, upon which final division the said Edward M. Hatcher and Sarah E. Clark shall account to the said Henry C. Hatcher for one-third part of the real estate herein devised to them, respectively, the value thereof to be estimated as of the date of which they may come in possession of the same." We are asked to determine the exact interest taken by Edward M. Hatcher, under this will, in the property disposed of in the clause last above cited. It will be observed that it refers to that portion of the testator's estate which he devises to his wife, Maria, for life, in a former part of the will. The appellant contends that the language of the will creates in Edward M. Hatcher a vested remainder in fee, while, upon behalf of the appellees, it is claimed that the remainder limited after the life estate to Maria Updegraff is contingent upon Edward M. Hatcher's surviving the first taker, and, he having died in her lifetime, that the said remainder is not subject to his debts, but passes to his heirs, and that the word "heirs" should be construed as a word of purchase, and not of limitation.

It is conceded that the estate given to Edward M. Hatcher and Sarah E. Clark, and their heirs, created in them a fee simple; but the testator, in disposing of the remaining portion of his estate, which consisted of the remainder after the termination of the life estate given to his wife in the lot fronting upon Craghead street, changes the phraseology, and bequeathes this remainder to "Edward M. Hatcher, Henry C. Hatcher, and Sarah E. Clark, or their heirs, respectively"; and it is argued that the change of expression from "and their heirs" to "or their heirs" is evidence of a purpose upon the part of the testator to use the word "heirs" in a different sense in the two passages quoted, and while in the first the word "heirs" has its usual and natural signification, as a word of inheritance or limitation, it is to be construed and interpreted in the latter clause as a word of purchase. In the case of *Chapman v. Chapman*, 90 Va. 409, 18 S. E. 913, the testator, by his will, said: "I loan to my wife all my estate not heretofore disposed of, during her natural life; and after death I wish that estate sold, and the proceeds equally divided between my four above-named children, or their lawful heirs, begotten of their bodies." It was contended that the phrase, "or their lawful heirs," made the gift to the children contingent, but the court thought otherwise; and Lewis, P., delivering the opinion, says "that, to effectuate the intention of the testator, we must read 'and' for 'or,' and give

the word 'heirs' its usual and legal signification." Courts always favor the vesting of estates, and therefore, in doubtful cases, lean in favor of construing language as creating vested, rather than contingent, remainders. "There is, indeed," says this court in the case just cited, "nothing better settled than that all devises are to be construed as vesting at the testator's death, unless the intention to postpone the vesting is clearly indicated in the will." *Chapman v. Chapman*, at page 411, 90 Va., and page 913, 18 S. E.

This rule of construction, upon which courts rely in cases of doubt and difficulty, need not be resorted to here, as there are other considerations which, in our judgment, place the interpretation to be given to this will beyond serious cavil or question. A vested remainder is defined to be one "limited to a certain person, and on a certain event, so as to possess a present capacity to take effect in possession, should the possession become vacant. *Fearne, Rem. 216*. "The present capacity to take effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." 2 *Minor, Inst. 337*. The estate given E. M. Hatcher by the will under consideration seems to fulfill every condition and requirement of this definition. It is the established law with us that, after a bequest of an estate for the life of the first taker, words of survivorship in a will are always to be referred to the period of the testator's death, where no special intent appears to the contrary. See *Hansford v. Elliott*, 9 Leigh, 79; *Stone v. Lewis*, 84 Va. 474, 5 S. E. 282; *Gish v. Moomaw*, 89 Va. 345, 15 S. E. 868; *Chapman v. Chapman*, supra.

In the case under consideration, not only is there nothing in the will to indicate that the words of survivorship should have reference to any period other than that of the death of the testator, but, as was said by Judge Richardson in *Gish v. Moomaw*, above cited, they are conspicuously absent. The will, on the contrary, affords other evidence that the testator intended that E. M. Hatcher should take a vested remainder in fee after the termination of the life estate given to his wife. As has been seen, a part of his real estate fronting on Craghead street was given absolutely to Edward M. Hatcher and Sarah E. Clark in fee, while in the succeeding clause of the will, which creates the interest which is the present subject of controversy, the testator directs that the remaining portion of his estate "shall be equally divided among the said Edward M. Hatcher, Henry C. Hatcher, and Sarah E. Clark, or their heirs, respectively, upon which final division the said Edward M. Hatcher and Sarah E. Clark shall account



to the said Henry C. Hatcher for one-third part of the real estate herein devised to them, respectively, the value thereof to be estimated as of the date of which they may come in possession of the same." The purpose of the testator is perfectly obvious. Edward M. Hatcher, Sarah E. Clark, and Henry C. Hatcher were equally the objects of his bounty. He intended to create among them perfect equality; and having given to Edward M. Hatcher and Sarah E. Clark, absolutely, the real estate fronting upon Craghead street, he directs that in the final division of his estate they shall account to Henry C. Hatcher, or, in other words, bring into hotchpot with him the property so devised to them, in order that the equality between them might be established or restored. If, however, the construction contended for by the appellees be the true one, then Edward M. Hatcher would take one-half of the devise to himself, and Sarah E. Clark and her heirs would take one-third of the devise in the latter clause of the will, the effect of which would be to diminish the interest of Henry C. Hatcher, and thereby to thwart the manifest intention of the testator. It seems to us that the will created a vested remainder in Edward M. Hatcher, which took effect immediately upon the death of the testator, but the full enjoyment of which was postponed until the death of the first taker, Maria Updegraff. We are therefore of opinion that the decree complained of is erroneous, and the same must be reversed.

(91 Va. 397)

CHAPMAN v. CHAPMAN et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 25, 1895.)

ADVERSE POSSESSION — VENDOR AND VENDEE — PURCHASER FOR VALUE — TRUSTEE FOR CREDITORS — NOTICE FROM POSSESSION — EQUITY PRACTICE — EVIDENCE.

1. Before adverse possession can arise between a vendor and his vendee, or between the grantee of the vendor and such vendee, where the vendor has retained the title, the vendee must have asserted an adverse right, and openly and continuously disclaimed the title of his vendor, and such disclaimer must have been clearly brought home to the vendor or his grantee.

2. A trustee to whom property has been conveyed to secure creditors is a purchaser for value.

3. One who buys land in the possession of another than his vendor is bound to take notice of such possession and all that it imports.

4. A father purchased land for his son, taking the deed in his own name. The son took possession of the land, and paid the purchase money, but never received a deed from his father. After the son had been in possession 14 years, the father made a deed to secure creditors, which included the son's land. *Held*, that the trustee in the deed to secure creditors acquired no interest superior to the son's.

5. Possession of a corporeal hereditament, to be effectual, need not be continually visible or without cessation actively asserted. If a man has once rightfully received actual possession of land, he may depart without authorizing a serv-

ant or agent to enter upon it, may leave it for years uncultivated and unused, may set no mark of ownership upon it, and his possession may nevertheless still continue, unless his conduct afford evidence of intentional abandonment, which the conduct mentioned would not necessarily do.

6. Notice to one of two or more trustees is notice to all.

7. Where one of two trustees is charged to have had actual knowledge of a title adverse to that conveyed to them jointly, and the other trustee answers, denying the allegations of the bill, but the one charged with knowledge makes no answer, the denial of the answer need not be overcome by the testimony of two witnesses, or the testimony of one witness with strong corroborating circumstances.

Appeal from circuit court, Madison county.

Bill by Bernard T. Chapman against Thomas A. Chapman and James Hay, trustees. From a decree for defendants, complainant appeals. Reversed.

J. C. Gibson, for appellant. James Hay and T. C. Gordon, for appellees.

RIELY, J. This is a controversy between the owner of the equitable title and the holders of the legal title to certain lands. Both claim under the same vendor. The appellant, Bernard T. Chapman, claims the lands by right of purchase, the payment of all the purchase money, and the delivery to him of the possession in pursuance of his purchase, although the title to the lands has never been conveyed to him. Long after he had acquired the said lands, his father, Thomas W. Chapman, from whom he claims, and in whom was the legal title, conveyed them, along with other lands belonging to him, to James Hay and Thomas A. Chapman, in trust to secure his creditors; and the trustees claim the lands in possession of the appellant as bona fide purchasers for value, without notice of any right in him to them. The appellant bases his right to hold the lands on several grounds.

The first ground on which he relies is that of adverse possession under claim of title for more than 15 years, the period of the statutory bar. This pretension, under the circumstances of this case, cannot be sustained. He purchased one part of the lands of his father in the year 1870, and acquired the other part in the year 1874, and took possession of each parcel at the time of the purchase, or very soon thereafter. He entered into possession of both parcels under his contracts of purchase. By such purchase, and the payment of the entire purchase money, he acquired the full equitable title, but such equitable title was derived from his vendor, who retained the legal title for future conveyance. In such case the vendee cannot be said to hold adversely to his vendor. *Clarke v. McClure*, 10 Grat. 305; *Creigh's Heirs v. Henson*, Id. 231; *Nowlin v. Reynolds*, 25 Grat. 137. He holds in subordination to and under the protection of the title of his vendor, and no length of time is sufficient for such possession to ripen silently into a title by

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

adverse possession. Such possession is in privity with and in subserviency to the legal title of his vendor, and he is not allowed to impeach or assail it. As was said by President Tucker in *Williams v. Snidow*: "Adverse possession is not the mere holding over against the will of the party from whom you obtain the possession. It is the holding by claim of title, adverse to another's title, that constitutes adverse possession." *Williams v. Snidow*, 4 Leigh, 14, 20. Before adverse possession can arise between a vendor and his vendee, or between the grantee of the vendor and such vendee, where the vendor has retained the title, and the statute of limitations commenced to run, the vendee must have disavowed the privity of title between them by the assertion of an adverse right, and openly and continuously disclaimed the title of his vendor, and such disclaimer be clearly brought home to the knowledge of the vendor or his grantee. *Creekmur v. Creekmur*, 75 Va. 430, 436; *Whitlock v. Johnson*, 87 Va. 323, 327, 12 S. E. 614. There has been no disavowal by the appellant of the title of his vendor, and the claim of adverse possession cannot avail him.

The next and main ground upon which the appellant relies is that the trustees are not bona fide purchasers for value without notice. They are unquestionably, under many decisions of this court, purchasers for value. *Evans v. Greenhow*, 15 Grat. 153; *Wickham v. Lewis*, 13 Grat. 427; *Bank v. Knox*, 19 Grat. 739; *Shurtz v. Johnson*, 28 Grat. 657, 667; *Cammack v. Soran*, 30 Grat. 292; *Williams v. Lord*, 75 Va. 404; *Witz v. Osborn*, 83 Va. 230, 2 S. E. 33. Are they bona fide purchasers without notice? The open and peaceable possession of land under a claim of right is notice to all the world of the right or claim of the person in possession; and, where one buys land in the possession of another than his vendor or grantor, he is bound to take notice of such possession and all that it imports. This is, I think, the rule to be deduced from the authorities. It is the duty of a purchaser to inquire into the fact of the possession, and he will be affected with knowledge of whatever right or interest the party in possession may have in the land which such inquiry would have disclosed. The rule has its foundation in the good faith of the purchaser. If he make the inquiry, he would acquire knowledge of whatever right or claim, if any, the person in possession may have; and if upon inquiry he receives information of any right or interest of such person in the land, it would be mala fides to attempt to deprive him of it. So, if he fail to make inquiry, he has not discharged the duty which good faith imposed on him; and whatever knowledge he might have acquired by means of an inquiry duly and reasonably prosecuted the law imputes to him. The purchaser is therefore charged with notice of the possession, and of whatever right,

interest, or claim the person in possession may have, when the party from whom he buys is not the person in possession of the land. Such notice is the same in effect as the notice which is imputed by the recording or registering acts. One may purchase land to which another than his vendor has a deed of conveyance, or upon which he has a mortgage duly recorded according to the statute for the recordation of deeds, but of which the purchaser knows nothing, yet he will be as conclusively charged with notice of such conveyance or mortgage as if he had examined the record and inspected the deed. He is required for his own protection to examine the records, and the law imputes to him all that such examination would have disclosed. Actual, notorious, and exclusive possession of land takes the place of the recordation of the instrument of title; and a subsequent purchaser of land in possession of one who is not his vendor is affected with notice of whatever claim or interest the person in possession has, and which an inquiry into the possession would have revealed. He is not permitted to dispute such right or interest unless he has made the inquiry which equity and good conscience impose on him, and such inquiry, duly prosecuted, has failed to reveal any right or interest in the tenant in possession. This is the established doctrine both in England and in this country. In the case of *Holmes v. Powell*, that eminent jurist, Lord Justice Knight Bruce, said: "I apprehend that by the law of England, when a man is of right and de facto in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistent with the title or alleged title under which he is in possession, or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who knows, or cannot be heard to deny that he knows, another to be in possession of a certain property, cannot for any civil purpose, as against him at least, be heard to deny having thereby notice of the title or alleged title under which or in respect of which the former is or claims to be in that possession." 8 De Gex, M. & G. 579. The same general rule, based upon the same motives and reasons, is said by Pomeroy, in his work on Equity Jurisprudence, to be established in the United States by a very great number of decisions. See 2 Pom. Eq. Jur. § 614, and the cases cited in the note thereto in support of the text.

The doctrine has recently been upheld by the court of appeals of New York in its fullest extent in the case of *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. 1109. Phelan lent to one John Murphy the sum of \$2,000, and took from him a mortgage on a tenement building or block containing 43 rooms or apartments, then occupied by 20 different occupants or families, as tenants from month to month, except that three of the apartments were oc-

cupied by Margaret Brady and her husband, who kept a liquor store in a part of the building and occupied two living rooms in the rear of the store. The wife claimed to be owner of the premises, and collected rents from the other tenants. Murphy had a perfect record title to the premises at the time Phelan lent to him the money and Murphy executed the mortgage to secure it; but he had never in fact any interest in the property, had never paid anything for it, was not in possession, and before the execution of the mortgage had conveyed it by deed to Mrs. Brady, who was the real owner. Her deed, however, was not recorded until several weeks after the recordation of the mortgage. Phelan had no notice, at the time he made the loan to Murphy and took the mortgage, of any title to the premises in Mrs. Brady, or of any claim on her part to be the owner; but she was in the actual possession of the premises under a perfectly valid but unrecorded deed. In a contest between her and the mortgagee, Phelan, the court said: "Her title must therefore prevail as against the plaintiff. It matters not, so far as Mrs. Brady is concerned, that the plaintiff in good faith advanced his money upon an apparently perfect record title of the defendant, John E. Murphy. Nor is it of any consequence, so far as this question is concerned, whether the plaintiff was in fact ignorant of any right or claim of Mrs. Brady to the premises. It is enough that she was in possession under her deed and the contract of purchase, as that fact operated in law as notice to the plaintiff of all her rights. It may be true, as has been argued by the plaintiff's counsel, that when a party takes a conveyance of property situated as this was, occupied by numerous tenants, it would be inconvenient and difficult for him to ascertain the rights or interests that are claimed by all or any of them. But this circumstance cannot change the rule. Actual possession of real estate is sufficient notice to a person proposing to take a mortgage on the property, and to all the world, of the existence of any right which the person in possession is able to establish." It was argued in *Edwards v. Thompson*, 71 N. C. 177, where the purchaser was a resident of South Carolina, and bought land in North Carolina, that the question of notice of an equity in derogation of the vendor's right to sell was exclusively one of fact, and that, in order to be fixed upon the purchaser, it must be shown either that he had notice in fact, or else willfully or imprudently omitted to inquire when the means of inquiry were in his reach. "We do not think," said the court, "this is the true principle. On policy, the law avoids such minute and uncertain inquiries. It says that if a contract of sale be registered it is conclusive of notice, notwithstanding the purchaser lived in another state, and did not, in fact, search the register's books. 1 Story, Eq. Jur. § 403. And on the same principle it follows that open, notorious, and exclusive possession in

a person other than his vendor is a fact of which a purchaser must inform himself, and he is conclusively presumed to have done so."

It appears from the record that Thomas W. Chapman, for the purpose of raising the money to pay a pressing debt, on February 24, 1870, sold certain portions of his real estate to his sons, James C., Thomas A., and Bernard T. Chapman. Each was to pay \$500 for the land he got, and this was done, they having borrowed the money for the purpose. The parcel of land bought by Thomas and Bernard was principally mountain land, and at first was held by them jointly. In 1874 Thomas W. Chapman agreed to buy for his sons Thomas and Bernard the tract of land called the "Yowell Land," which adjoined the land he had sold to them, but he did so in his own name. He retained about 15 acres, to straighten his own lines, for which he allowed and paid \$75, and they took possession of the residue of the tract, and paid the balance of the purchase money. Thomas and Bernard afterwards divided the lands between themselves so as to throw the share of each into one body, by which division Bernard acquired all of the Yowell land except the 15 acres retained by their father, and Thomas received about 80 or 90 acres of Bernard's part of the mountain land. Subsequently Thomas W. Chapman conveyed to his sons James C. and Thomas A. Chapman the lands they were respectively entitled to, but failed to make a deed to his son Bernard for his land; and on September 19, 1888, conveyed, among other property, 820 acres of the land on Quaker Run, in Madison county, which included Bernard's part of the mountain land, and the whole of the Yowell land, to James Hay and Thomas A. Chapman, in trust to secure his creditors. It is shown that Bernard took possession and control of his part of the mountain land in 1870, and of the Yowell land in 1874, as the owner thereof, in accordance with his purchase. He did not reside on the mountain land, as the house thereon had been burned, but in December, 1874, after the purchase of the Yowell land, he moved into the dwelling house on it, and lived there with his wife and children, exercising acts of ownership over all of said lands, until the year 1881, when, his wife having died, leaving several small children, upon the advice of his brother, Thomas A. Chapman, he moved back to his father's home. During the years 1875 to 1881 he made valuable improvements upon the lands. He enlarged the dwelling house by the addition of several rooms, and otherwise improved it. He erected a tenant's house, a large barn, a corn house, and made other improvements, at a total cost of about \$1,200. After the death of his wife, and his removal with his children to his father's home, he rented out his lands to his father for several years, and worked for him for wages. In December, 1887, having in the meantime remarried, he moved back, and again took actual possession

of his lands, and has ever since resided on them. It thus appears that he was the full equitable owner of the lands by purchase and the payment of the entire purchase money, and was in open, peaceable, and exclusive possession of them at the time they were conveyed by his father to said trustees. Of this equitable estate the trustees were charged with notice. If they had made due inquiry, which his possession made it their duty to do, they would have learned the facts upon which his right of possession was based, and knowledge thereof is by the law imputed to them. They are not, therefore, bona fide purchasers without notice, and the appellant is entitled to hold the lands against them.

Stress was laid by the counsel for the appellees upon the absence of Bernard Chapman from the lands between 1881 and December, 1887. The fact of his absence, under the circumstances, does not alter the result. In reply to the argument of abandonment made in the case of *Holmes v. Powell*, supra, it was said: "But possession of a corporeal hereditament, to be effectual, need not be continually visible or without cessation actively asserted. If a man has once received rightful and actual possession of land, he may go to any distance from it without authorizing any servant or agent or other person to enter upon it or look after it, may leave it for years uncultivated and unused, may set no mark of ownership upon it, and his possession may nevertheless still continue; at least, unless his conduct afford evidence of intentional abandonment, which such conduct as I have mentioned would not necessarily do." There is no evidence here of intentional abandonment or surrender of his right to the lands. Although he did not reside on them during the period mentioned above, he nevertheless exercised the right of ownership over them by renting them out to his father. And, besides, the vital question is, was he in possession of the lands under a claim of right at the time they were conveyed to the trustees? 2 Pom. Eq. Jur. § 622. Of this the evidence admits of no doubt. Thomas A. Chapman was not only affected with constructive notice of the right of Bernard Chapman by reason of the latter's possession of the lands, but the record discloses that he had that which was superior to notice, and which notice was intended to supply. He had knowledge. He knew that he and Bernard had jointly purchased their lands of their father and divided the same between them. He knew that Bernard, as well as he, had paid for his part. He knew that Bernard had entered into possession of it under his contract of purchase, had put valuable improvements upon it, and was the real equitable owner. And he knew that he was in possession and living upon the lands when the deed of trust was executed. What was the effect of his knowledge on the title of himself and his cotrustee under the deed of trust? Did it make them both purchasers with notice? The conveyance was

to them jointly. The particular estate they took was joint and inseverable; the title joint and indivisible. To be bona fide purchasers without notice, they must be wholly so. There can be no such thing as a purchase partly bona fide. If tainted in part, the whole is infected. Consequently, notice to one of two or more trustees is notice to all. *Le Neve v. Le Neve*, 2 White & T. Lead. Cas. Eq. pt. 1, p. 109; *Smith v. Smith*, 2 Crompt. & M. 230; *Meux v. Bell*, 1 Hare, 73; *Willes v. Greenhill*, 4 De Gex, F. & J. 147, 150; *Bank v. Davis*, 2 Hill, 453, 464; *Myers v. Ross*, 3 Head, 59; 2 Pom. Eq. Jur. § 667; *Lewin, Trusts*, 609-612.

It was claimed by counsel for the appellees, upon the authority of *Morrison v. Bausermer*, 32 Grat. 225, and *Johnson's Ex'r v. Bank*, 33 Grat. 473, that such knowledge must have been present to the mind of Thomas A. Chapman at the time the deed of trust was executed, in order to affect the title in him and his cotrustee, and fix notice of the prior incumbrance upon the beneficiaries of the trust. In the case at bar the bill expressly charges that Thomas A. Chapman had "at all times" actual notice of Bernard Chapman's claim and right to the land. He filed no answer to the bill, though his cotrustee did, denying the allegations of the bill. He did not claim to have, nor does it appear that he could have had, personal knowledge of the facts relating to the claim of Bernard Chapman to the land. The effect of his answer was, therefore, merely to present an issue and throw the burden of proof on the complainant. It could have no further weight. It is not required in such case that the denial of the answer shall be overcome by the testimony of two witnesses, or the testimony of one witness accompanied by strong corroborating circumstances. *Dutilh v. Coursault*, 5 Cranch, C. C. 349, Fed. Cas. No. 4,206; *Lawrence v. Lawrence*, 21 N. J. Eq. 319; *Pennington v. Gittings*, 2 Gill & J. 206; *Deibel v. Brown*, 136 Ill. 506, 27 N. E. 44; *Lattomus v. Garman*, 3 Del. Ch. 232; *Watson v. Palmer*, 5 Ark. 501; *Combs v. Boswell*, 1 Dana, 473; 1 Daniell, Ch. Prac. 846, and note thereto; 1 Enc. Pl. & Prac. 947, and cases there cited. Thomas A. Chapman testified in the cause, and it abundantly appears from his deposition, that the facts relating to Bernard Chapman's right to the land were distinctly remembered by him; and, from all the circumstances, we cannot doubt but that such was the case. For the foregoing reasons, the decree of the circuit court of Madison county must be reversed.

The beneficiaries under the deed of trust were not made parties to the suit, and it is proper to add that it is not intended that they should, as they could not, be concluded by this decision. The court below passed directly on and adversely to the right of Bernard Chapman to the lands, and this was the subject of the appeal here. The counsel for the appellees made no objection for

the want of proper parties, and the appellant, who was the plaintiff in the court below, could not complain of his own omission. Under these circumstances, and for the reason that counsel seemed to desire that we do so, we have proceeded, in the absence of the beneficiaries as parties, to consider and pass upon the legal questions involved in the appeal.

(90 Va. 936)

# FARINHOLT v. LUCKHARD.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Feb. 23, 1886.)

## EXEMPTIONS—LABORING MAN.

One engaged in carrying the United States mail, though he uses his own horse and vehicle therefor, is a "laboring person," within the meaning of Const. art. 11, § 1, which provides that homestead exemptions shall not extend to process issued on a demand "for services rendered by a laboring person."

Bill in chancery by D. A. Farinholt against Hardin A. Luckhard. From a decree for defendant, complainant appeals.

Const. Va. art. 11, § 1, exempts from execution property of a householder to the value of \$2,000, but provides that such exemption shall not extend to process issued on any demand "for services rendered by a laboring person," etc.

James W. Stubbs, for appellant.

HINTON, J. The bill in this case alleges that the plaintiff, D. A. Farinholt, in August, 1875, entered into a contract with one Hardin A. Luckhard for the purpose of transporting the United States mail from West Point to Gloucester Courthouse; that by this contract Luckhard obligated himself to assign and transfer all orders and warrants that he should receive to the plaintiff. It charges that Luckhard, in violation of his contract, had assigned one of said warrants to H. R. Pollard to secure the sum of \$65, but that there was a balance of \$73 remaining in the hands of the assignee to which the plaintiff was entitled, and that Luckhard is indebted to the plaintiff in an amount much larger than the amount now in the hands of said Pollard. It then charges that Luckhard is insolvent, and asks that the assignee, Pollard, may be enjoined and restrained from paying over, and the said Luckhard may be enjoined from collecting, the said balance until a common-law suit, which was then pending, for the recovery of damages under said contract, could be determined. The injunction was awarded, but, on the hearing of the cause, the court, "deciding that the claim of homestead asserted in the answer [of the defendant Luckhard] embraces the \$73," dissolved the injunction and dismissed the bill.

The plaintiff asserts that he is a "laboring

man," within the meaning of these words as used in article 11, § 1, of the constitution of Virginia, and insists that Luckhard's claim to this balance, as a part of his homestead exemption, cannot be sustained as against the claim of the plaintiff thereto "for services rendered as a laboring person"; and this is the single question to be determined, and it depends upon the construction which must be given to the phrase "laboring man." Bouvier defines "laborer" as "a servant in husbandry or manufacture, not living intra moenia," and no doubt this was the original technical meaning of the word. It was usually applied to those employed in toilsome outdoor work, as distinguished from domestic servants. But this is not the exact sense in which the words "laboring person" are used in the constitution. "A constitution," says Allen, J., in a noted case, "is an instrument of government, made and adopted by the people for practical purposes connected with the common business and wants of human life. For this reason, pre-eminently, every word in it should be expounded in its plain, obvious, common sense." *People v. New York Cent. R. Co.*, 24 N. Y. 486; *Gibbons v. Ogden*, 9 Wheat. 183. This rule has a direct application to this case. It would be difficult, if not impracticable, to give any general definition of the words "laboring man" which would at once include all the cases falling within the words and exclude those falling without, and I shall not attempt to do so. But we think it safe to say that the word "laborer," when used in its ordinary and usual acceptation, carries with it the idea of actual physical and manual exertion or toil, and is used to denote that class of persons who literally earn their bread by the sweat of their brows, and who perform with their own hands, at the cost of considerable physical labor, the contracts made with their employers. It is in this sense that the words "laboring man" were used in the constitution. The framers of that instrument, in giving to a large class of people a homestead exemption, clearly designed that it should not affect that class of persons who were dependent upon their own manual labor for the support of themselves and their families, and whose necessity for the prompt and certain payment of their wages they regarded as paramount even to the claims of the debtor to a homestead. Assuming, then, that the words "laboring man" were used in the sense indicated above, it seems to us clear that the plaintiff must be regarded as a laboring man, within the meaning of these words as used in the clause of the constitution under review. This case is analogous to the drayman who hauls the goods of the merchant along the streets of the city, perhaps with his own wagon and horses, or to the plowman who habitually, and perhaps with his own team, is accustomed to break up the lands of his wealthy neighbors. The mail carrier in this

<sup>1</sup> Reported 90 Va. 936, by order of court.  
v.218.e.no.11—52

case is clearly a laboring man. Few employments could be more arduous than the one in which he was engaged, and the mere circumstance that he happened to own the horse and vehicle used by him in carrying the mail cannot deprive him of the character of laborer. I am, therefore, of opinion that the circuit court of King William county erred in dissolving the injunction and dismissing the bill. Its decree must therefore be reversed, and the injunction must be reinstated, to await the determination of the action at law. Decree reversed.

(91 Va. 410)

### CLENDENNING v. CONRAD.<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 25, 1895.)

#### AMENDMENT OF DECREE DURING TERM—REMOVAL OF FUNDS OF WARD—JURISDICTION OF FOREIGN GUARDIAN—PARTIES.

1. A foreign guardian of infants asked the court, under Code 1887, §§ 2629, 2633, for authority to remove to his own state a certain fund in the hands of an attorney for the infants. The request was granted, and the court ordered that the money be paid over to him, which was done. *Held* that, the order being subject to amendment during the term, the court could during that time withdraw the fund from such guardian upon the application of one claiming an interest therein.

2. A foreign guardian seeking permission from a Virginia court to remove his ward's property to his own state is subject to the Virginia laws, and may be compelled to return the money which he has been improperly allowed to remove from Virginia.

3. Infant children are necessary parties to a petition seeking to restrict their right to the use of a fund assigned to them by virtue of their deceased father's claim of homestead.

Appeal from circuit court, Fauquier county; James Keith, Judge.

Proceeding by John D. Conrad, as guardian, to obtain permission to remove a certain fund from the state. From an order overruling a petition asserting the rights of certain persons in said fund as creditors of the wards' parent, one Clendenning appeals. Reversed.

Brooke & Scott and W. E. Garnett, for appellant. Eppa Hunton, for appellee.

BUCHANAN, J. By a decree rendered in the cause of Clendenning against Hall on the 15th day of September, 1882, the circuit court of Fauquier county set apart the sum of \$2,000 as a homestead to B. F. Conrad, which was to be paid out of the proceeds of his property ordered to be sold in that case for the benefit of his creditors. The sale was made, but before the homestead fund was paid over to him he departed this life, leaving four infant children. At the December term, 1882, of the court a decree was entered directing the receiver of the court in that case to pay that fund over to the attorney of the infant children of the homestead claimant. Pursuant to this decree, the \$2,000 set apart was

paid to the attorney. At the April term of the court, 1883, John D. Conrad filed his petition in the same court, showing that he had qualified as the guardian of the said infant children in the county court of Jefferson county, in the state of West Virginia, and asked the court to authorize him to remove the \$2,000 to West Virginia, where he and his wards resided, as provided in sections 2629, 2633 of the Code. The court, being satisfied that all the provisions of the Code had been complied with, at the same term of the court entered an order directing the attorney of the infants to pay the \$2,000 to their guardian, less costs, for removal, as prayed for. The attorney paid the money to the guardian, and reported the fact to the court on the 6th of that month, and on the same day his report was confirmed, and the case for the removal of the fund stricken from the docket. On the 13th of that month, and during that term of the court, James H. Clendenning, complainant in the case of Clendenning against Hall mentioned above, filed his petition, in which he alleged that the infant children of the homestead claimant were only entitled to the use of the \$2,000 until the youngest attained the age of 21 years, and that upon the happening of that event his creditors had the right to have that fund distributed among them; and prayed for a receiver to be appointed to take such steps as might be necessary to secure the corpus of the \$2,000, so that the same might be forthcoming when the youngest child attained that age. The court entered an order in the case in which the order for the removal of the fund had been made, and appointed a receiver as prayed for, and directed him to take such steps by bringing suit in the state of West Virginia, or in this state, or in such other manner as to him shall seem proper, in order that the fund may be forthcoming when the youngest child of B. F. Conrad shall have attained the age of 21 years.

At the December term of the court in the year 1887 the receiver filed his petition in the proceedings in which he was appointed, stating that John D. Conrad, the guardian of the infants, had received the \$2,000, and transferred it to West Virginia a day or two after the order for its removal was made. He also sets out the proceedings had which resulted in his appointment as receiver to secure the corpus of the fund for the benefit of the creditors, and that the order for the removal of the fund and his appointment as receiver were both made at the same term of the court, while the whole matter was in the breast of the court. He further states that John D. Conrad, the guardian, who removed the fund to West Virginia, has returned to Virginia, and is within the jurisdiction of the court, and prays that the said guardian may be compelled to appear and bring that fund into court, and to so invest it that the principal may be forthcoming when the said youngest child, who is a citizen of this state, shall have

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

attained the age of 21 years, and for general relief.

To this petition John D. Conrad filed his demurrer and answer at the April term, 1888, of the court.

He assigns as causes of demurrer: (1) That a guardian qualifying in the state of West Virginia cannot be proceeded against as such in this state.

(2) That the infant children are not made parties to the petition.

(3) That a petition does not lie in such a case, and that an original bill is necessary if there can be any relief at all.

(4) That there is no equity in the petition, and no proper case for relief is stated.

In his answer he claims that he qualified as guardian in the state of West Virginia; that he filed his petition for the removal of the \$2,000 from this state; that an order was so made, the money removed, and the cause ordered to be stricken from the docket; that neither he nor his wards had any notice to rehear or set aside the final order in that proceeding, or that any further proceedings would be had in the case, and that all proceedings had or orders made therein afterwards were null and void, and that neither he nor his wards can be affected by them. He further states that a creditors' suit was instituted in the circuit court of Jefferson county, in the state of West Virginia, by James H. Clendenning against him, his wards, and the administrator of B. F. Conrad, deceased, asserting the rights of the creditors of the said decedent in the \$2,000 fund; that such suit was dismissed upon demurrer; and avers that he will file a copy of the proceedings as an exhibit with his answer, but the exhibit was not filed. He admits that he was living in this state, but denies that he is a citizen of Virginia, and says he is going to return to West Virginia, where he qualified as guardian; that his settlements as guardian have been made in the court where he qualified, and the fund in controversy is under its control.

Upon a hearing of the cause, the court dismissed the receiver's petition, and from that decree this appeal was taken by James H. Clendenning.

The creditors' suit of Clendenning against Hall, in which the \$2,000 was set apart as a homestead, and the ex parte proceedings of the guardian for the removal of that fund to West Virginia, are separate and distinct proceedings, and not one proceeding, as counsel for appellant insists.

While the application of the guardian for the removal of the fund in controversy was a summary proceeding, notice of it was required to be published for four weeks in some newspaper, in order that parties to be affected by such removal might appear to protect their interests, and prevent it where such removal would impair their rights, or prejudice their interest. Code, § 2631.

Clendenning, the creditor, had the right, therefore, to come into that proceeding and make defense against the removal of the fund. He did not file his petition until after the order for the removal of the fund had been made, but he did file it during that term of the court, and while the whole matter was under the control of the court, and in time to have his interest in the fund fully protected, if the usual and regular course had been followed in the case. Until the court adjourns for the term, no one, unless expressly authorized to do so, can act under a decree or judgment entered at that term, except at his peril. During the term all the proceedings are in the breast of the court, and under its control, and liable to be stricken out, altered, or amended during the term, and that without notice to the parties. *Freem. Judgm.* § 69; *Robinson v. Commissioners*, 12 Md. 132-141; *Green v. Railroad Co.*, 11 W. Va. 685, 692.

The guardian is conclusively presumed to have known that the decree entered at an early day of the term of the court had been modified by the decree entered at a later day, and should have governed himself accordingly. He had no right to remove the fund until the principal had been so secured that the creditors would get the benefit of it after the youngest of his wards had attained the age of 21 years, or until the further order of the court.

Although the proceeding for the removal of the fund was a summary one, the court had the right to take all the necessary steps to ascertain whether it was a proper case for its removal, or if, after it had authorized its removal, facts came to its knowledge which showed that the order for the removal had been improperly made, it was its duty, and it had the power, to direct all proper proceedings to prevent its removal, or to secure the rights of the creditors therein. There does not seem to be any good reason why a party in interest could not come into the case by petition to assert his rights, nor why the receiver of the court could not file a petition in the cause in which he was appointed, in order to bring to the attention of the court the fact that the foreign guardian, who had improperly removed the fund in controversy, had returned to this state, and to ask the court to compel him to do what he ought to have done before he removed the fund.

Is the contention of the appellee that he cannot be proceeded against in this state because he qualified as guardian in another state well founded? He had no right to remove the fund in controversy, except as authorized by the court whose jurisdiction he had invoked. He ought not to have acted under the order authorizing him to remove it until the court had adjourned for the term. But, having done so, he ought to have returned the fund to this state, to be

dealt with by the court according to the rights of the parties. He failed and refused to do this. He was within the jurisdiction of the court. The proceeding which he had instituted was still pending. The rights of all the parties interested in the fund could be ascertained and secured in that case. Why should it not be done? It is true, as a general rule, that a guardian cannot be sued as such out of the jurisdiction in which he qualified. His rights and powers, like those of an administrator and executor, are considered as strictly local. Story, Conf. Laws, § 499. But in this state, at least, there are exceptions to the general rule.

It was said by President Tucker in *Tunstall v. Pollard's Adm'r*, 11 Leigh, 1, 36, that: "Upon a full review of the whole subject, I am of opinion that justice, convenience, and necessity required a recognition of the rights to sue an executor who has qualified abroad, if he comes within this jurisdiction, bringing the assets with him. And no authority sustains the contrary proposition." *Rinker v. Streit*, 33 Grat. 666; 1 Minor (4th Ed.) 476.

In the same case, at page 32, he says: "If it is the duty of every sovereignty to provide for the security of its own people, it is as much bound to enforce justice in their behalf from an executor who is within its jurisdiction, and has also within it the assets out of which they have a right to payment, as it is to prevent a foreign administrator from recovering and withdrawing the assets which are within its power." The same doctrine applies to foreign guardians, and for the same reasons. 1 Minor (4th Ed.) 476; *Rinker v. Streit*, 33 Grat. 666.

The foreign guardian in this case improperly removed the fund from the state, and, if he cannot be held responsible for his conduct here, the creditors must either lose their debts or be compelled to seek their remedy in the domicile of the foreign guardian. They ought not to be compelled to leave the state to subject the assets of their debtor to the payment of their debts, when the foreign guardian is within the jurisdiction of the domestic courts, and can be proceeded against in them.

The infant children of B. F. Conrad, deceased, were necessary parties to the petition of the receiver, and the demurrer to it on that ground ought to have been sustained, and leave been given to amend. The court erred in dismissing the petition. It also erred in passing upon the rights of the infants in the \$2,000 fund by its decree of April 13, 1883, when they were not before the court. For these errors the decree of the April term, 1891, will have to be reversed, the decree of April 13, 1883, be set aside, so far as it declares what the interest of the said children is in the \$2,000 fund, and the cause remanded for further proceedings to be had in accordance with this opinion.

(91 Va. 347)

NATIONAL BANK v. CRINGAN et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. April 18, 1895.)

NOTE OF PARTNER—PROCUREMENT OF FIRM CAPITAL—LIABILITY OF SILENT PARTNERS—FIRM NAME.

1. C. applied to a bank for a loan to make up his input in a firm he proposed joining, his partner, T., being offered as an indorser. The loan was made, the firm subsequently formed, and the money turned over to it. The note was renewed several times in the same form as at first negotiated, and never in the name of the firm; the proceeds of each renewal placed to the credit of the firm on the bank's books, and the old note charged to their account. F. was a silent member of the firm from the start, and later B. became a member, but the bank did not know that they were connected with the firm. F. and B. bought out the firm, and they first learned then of the existence of the note. The note was not placed upon the bills payable of the firm, except upon the last renewal, by the bookkeeper of his own motion, which act was promptly repudiated by B. *Held*, that C. had no power to bind the firm which was not in existence when the note was first given, and that F. and B. had never ratified the giving of said note so as to bind them.

2. A partner has no implied power to bind his firm for his own share of the capital agreed to be subscribed.

3. Where a bank holds a note made by one partner, and indorsed by another individually, the burden rests on it to show that it is a firm note.

4. If money is borrowed, or goods bought by one partner of a known concern upon his own credit exclusively, he alone is liable therefor, though the money or property is for the use and benefit of the firm alone, or is applied thereto.

5. Code 1887, § 2377, after providing how a person trading with such words as "& Co." after his name shall publish the same, recites: "Or if any person transact such business in his own name, without any such addition, all the property, stock, and choses in action acquired or used in such business shall" be liable for the debts of such person. *Held*, that said statute applies only to the case of a person trading in his own name, either with words indicating that he has a partner, but which do not disclose his name, or without such words, and not to a case where there are silent partners not indicated in the firm name.

6. There is no statute in Virginia requiring a firm of general partners to disclose their names on a sign at the door and by advertisement, although such is required of limited partnerships.

Appeal from chancery court of Richmond; James C. Lamb, Chancellor.

Bill by the National Bank of Virginia against John W. Cringan and others. From a decree for defendants, complainant appeals. Affirmed.

Christian & Christian, for appellant. Coke & Pickrell, for appellees.

HARRISON, J. This is an appeal from a decree of the chancery court of the city of Richmond, pronounced on the 4th day of March, 1892. In deciding the case, the learned chancellor of that court delivered the following opinion, which is filed with and made a part of the record:

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



"This is a bill to charge W. S. Forbes and W. L. Boyd, as secret partners in the firm of Cringan & Trant, on a note for \$5,000, dated July 6, 1889, drawn by John W. Cringan to the order of E. L. Trant, payable at four months from date, and indorsed by Trant, and discounted by the plaintiff bank. The note in suit was given in renewal for the third time of a similar note, dated June 29, 1888, and discounted on that day by the plaintiff.

"The evidence shows that prior to June 29, 1888, John W. Cringan, E. L. Trant, and W. S. Forbes had agreed to form a partnership to conduct the wholesale grocery business in the city of Richmond, to commence business on or about July 1, 1888. The firm did commence business on July 2, 1888, and about the last of that month W. L. Boyd was admitted as a partner, his interest to relate back to the beginning of the business. The firm was dissolved in September, 1889, by the death of Trant.

"On or shortly before June 29, 1888, Cringan applied to the plaintiff bank for a loan of \$5,000, to make up his input of capital in the concern, offering his note indorsed by Trant; and on June 29th the loan was made, the proceeds of the note being placed to the credit of Cringan on the books of the bank, and on July 6th it was checked out by Cringan, and placed to the credit of Cringan & Trant on the books of the bank.

"In applying for the loan, Cringan informed the cashier of the bank (Lockwood) that Trant and himself had agreed to form the partnership, and that he (Cringan) wanted the money to make up his input of capital; but he did not tell the cashier that there were to be other partners than Trant and himself (Forbes having requested that his connection with the firm should not be made public, and it not being then contemplated that Boyd would be a partner), and the cashier did not ask him that question.

"When the note matured, it was renewed in the same form, discounted by the bank; the proceeds of the new note placed to the credit of Cringan & Trant on the books of the bank, and the old note charged up to the account; and this was repeated at each renewal of the note, of which there were three.

"After the dissolution of the firm, in September, 1889, by the death of Trant, Cringan sold out his interest to Forbes and Boyd for \$1,000 in cash and any interest he might have after the debts were paid; and Forbes and Boyd took possession of the assets, then amounting to something like \$20,000, and proceeded to apply them to the payment of the debts of the firm. The bank did not know that Forbes and Boyd were partners in the concern until after the dissolution; and, the note held by it not having been paid, this suit was brought to charge Forbes and Boyd as dormant partners.

"It would serve no good purpose to go more into the details of the evidence at this point. Such parts of it as are deemed material will be noticed in their proper connections in what follows.

"It seems to me that the vital inquiries in this case (independently of the statute, presently to be considered) are these:

"(1) Did Cringan, on June 29, 1888, have the power, express or implied, to bind the firm of Cringan & Trant in this transaction?

"(2) If nay, has his action been ratified by his copartners, so as to be binding on the firm?

"It is not pretended that at that time Cringan had any express power to bind his firm. This is a question of fact. Whether or not he had any implied power is a question of law. If there was at that time no existing partnership, then he had no such power; for, prior to the actual existence of a partnership, there is no implied power to one partner to bind his firm. That agency only arises when the partnership is actually in existence, and then, of course, only in matters necessary to the business of the concern in the ordinary way. See 1 Bates, Partn. §§ 78, 80, 221; 1 Lindl. Partn. p. 385 et seq.; Story, Partn. § 122a.

"I am clearly of opinion that on June 29, 1888, the partnership of Cringan & Trant was not in existence. There was at that time an executory contract or agreement between Cringan, Trant and Forbes to form a partnership, to go into effect on or about July 1, 1888. That such an agreement does not constitute a partnership, see 1 Bates, Partn. §§ 78, 80; 1 Lindl. Partn. pp. 26, 29, 385, et seq., and notes. In contemplation of law, and as a matter of fact, the partnership did not come into existence until July 2, 1888, when the joint adventure was 'launched,' as it is called in the books. This is shown by the evidence, oral and documentary, in the most satisfactory way, as: (1) By the articles of partnership, dated July 2, 1888, though actually written subsequently to that date. (2) By the printed circular of Cringan & Trant, bearing the same date, saying that the parties 'have this day formed a copartnership.' (3) By the positive testimony of Cringan, Forbes, and Boyd. (4) By the allegations, on page 1 of the bill, sworn to by the cashier, 'that on June 29, 1888, one John W. Cringan represented to him [the cashier] that he, the said Cringan, and one E. L. Trant, were about to form a copartnership,' which statement is substantially repeated in his deposition. (5) From the testimony of the cashier 'that the firm had not (to my knowledge) come into existence legally when the note was first given. If it had, I certainly would have made them indorse it "Cringan & Trant," and would not have accepted it otherwise. \* \* \* Mr. Cringan informed me that the partnership only dated from the 1st or 2d July.' And (6) from the books of the concern.

"But, even if the partnership had been in

existence on June 29th, I should, nevertheless, be of opinion that Cringan had no authority to bind it for his input of capital, even if he had intended and attempted to do so. It is not among the implied powers of a partner to bind his firm for his own share of the capital agreed to be subscribed. Says Mr. Justice Lindley:

"One of the implied powers of a partner, and one of the most important of his powers, is that of borrowing money on the credit of the firm; but this power, like every other implied power, only exists where it is necessary for the transaction of the partnership business in the ordinary way; and consequently, if money is borrowed by one partner for the declared purpose of increasing the partnership capital, or of raising the whole or a part of the capital agreed to be subscribed in order to start the firm, \* \* \* the firm will not be bound unless some actual authority or ratification can be proved." 1 Lindl. Partn. 269, 273, 274; 1 Bates, Partn. §§ 446, 371; Story, Partn. 148.

"And, again, the same author: 'Although each member of an ordinary trading partnership can pledge its credit for money borrowed in order to carry on its business, he cannot render it liable to repay money borrowed by him to enable him to furnish the amount of capital which he has agreed to bring in.' 1 Lindl. Partn. 611.

"There can be no doubt here that Cringan borrowed the money to make up his input, and that he distinctly informed the cashier of that fact at the time. Cringan swears positively that he so informed the cashier, and he is strongly corroborated, as we shall presently see, by a memorandum made by the cashier at the time, and laid before the board of directors of the bank. The cashier denies this, and says that Cringan told him that the money was to make up the capital of the concern, but not to make up Cringan's input. But, even if this be true, it was as much beyond Cringan's power to bind the firm to raise or increase its capital as it was to bind it for his own input.

"2. It is equally clear from the evidence that Cringan's action has not been ratified by his copartners. There is, indeed, nothing approaching a ratification, except the fact that at each renewal of the note the matured note was charged up on the books of the bank to the account of the firm, and the proceeds of the new note credited to that account. But in each instance the new note was made in the same form as the original (drawn by Cringan, to the order of Trant, and indorsed by Trant), and the discount and the old note were charged up on the books of the firm to the account of Cringan. The notes were never placed on the bills-payable book of the firm until at the time of the last renewal, when it was done by the bookkeeper of his own motion, which act was promptly repudiated by the partner Boyd, when he discovered it, after the dissolution of the firm. Neither Forbes

nor Boyd knew of the existence of the note for about one year after the partnership was formed, nor did either of them know that this bank held it until about November, 1889, after the firm had dissolved. It is alleged by the plaintiff that these renewals were made at the request of the firm, and that the old notes were charged by the bank to the account of the firm, and the proceeds of the new notes credited to that account by like request; but this is denied by Cringan, and certainly is not proved by the evidence. Cringan says that he himself requested the renewal of the note when it was first renewed, and that the bookkeeper for the firm attended to it at the subsequent renewals; and he denies that he requested or directed that the old notes should be charged, and the proceeds of the new notes credited to the account of the firm. Such request could not have been made by the firm, for Forbes and Boyd did not even know of the existence of the note, and, of course, the renewal at Cringan's request would not make the note binding on the firm. That no such request was made by the firm is well established by the fact that the form of the note was not changed, nor was the firm's indorsement asked for by the cashier, for the cashier swears that, if the firm had been in legal existence (to his knowledge) on June 29th, he would certainly have made them indorse it 'Cringan & Trant,' and would not have accepted it otherwise. And yet he did not make them indorse it at either of the three renewals. This not only completely repels any presumption of ratification by the firm, but furnishes a very reasonable presumption that the cashier did not desire such ratification. It can scarcely be doubted that this method of charging and crediting was adopted for convenience merely, as neither Cringan nor Trant kept an individual account at that bank, just as other individual notes of both Cringan and Trant were charged up to the firm account on the books of the bank. It certainly falls far short of a ratification by the firm.

"Now, if it has been established that Cringan had no authority to bind his firm by this note, and that his copartners have not ratified his action, that of itself sufficiently disposes of this branch of the case, and this opinion might properly close here. But there are other views of the case which may be presented without impropriety, and certain contentions of the counsel for the plaintiff which should be noticed.

"Thus, I am fully satisfied that this note is the individual obligation of John W. Cringan and E. L. Trant, and not that of the firm of Cringan & Trant. The evidence is to my mind entirely satisfactory on this point, but I can only notice briefly a few of its leading features.

"In the first place, the form of the note makes it prima facie the individual obligation of the maker and indorser, and not that of the firm in which they are partners. The bur-

den is therefore on the bank to show that it is the obligation of Cringan & Trant. This is attempted by the cashier by showing that he understood at the time that the loan was for the benefit of the firm, and that the money was wholly in the firm's business. The latter statement is not disputed, but, as we shall see, that of itself is far from making it a firm obligation.

"Again, Cringan swears positively, both in his answer and in his deposition, that he borrowed the money for himself to make up his input, and that he distinctly so informed the cashier at the time, and he indignantly denies that he intended or attempted to bind the firm. His evidence, I think, is strongly corroborated by the sworn statement of the cashier as to what occurred at that time, as made on page 1 of the bill, and still more strikingly by a memorandum which the cashier made and submitted to the board of directors of the bank when he laid before them Cringan's application for the loan. That memorandum, in the handwriting of the cashier, is as follows:

"J. W. Cringan wants \$5,000, at four months, indorsed by E. L. Trant. He says he has put in \$15,000, and wants \$5,000 in addition, to make it \$20,000. His money is tied up with Cringan, Watkins & Co., and is unavailable at present."

"Again, Trant certainly must have understood this to be a loan to Cringan, for he opened the books of Cringan & Trant, and credited Cringan's stock account with this \$5,000, and charged him on his individual account with the discount.

"Lastly, the proceeds of the note were placed by the bank on its books to the credit of Cringan, although he had no account there, and although it had been agreed that the firm of Cringan & Trant should keep its account there, and that firm was to begin business three or four days afterwards. The money was actually checked out by Cringan on July 6th, and placed to the credit of Cringan & Trant. Moreover, the cashier says that, in the ordinary course of business, the money would have been credited to Trant, but that he was instructed by Cringan to put it to his (C.'s) credit. All this is very persuasive to show that the cashier recognized in Cringan the real owner of the money, and acknowledged his dominion over it. In fact, after the most attentive consideration of his and Cringan's testimony, I am unable to escape the conviction that it was well understood between them on June 29th that Cringan was the real borrower of the money, with Trant as his indorser; and that, while the cashier thought that they alone composed the firm, yet that he did not consider that he was giving credit to the firm. I do not know how otherwise to explain his repeated statements that the firm had not then come into legal existence: 'If it had, I certainly would have made them indorse it "Cringan & Trant," and would not have accepted it otherwise.' And, in answer to the eighteenth cross question, he says: 'It was a note

of the individuals composing the firm, and not a note of the firm, for it had not then come into existence; and I regarded it as an obligation of the individual members composing the firm of Cringan & Trant.' I think this must be taken to mean that he credited J. W. Cringan and E. L. Trant, the firm being then unborn. Whether or not, had the firm then been in existence, he would have insisted on the firm's indorsement, we can only judge by the fact that he failed to do so subsequently, though three opportunities were offered him.

"If, then, this was the individual obligation of J. W. Cringan and E. L. Trant, it would not be binding on the firm of Cringan & Trant, even though the money was wholly used in its business, if that firm was open and notorious; that is, if there were no dormant partners.

"This brings us to the main contention of the counsel for the plaintiff, which is pressed with great force in his closing note.

"The principle which exempts a partnership from liability for the individual obligations of one partner, even though given for money or goods brought into the concern, is that the creditor has made his election between the security of the firm, on the one hand, and that of the individual partner, on the other; and, having chosen to look to the latter, he must abide his own decision. But where no firm was known to exist, or where there were dormant partners, the creditor cannot be held to have made an election, and he may therefore charge the firm or the dormant partners when discovered. Mr. Story says: 'If money is borrowed or goods bought or any other contract is made by one partner upon his own exclusive credit, he alone is liable therefor; and the partnership, although the money, property, or other contract is for their proper use and benefit, or is applied thereto, will in no manner be liable therefor.' Story, Partn. § 134.

"And, again, he says: 'In the case of a dormant or secret partner, the credit is manifestly given only to the ostensible partner, for no other party is known. Still, however, it is not treated as an exclusive credit, for the law, in all cases of this sort, founds its decision upon the ground that the creditor has had a choice or election of his debtor, which cannot be where the partner is dormant and unknown. The credit, therefore, is not deemed exclusive, but binding upon all for whom the partner acts, if done in their business and for their benefit, as is the case in cases of agency for an unknown principal.'

"In *Holmes v. Burton*, 9 Vt. 252, it was held that a note given by one partner in his individual name cannot be enforced against the partnership, though made in consideration of property of which the firm had the benefit. "This rule holds where the partnership is public, although it may not apply to the case of a dormant partnership. It goes upon the ground that the creditor elects to take the individual security.' See, also, 1

Bates, Partn. § 157, and cases cited; In re Warren, 2 Ware (Davies) 320, 322, Fed. Cas. No. 17,191.

"The counsel for the plaintiff contends that this case falls within the exception to the rule; that, even if the credit was in fact given to Cringan, yet, this being a dormant partnership, the firm is, nevertheless, liable, the money having gone to the benefit of the firm.

"It seems to me that the complete answer to this is that Cringan had no authority to bind the partnership in this matter, and that his action has not been ratified by his copartners; and, if he could not bind the partnership, he could not bind the dormant partners, for their liability, when discovered, is exactly what it would have been had they been known as partners from the beginning—that is to say, they are liable for the debts of the firm, not for those of the individual partners.

"If Cringan had borrowed this money after the firm came into existence on his own note, whether indorsed by Trant or not, and for the purpose of carrying on the business of the concern in the ordinary way, and not to increase the firm's capital, nor to make up his own input, then, even though the credit was given in the first instance to Cringan alone, the firm (this being a dormant partnership) would, nevertheless, be bound for the debt, and hence the dormant partners would be liable to pay it. The case would then fall easily within the exception to the rule, and the views of the counsel for the plaintiff would prevail.

"But such is not the case. Cringan borrowed the money before the partnership came into existence. At that time he had no implied power to bind the firm, and no express authority nor any ratification of his act has been shown. He borrowed the money to make up his input of capital, and so informed the lender at the time; but he had no implied power to bind the partnership for the purpose of raising the capital which he himself had agreed to bring in, and no express authority nor any ratification of his act has been shown.

"To recur again, and briefly, to the principles laid down: If credit is given to one member of a known firm, the firm is not liable for the debt, even though the fruits of the credit go to the benefit of the firm: the creditor has made his election to credit the individual partner. But if no partnership was known to exist, or if there were dormant partners, the firm will be liable, for the creditor cannot be held to have made an election. But there is another principle which underlies both these, viz. that the act done must be within the scope of the partner's authority; that is, it must be necessary to the conduct of the business of the partnership in the ordinary way. The authorities show this very clearly. I have examined the cases cited by counsel for the

plaintiff and many others, and in each of them I find that there was an existing partnership, and that the act of the partner was done in the usual course of the business of the concern.

"It now becomes necessary to examine the Virginia statute which is invoked by the plaintiff.

"It is strenuously insisted, and as strenuously denied, that section 2877 of the Virginia Code governs this case; and that, even if the court should reach the conclusions above set forth, yet that the claim prosecuted here is undoubtedly the individual debt of J. W. Cringan and E. L. Trant; and that, being such, the statute makes the assets of the firm of Cringan & Trant, all of which have come into the hands of Forbes and Boyd, liable for its payment. The section reads as follows:

"If any person transact business as a trader, with the addition of the words 'Factor,' 'Agent,' 'and Company' or '& Co.,' and fail to disclose the name of his principal or partner, by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the city, town or county wherein the same is transacted; or if any person transact such business in his own name, without any such addition, all the property, stock and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person.'

"Since the business here was conducted under the firm-name of 'Cringan & Trant,' without the addition of any words, it is the latter clause of the statute which is particularly relied on, viz.:

"'Or if any person conduct such business in his own name, without any such addition, the property, stock and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person.'

"I have considered this matter very attentively. In fact, the evident sincerity of the counsel for the plaintiff in pressing it has induced me to bestow on it far more thought than I would otherwise have considered necessary. The result is that I am satisfied that the statute does not apply, and was not meant to apply, to such a case as this. No authority was cited on either side in the argument, and I have not been able to find any bearing on this point.

"The position of the plaintiff is this: Conceding that the debt here is not the debt of the firm of Cringan & Trant, but the individual debt of J. W. Cringan and E. L. Trant, yet, inasmuch as J. W. Cringan and E. L. Trant conducted the business in their own names (i. e. in the firm name of Cringan & Trant), without the addition of the words mentioned in the statute, the assets of the firm of Cringan & Trant are expressly made

liable for the payment of this debt, which is, of course, equivalent to saying that, by virtue of this statute, it is the law of Virginia that partnership assets are impressed with a statutory lien or charge in favor of the individual creditors of the members of the firm. If this be so, it involves very serious consequences. I think it effectually destroys the equity of the parties inter sese to have the partnership assets first applied to the payment of the partnership debts, and hence the creditors of one partner (or, as in this case, of two partners), who might be heavily indebted, could take the social assets *pari passu* with the social creditors, and leave the other partners to pay the whole of the social debts remaining unpaid. I am not sure, indeed, that in such a case the individual creditors would not have priority over the social creditors. I think that, if this had been the real meaning and effect of the statute, it would very likely have been discovered during the half century that it has been on our statute books.

"It seems to me very plain that the statute applies only to the case of a person trading in his own name, either with the addition of words which indicate that he is an agent or has a partner, but which do not disclose the name of his principal or partner, or else without any such words; and its effect is to make the assets used or acquired in such business liable for the debts of such trader. I believe that there is a consensus of opinion in the profession that the statute was intended to meet the common case of a person trading in his own name, either with or without the words 'Agent' or 'Company,' and obtaining credit presumably on the faith of the assets used in such business, and then, when the necessity arises, shielding those assets from the demands of his creditors by claiming that they belong to his principal or to his partner. The statute is aimed at the fraud which might be, and no doubt often was, practiced in this way, and it prevents the fraud by making the assets used or acquired in such business liable for the debts (all the debts) of such person, unless the name of his principal or partner be disclosed in the manner prescribed. An examination of the language of the statute as first enacted in 1839 will materially aid this construction. The act is entitled 'An act to prevent persons from carrying on business under false or fictitious names and firms,' and its full text is as follows:

"Section 1. Be it enacted by the general assembly, that no person shall transact any business whatever, in the co-partnership name and style of himself and any other person, who is not liable for the debts incurred in the course of business; and no person shall transact business in his own name, with the addition of the words "Agent" or "Factor," merely without adding thereto the name of his principal; and no person shall transact business under his own name, with the addition of the words "and Company" or "& Co.," unless some actual partner be represented

thereby. And if any person shall offend against the provisions of this act, or either of them, he or she shall be guilty of a misdemeanor, and for each offence shall be punished by a fine of not less than one hundred, or more than one thousand dollars.

"Sec. 2. And be it further enacted, that all property, debts, stock, and choses in action acquired by any person trading or transacting business in his own name, with the addition of the words "Agent," "Factor," and "Company," or "& Co.," and who does not disclose the name of the principal or partner liable for the payment of all the debts incurred in the course of his business, shall, as to all creditors of such person, be taken to be his individual property, and liable to his debts, as if it were acquired solely on his own account." Acts 1839, p. 45, c. 72.

"The only cases in which the statute has come under review in our supreme court of appeals were cases of agency. See *Farmers' Bank v. Kent*, 16 Grat. 257; *Penn v. Whitehead*, 17 Grat. 508, 524.

"Neither the terms of the statute nor the policy of the law requires, or even permits, that it should be applied to an avowed partnership of two or more persons doing business under a name which shows that it is in fact a partnership, and discloses full names of at least two of the partners. There is nothing false or fictitious in the names of 'Oringan & Trant.' It shows on its face that there is a partnership, and discloses the names of two persons who, in the language of the original act, are 'liable for all the debts incurred in the course of the business'; and, if there are other partners who are not thus disclosed, they will be equally liable, when avowed or discovered, for all such debts. On the other hand, the name of 'John Smith' or 'John Smith, Agent,' or 'John Smith & Co.,' may be fictitious. There may or may not be a partnership or agency; and, if there is, the statute requires that the name of the partner or principal shall be posted at the door and published in a newspaper; else John Smith is estopped from asserting that fact against the demands of his creditors.

"There is no statute in Virginia requiring a firm of general partners to disclose their names on a sign at the door and by advertisement in a newspaper, although limited partnership associations are required to disclose names, advertise and record articles; and the statute under consideration requires a person doing business as a trader, where his name is the only ostensible name, and the only indication of a partnership is the words 'and Company' or '& Co.,' to have such sign and make such advertisement. When we consider the fact that the great majority of all partnerships are general partnerships, this absence of any such requirement as to them seems to have some significance. I also think that there is great significance in the word 'person,' so often used in the statute, notwithstanding the rule of construction which per-

mits a word importing the singular number to be extended and applied to several person or things (Code Va. § 5, cl. 13); especially when we consider the language of the original act.

"Again, the trader contemplated by the statute is a person doing business as a trader. In this case neither J. W. Cringan nor E. L. Trant, separately or jointly with each other, transacted business as a trader. The firm of Cringan & Trant, composed of Cringan, Trant, Forbes, and Boyd, was the person or trader who transacted business without complying with the statute. The partnership was an entity, entirely distinct from either of its component parts. If this trader is within the terms of the statute, and has failed to comply with its provisions, the penalty is that its assets are liable to the payment of its debts; and the force of the statute so applied is simply that the assets of the trader, Cringan & Trant, are liable for the debts of the trader, Cringan & Trant, and that is the law independently of the statute. But the debt here is not the debt of Cringan & Trant, and the contention of the plaintiff is based on the concession of this fact. So that, even if the statute be made to apply in this way, it does not help the plaintiff.

"The arguments on this point are by no means exhausted, but these must suffice.

"I am of opinion to dismiss the bill, and decree may go accordingly."

We have carefully examined the record, and find that our views of this case are fully and clearly expressed in the opinion of Judge Lamb, which this court adopts; and, for the reasons therein given, we are of opinion that there is no error in the decree complained of, and it is affirmed.

(90 Va. 80)

#### MORGAN v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 29, 1893.)

##### INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

Where an indictment for selling liquor charges the offense to have been committed in the Auburn magisterial district, and the proof only shows that said offense was committed at a place in Montgomery county, it is insufficient.

Error to circuit court, Montgomery county.

Daniel Morgan was indicted for violating liquor law. From a verdict of guilty, defendant appeals. Reversed.

Hoge & Hoge, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

LACY, J. The case is as follows: The plaintiff in error was indicted in the said county court on the 24th day of February, 1891, by a special grand jury, that he did in Auburn magisterial district, in Montgomery county, within 12 months next preceding the indictment, unlawfully sell wine, spirituous, and malt liquors, and a mixture thereof, to

R. L. Shanklin. The jury on the trial found him guilty as charged in the indictment, and fixed his fine at \$125, and the court determined his term of imprisonment at 60 days. The plaintiff in error moved the court to set aside the verdict, and grant to him a new trial, which motion the court overruled, and rendered judgment on the verdict; and the accused excepted, and tendered his bill of exceptions, which was signed and sealed, and made a part of the record. Wherein the court certified that, upon the trial of the case, the commonwealth proved by the witness Shanklin that he purchased from defendant a pint of brandy in West Radford, in Montgomery county, 12 months before the finding of the indictment, and that the defendant's place had the appearance of a bar; and then proved by the depot agent at Radford that there was a shipment of spirits to one D. Morgan; that the same was delivered to draymen; and that he did not know that the same was delivered to the defendant, nor that the defendant was the owner of the same. The jury in their verdict found the defendant guilty as charged in the indictment, and fixed his fine at \$125.

The first question we will consider is the action of the court in refusing to set aside the verdict and grant a new trial on the motion of the defendant. The indictment charged that the unlawful act was committed in Auburn magisterial district, and was essential, as the vote on "license" or "no license" is required to be held by districts, and not by counties. It was said by Samuels, J., in the case of *Com. v. Head*, 11 Grat. 818: "An indictment or presentment should always allege the offense with so much fullness and precision of description that the defendant may know for what he is prosecuted, and thereby be enabled to prepare his defense; and, further, that the conviction or acquittal may be pleaded in bar of any future prosecution for the same offense." This offense is local in its nature. Place is of its essence, and yet no place is alleged, but the whole county; and the indictment was held bad. So it is an essential that the place shall be set forth. The evidence does not prove that it was in the Auburn district, but at a place in Montgomery county, whether in Auburn district or not does not appear. The action of the county court in refusing to set aside the verdict, and rendering judgment on the verdict, was erroneous, and the said action of the said county court ought to have been set aside and reversed. We are therefore of opinion to reverse the action of the circuit court, and, rendering such judgment as said circuit court ought to have rendered, to reverse the judgment of the said county court, and remand the case to the said county court of Montgomery county for a new trial in the case, which will be ordered to be certified to the said county court of Montgomery county. Judgment reversed.

FAUNTLEROY, J., dissents.

(94 Ga. 684)

## FIELDS v. BUSH et al.

(Supreme Court of Georgia. July 30, 1894.)

## WILLS—CONSTRUCTION—NATURE OF ESTATE—SALE BY DEVISEE—BONA FIDE PURCHASER.

1. The will involved in the present case created an estate in the testator's widow for and during her life or widowhood, without reference to whether all the children should arrive at majority within that period or not.

2. A sale and conveyance by her of a portion of the realty embraced in the devise, the sale being made privately and without an order of the ordinary, would pass such estate as she had as devisee, but no more.

3. If the conveyance from her was procured by fraud, and afterwards the property was legally sold at sheriff's sale under a judgment against her vendee, the purchaser at that sale, while he would be affected by notice of the fraud, were she reclaiming the property, is entitled to hold it, irrespective of the question of fraud or no fraud, during her life or widowhood, as against any claim to possession by the devisees in remainder, children of the testator.

(Syllabus by the Court.)

Error from superior court, Gordon county; T. W. Milner, Judge.

Action by Emma Bush and others against J. F. Fields and others to set aside several conveyances. There was a verdict for plaintiffs, and from a judgment denying his motion for a new trial defendant Fields brings error. Reversed.

The following is the official report:

Emma Bush, Clara Fields, and several others, children of I. N. Buckner and Sarah A. Buckner, brought their action against their mother, their brother, John C. Buckner, and his wife, Mattie Buckner, and J. F. Fields, to set aside a deed made by their mother to John C. Buckner, a deed from John C. to his wife, a deed from his wife to Fields, and a deed from the sheriff of Gordon county to Fields, and to recover the property included therein. Petitioners alleged, in brief, that the property in question had belonged to their father, and was covered by the terms of his last will, under which they were legatees; that the deed from their mother to John C. Buckner was procured by fraud of John C.; that John C. fraudulently deeded the property to his wife; that she conveyed a portion to Fields, and the sheriff of Gordon county levied on the other portion as the property of the wife of John C., and sold it to Fields; that under the will Mrs. Sarah Buckner had no power to sell the property; and that defendants had full notice of the fraud and the rights of plaintiff. They prayed, among other things, that the property be decreed to be still part of the estate of their father, to be administered under the will; that Mrs. Sarah A. Buckner be required to give bond for the true administration of the estate, etc. There was a verdict for the plaintiffs, Fields alone defending the case. The verdict was a general one, and upon it a decree was taken setting aside the deeds, and vesting the title to the property in plaintiffs. Fields made a motion for new trial, which was overruled, and he excepted. The mo-

tion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because the court erred in charging: "It is my duty to construe the will of I. N. Buckner, and I charge you that under this will Sarah A. Buckner could manage the property so as to maintain and educate the minor children of I. N. Buckner. She had no power to sell any part of it without an order of court to do so. If it became necessary to use any part of the property left by I. N. Buckner, she could have applied to a court of equity, and obtained an order to sell; but, if you find that she had no such order, —and it is not contended that she did,—her deed made to John C. conveyed no title to him, and, no title being in him, he could convey none to Mattie A., his wife, if he conveyed to her without a valuable consideration." Error in charging, in connection with the foregoing charge: "A purchaser at a sheriff's sale can get no more title than the defendant in *fi. fa.* had; and if you find, under the charge given, that Mattie A. Buckner had no title, then the defendant Field got none." Error in refusing to charge as requested by defendant in writing: "Under the will of I. N. Buckner, his wife, Sarah A. Buckner, took the property in dispute, with full power to manage the property as she thought best, for the purpose of maintaining and educating her minor children. The title thus vested in her upon the probate of the will. And I charge you that, if she thought best, she had the right to sell this property in her own name, for the purpose aforesaid. She could have sold the property to John C. Buckner, as the deed to him purports to do." Error in refusing to charge as requested by defendant in writing: "If this deed to John C. was obtained by fraud, it would be void as to him, and if conveyed to his wife voluntarily, or if she had notice of the alleged fraud, her title would also be void. But, while this is so, yet, if you find that this property was levied on as hers, under an execution against the wife of said John C., purchaser at the sheriff's sale, who bought without notice of the alleged fraud, got title free from the equity of plaintiffs." Error in refusing to charge as requested by defendant in writing: "Under the will of I. N. Buckner, the widow had a life interest in the property, and the plaintiffs cannot recover the possession while Mrs. S. A. Buckner lives unmarried; and you should add to your verdict, 'but defendant is entitled to possession of the property until the death of Mrs. Buckner.'" This request was made, to be given if the court should refuse to give the charges set out in the two grounds last above. Error in refusing to allow defendant to prove that Mrs. Sarah A. Buckner, after taking possession of all the property, sold off to various parties portions of the property so received by her from her husband's estate, before she conveyed this property to John C. Buckner; plaintiffs' counsel objecting to this testimony

as irrelevant. The material portions of the will of I. N. Buckner were as follows: By the second item he directed that all his just debts be paid, without delay, by his executor. By the third item he bequeathed to his wife realty, including the property in dispute, and also all merchandise and furniture of which he might be possessed at his death, and all notes and accounts and debts that should be owing to him at his death, and provided that she should have full power to collect all debts due him, "without any further, as my executrix hereinafter named, during her lifetime and widowhood"; that she should have full power to manage the property "so as to raise and educate the minor children during her lifetime or widowhood, then the remainder to be sold, and divided equally between my heirs." By the fourth item he directs that his wife pay to each of his heirs who were of age, and the others as they came of age, \$100 each, as she might be able, and at her convenience. His wife was appointed executrix.

W. H. Dabney and R. J. & J. McCamy, for plaintiff in error. McCutchen & Shumate, J. C. Fain, and W. R. Rankin, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 879)

#### EARLY COUNTY v. JONES.

(Supreme Court of Georgia. Aug. 14, 1894.)

JUSTICES OF THE PEACE—COMPENSATION FOR SERVICES AS CORONER.

In order for a justice of the peace to be entitled to compensation for holding an inquest upon a dead body, he must make it affirmatively appear that he rendered the service under circumstances which gave him the legal right to act as coroner, namely, that there was no coroner in office, or that he was absent from the county when needed, or would not or could not take the inquest.

(Syllabus by the Court.)

Error from superior court, Early county; J. M. Griggs, Judge.

Action by J. D. Jones against the county of Early. Plaintiff had judgment, and defendant brings error. Reversed.

The following is the official report:

J. D. Jones sued Early county for \$10 for holding an inquest. The justice, on the evidence submitted, rendered judgment for that amount in plaintiff's favor, whereupon plaintiff carried the case by certiorari to the superior court. On the hearing it was ordered that the writ of certiorari be overruled, and that "the verdict and judgment" of the court below be affirmed. To this ruling defendant excepted. The testimony of plaintiff was: He is notary public and ex officio justice of the peace for Early county. He was notified by a son of Simon Lofton that Simon Lofton had come to his death by violence, and the son wanted plaintiff to go out to his

home, and hold an inquest on the body. Plaintiff went out to Howard's Landing, on the Chattahoochee river, and returned, a distance of nine miles. After returning to the town of Blakely, and hearing that no inquest had been held on the body of Simon Lofton, plaintiff ordered the sheriff to summon a jury, and proceeded out in the afternoon to hold inquest, as requested by the son of deceased. Plaintiff presented his account for payment to the county commissioners, as per fee bill for such cases, and they refused payment, "whereupon suit was brought against said county, and judgment rendered for the sum of ten dollars."

O. B. Weaver testified for defendant: He was the commissioned coroner. Was duly elected to that office by the qualified voters of Early county at the last election for county officers. He had qualified and given bond for the faithful performance of his duty as coroner. He went to Blakely the next morning after the inquest on the body of Simon Lofton was held (the evening before), and was informed by plaintiff that inquest was held, and that it would not be necessary to hold another inquest. He could and would have held the inquest if he had been informed of the death of Lofton. He was in the county at that time.

W. D. Kiddoo and R. H. Sheffield, for plaintiff in error. R. H. Powell & Son, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 880)

#### GEORGIA HOME INS. CO. v. HALL et al.

(Supreme Court of Georgia. July 16, 1894.)

INSURANCE ON FIRM PROPERTY—BREACH OF CONDITIONS—CHANGE OF TITLE—TRANSACTION BETWEEN PARTNERS—INSURABLE INTEREST.

1. A policy of insurance upon partnership personality, taken out by the partners in their firm name, is not vitiated by a contract between them, made while the policy was in force and before any loss was sustained, by which one of the partners agreed to sell his interest in the property insured to the other, reserving the title to such interest until the purchase money should be paid, the loss occurring before payment in full had been made, the stipulations in the policy bearing upon the subject being that the policy should be void if there be a mortgage, bill of sale, or other lien upon the property insured, or any part of it, either prior or subsequent to the issuance of the policy, without the fact being indorsed thereon, or if any change takes place in the title or possession of the property, whether by sale, transfer, conveyance, legal process, or judicial decree, or if the policy, before loss, be assigned without the consent of the company indorsed thereon, or if the insured is not the sole, absolute, and unconditional owner of the property insured.

2. A partnership has no insurable interest in household, ornamental, and kitchen furniture of one of the partners and his wife, or in their wearing apparel. A policy embracing these articles, as well as property of the firm, is void as to the former, though valid as to the latter.

(Syllabus by the Court.)



Error from city court of Richmond; W. F. Eve, Judge.

Action by Hall & Peddinghaus, for the use of Hall, against the Georgia Home Insurance Company, upon a policy of insurance. From a judgment overruling a demurrer to the declaration, defendant brings error. Reversed in part, and affirmed in part.

The following is the official report:

Hall & Peddinghaus, suing for the use of Hall, brought their action against the Georgia Home Insurance Company. The defendant demurred generally and specially to the declaration. An amendment was made to the declaration, and the judge presiding overruled the demurrer upon the first four grounds thereof, and sustained it as to the fifth ground. After the judge had announced his decision or the demurrer, counsel proceeded to strike the jury; and after the jury was stricken, and counsel for plaintiffs was about to proceed with the evidence, defendant's counsel asked that the trial of the case be postponed until the supreme court could review the decision on the demurrer, which request was granted. The plaintiffs excepted *pendente lite* to the decision of the judge ordering stricken from the declaration the language objected to in the fifth ground of the demurrer, and to the action of the judge in granting a postponement of the case. The defendant excepted to the judgment overruling the first four grounds of demurrer, and brought the case to this court for review.

The declaration alleged, in brief: The defendant is indebted to petitioners \$3,000, besides interest, 25 per cent. damages, and \$500 reasonable attorney's fees, upon a policy of insurance, and arising as follows: On December 6, 1889, petitioners, having a photograph and art gallery in Augusta, and petitioner Hall with his wife occupying rooms adjacent, in the same building with the gallery, applied through Hall to Allen & Co., agents of defendant, for \$2,500 insurance upon the gallery and stock therein, and for \$500 on the household furniture, wearing apparel, etc., of Hall and wife. Petitioner had no connection with the writing of the policy, but informed the agent that the \$2,500 insurance was wanted upon the art gallery belonging to Hall & Peddinghaus, and the \$500 insurance upon the personal effects of Hall and wife. Allen, the agent of defendant, was not only familiar with the surroundings and location of the gallery, and knew that Hall and wife occupied rooms adjacent thereto, but Hall fully explained to him all the facts and circumstances connected therewith which he desired to know; and, after being satisfied with the conditions, location, ownership, and circumstances connected with the risk, Allen issued to Hall & Peddinghaus policy number 140,315 of defendant, containing a written description in reference to the property insured, after stating "insures Hall & Peddinghaus to the amount of three thousand dollars," as follows: \$2,500 on furniture, fixtures, cases in gallery, por-

traits, cameras, working tools, photograph implements, stands, rests, baths, screens, material, supplies, and all other furniture, fixtures, and stock usual to a photograph gallery; and \$500 on household, ornamental, and kitchen furniture of all kinds, including wearing apparel, and all while contained in their apartments on second and third floors of three-story brick, metal-roof building No. 712, south side Broad street, Augusta, Ga. The policy was to be of force until December 6, 1890, the consideration therefor being \$30, which was paid by petitioners to Allen & Co. The words "in their apartments" were intended by defendant and understood by Hall to mean the apartments of Hall and wife, in the rooms adjacent to the gallery, as before stated. On December 6, 1890, by renewal receipt of defendant No. 6,174, the policy was continued to December 6, 1891, for a consideration of \$30 paid by petitioners; and on December 6, 1891, by renewal receipt No. 6,810, the policy was continued to December 6, 1892, for a like consideration paid by petitioners. The original policy was placed by Hall in the safe of John Sancken, who in September or October, 1891, sold his safe, and in removing papers therefrom, seeing that the policy on its face had expired and supposing it of no value, destroyed it, with other papers of his own. About the time of the renewal of the policy, in December, 1891, Hall informed Allen that Sancken had destroyed the original policy, and Allen stated that that made no difference; that the company had the material parts on its books; that the body of the policy was a printed form, and that petitioners' holding a renewal receipt was all-sufficient for their protection. Petitioners, therefore, sue upon the policy as a paper destroyed, and attach a copy in substance thereof, if not an exact copy, the written portion having been furnished from defendant's books, and the balance being upon one of the regular official blank forms furnished by defendant. On August 27, 1892, fire in an adjoining building spread to the buildings and rooms occupied by petitioners and Hall and his wife, and Hall and his wife were obliged to leave the building hurriedly, saving only a few articles belonging to the gallery and of wearing apparel, the remainder of the property appertaining to the gallery and in the apartments of Hall and wife being destroyed. A few days after the fire defendant sent its special agent, Spencer, to examine into the losses, and, among others, that covered by this policy. He was given every facility and all the information possible concerning the loss of petitioners, and, after considering the same, offered to waive all proof, and give Hall a check at once for about \$1,500, if he would give a receipt in full. This proposition was not made with a view to a compromise, but because Spencer was of opinion that as a partner Hall had never owned but a half interest in the firm, and he claimed, as Peddinghaus had sold to Hall, Peddinghaus' interest in the insurance was forfeited. Peti-

tioner at once declined this offer, and for about ten days or two weeks Spencer led him to believe the loss would be soon adjusted, but finally left the city without even reporting to Hall that he had gone. After waiting some time, petitioner, on a loss blank furnished by Allen & Co., made out full proofs of the loss, verifying same by affidavit about September 22, 1892, and forwarded them, as requested, to the home office of defendant, where they were received a few days afterwards. These proofs showed a loss upon the property covered by the policy of \$7,845, showing a loss upon the gallery of about \$6,800, and upon the wearing apparel and furniture of Hall and wife of over \$1,100. Defendant was notified at the time that petitioner was anxious to give it all the information it desired, and, if the proofs were in any way unsatisfactory, any additional information or proof would be furnished. After keeping the proofs until about November 2, 1892, and without specifying wherein they were deficient in any way, defendant demanded from petitioner Hall duplicate invoices of all purchases made within six months prior to the fire. After much trouble in procuring them, about January 7, 1893, he forwarded the duplicate invoices to defendant at its home office, and the same were duly received by it. On or about April 30, 1892, Hall made a contract with Peddinghaus to purchase the latter's interest in the gallery, the latter agreeing to sell, but reserving his title to the half interest bargained for by Hall until the purchase money for said half interest was paid. It has not yet all been paid, and at the time of the fire Peddinghaus held title to the half interest, as agreed at the time of the sale. He has agreed that the suit shall be brought upon the policy in the name of the firm for the use of Hall, so far as the firm were interested in the contract. After 60 days from the filing of the proof of loss with defendant, it having failed to pay or in any manner adjust the loss, petitioner Hall made a written demand on it on or about December 1, 1892, and served the same on Allen, its agent at Augusta. On January 28, 1893, defendant, through its agent Spencer, made demand upon Hall for an appraisal of the value of loss; and about February 4, 1893, without acknowledging its right to ask for appraisal, Hall signed the papers sent him, and forwarded them, as requested, to defendant's home office. Hall having appointed Cohen appraiser to act in his behalf, Spencer, said special agent, appointed Doughty appraiser in behalf of defendant. Defendant then undertook in its own behalf to appoint an umpire, and referred the name of the umpire to Cohen, who, without other objections to the umpire than that he was named by defendant, declined to agree to him as an umpire, and notified Doughty, Spencer, and Allen that he was ready to select an umpire in accordance with the terms of the policy, and proceed with the appraisal. Cohen informed them that he rejected the umpire named by them because not

appointed in accordance with the policy, law, or usage, and informed defendant and Hall that he would be ready to proceed with the appraisal on the morning of February 18, 1893; and petitioner appeared there, with his witnesses, but neither the appraiser appointed by defendant nor defendant appeared, and since that time have abandoned all efforts to have an appraisal made. On March 7, 1893, Hall made written demand of defendant that it proceed with the appraisal, if it desired the same, within five days, but from that time until now defendant has refused to go on with the appraisal, and has therefore abandoned the same. Petitioner claims that defendant never had any bona fide intent of having an appraisal made, unless it could have it done by a board with a majority of the appraisers appointed by itself, and in making such attempt it acted in bad faith, and it is a part of an original intent to defeat petitioner in the collection of the insurance. Defendant has acted in bad faith, caused petitioner unnecessary delay, trouble, and expense, and, in refusing to pay a loss it knew to be just and due, has forced him to the expense of employing attorneys and bringing suit. At the time of the fire the policy was in full force, and all its terms and conditions have been fully complied with by petitioner, and everything done either required by the policy or demanded by defendant.

The demurrer was upon the following grounds: (1) That the declaration does not set out a complete cause of action at law. (2) That the plaintiff or plaintiffs cannot recover any portion of the \$500 damages alleged to have been done to the "household, ornamental, and kitchen furniture," because it appears from the declaration and exhibits attached that said furniture was insured as the property of the partnership of Hall & Peddinghaus, whereas it did not belong to said partnership at all, but was the individual property of said Hall and his wife,—said policy of insurance expressly stating that it was to be void "if the assured is not the sole, absolute, and unconditional owner of the property insured." (3) That the plaintiff or plaintiffs cannot recover any portion of the \$2,500 damages alleged to have been done to the "furniture or fixtures, cases," etc., and "stock," etc., because it appears from the declaration and exhibits attached that the property was insured as the property of the partnership of Hall & Peddinghaus, and that on April 30, 1892, after the renewal of the policy, and before the fire, said Peddinghaus executed and delivered to said Hall a conditional bill of sale to his (Peddinghaus') half interest therein, and surrendered possession of said property to said Hall, without said change in title and possession of the property being indorsed on the policy, and without any notice of such change being given to the defendant company or any of its agents, and without any consent or ratification by said company or its agents; said policy of insurance expressly stating that it shall be

void "if any change takes place in the title or possession of the property, whether by sale, transfer, conveyance, legal process, or judicial decree, or if the policy before loss be assigned without the consent of the company indorsed thereon." (4) That the plaintiff or plaintiffs cannot recover any portion of the \$2,500 damages alleged to have been done to the furniture, fixtures, cases, etc., stock, etc., because it appears from the declaration that on April 30, 1892, said Peddinghaus made a conditional bill of sale of his half interest therein to said Hall without having that fact indorsed on the policy, or giving notice thereof to the defendant company or its agents, or obtaining any consent or ratification by said company or its agents; said policy of insurance expressly stating that it shall be void "if there be a mortgage, bill of sale, or other lien upon the property hereby insured or any part of it, either prior or subsequent to the issue of this policy, without the fact being indorsed hereon." (5) That the plaintiff has improperly and illegally incorporated into his pleadings the statement that this defendant company, through its agent R. P. Spencer, offered to pay plaintiff \$1,500 in full settlement of his claim, it appearing that said offer was made by way of compromise, and therefore it is not admissible in evidence or in pleading against the defendant company, and defendant moves now to strike from the declaration all words referring to said offer. The words which were incorporated in the declaration by amendment were, after the allegation that Spencer offered to waive all proof and give Hall a check at once for about \$1,500, if he would give a receipt in full: "This proposition was not made with a view to a compromise, but because Spencer was of opinion that as the partner Hall had never owned but a half interest in the firm, and he claimed that, as Peddinghaus had sold to Hall, his (Peddinghaus') interest in the insurance was forfeited."

Fleming & Alexander, for plaintiff in error.  
J. S. & W. T. Davidson, for defendants in error.

PER CURIAM. Judgment reversed in part, and affirmed in part.

(94 Ga. 645)

#### JONES et al. v. KENDRICK.

(Supreme Court of Georgia. July 23, 1894.)

#### LEVY ON PERSONALTY — SUIT ON CLAIM BOND — DEFENSES—ESTOPPEL TO CLAIM TITLE.

1. One who gives to a constable by whom personal property has been duly seized under an execution against a third person a bond for the production of such property at the time and place of sale, and, in consequence of so doing, is intrusted by the constable with the possession of the property, cannot, when sued upon the bond for a breach of its condition, set up title in himself to the property, and thereby defeat the action. He and his sureties are estopped from contesting the constable's title.

2. A recital in the bond that the principal obligor claimed the property would indicate that

he intended to interpose a statutory claim with a view to making an issue with the plaintiff in execution as to the title, but, no such claim having been in fact interposed, the bond is to be treated as a voluntary bond, executed and delivered by a bailee to his bailor.

(Syllabus by the Court.)

Error from superior court, Taliaferro county; H. C. Roney, Judge.

Action by W. B. Kendrick against J. E. Jones and another on a bond. There was a verdict for plaintiff, and from a judgment overruling their motion for a new trial defendants bring error. Affirmed.

The following is the official report:

Kendrick, a constable, sued Jones and Duckworth on a forthcoming bond. There was a verdict for the plaintiff, and to the overruling of their motion for a new trial the defendants excepted. The grounds of the motion are that the verdict is contrary to law and evidence, and that the court ruled that defendants were estopped from showing that defendant Jones was the owner of the property when levied on, and that Amos Perkins, the defendant in *fi. fa.*, never at any time owned said property or had any interest therein. The bond sued on is dated October 7, 1891, and is signed by Jones as principal, and Duckworth as security. The condition therein stated is that "Kendrick, as constable, having levied an execution from a justice's court, in favor of Titus Richards against Amos Perkins, on one bale of lint cotton, supposed to weigh 450 pounds, said cotton having been claimed by Jones, now, should said Jones deliver said property to the constable at the time and place of sale, provided the property be found subject to the execution, this bond to be void." In evidence appeared an execution in favor of Titus Richards against Amos Perkins, issued from a justice's court on January 4, 1890, for \$90, principal, besides interest and costs, bearing the following indorsements, signed by Kendrick as constable: "Levied the within *fi. fa.* on one bale of lint cotton, this October 7, 1891." "Sold the above bale of cotton at 7½ cents, making the sum of \$32.62, this October 17, 1891." Also in evidence was a notice of the sale of the property levied on, given by the constable, stating that the property would be sold at the district court ground on October 7, 1891, within the usual hours of sale, and that it was levied upon as the property of Amos Perkins under the *fi. fa.* The place where the property was located was not stated in said advertisement. The constable testified: He made the levy referred to. The property, when levied upon, was at the gin-house of Edwards. He took the bond sued on from defendants, who executed and delivered it to him when he levied on the cotton. It was in the seed, and not ginned. And he then took a sample of it by which to sell it, and sold it on October 17, 1891. He consented for it to be ginned. It was not produced by defendants, or by any one at the time and place of sale. Richards ruled him in open

court in this matter, and obtained judgment for \$32.62. He employed no counsel, and there was no trial, and he submitted to judgment under the rule. No claim was filed by Jones or any one to the property levied on. He paid to Richards the amount of the judgment. Rainey Perkins was present on the day the property levied on was sold, and knew it was being sold, and did not assert or make known that she had any interest or title to it. The minutes of the superior court were introduced, showing petition for rule, service of same, and judgment for said amount. Jones testified that the property levied on was produced on land which he rented to Rainey Perkins, and was delivered to him as part payment of said rent for the year 1891; that Amos Perkins never at any time had any interest in the property; and that it was delivered to defendant Duckworth by Jones, who disposed of it, and has never accounted for it to any one. Defendant also introduced the note of Rainey Perkins, dated December 9, 1890, for rent of land for 1891, for 650 pounds of lint cotton. In the judgment overruling the motion for the new trial it is stated that no point was raised on the trial as to the form of the bond, nor as to the sufficiency of the advertisement; that defendants admitted there was a breach of the bond, but claimed that defense could be made to the suit as freely as if a claim had been regularly filed; and that on the hearing of the motion for the new trial it was insisted that the evidence showed the advertisement defective. But the court held the defendants estopped, under the evidence, from claiming any irregularity in the sale, and from saying the property was not that of defendant in *fi. fa.*

H. M. Holden, for plaintiffs in error. J. W. Hixon, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 442)

CHANDLER v. WESTERN UNION TEL. CO. WESTERN UNION TEL. CO. v. CHANDLER. GEORGIA, C. & N. RY. CO. v. SAME.

(Supreme Court of Georgia. July 23, 1894.)

ACTION FOR PENALTY — DELAY IN DELIVERING TELEGRAM—JOINT DEFENDANTS—AMENDMENT OF DECLARATION.

1. A company receiving a telegraphic message for transmission, and a connecting company whose agent at the point of destination failed to deliver it with due diligence, cannot be joined in the same action for the statutory penalty; the action being brought for an alleged default of each severally, and no joint default or joint conduct of the business of telegraphing by the defendants being alleged.

2. A declaration against a telegraph company for the statutory penalty, which alleges that the message delivered to the company for transmission was never transmitted, may be amended by striking out everything which follows in the declaration which is inconsistent therewith, and by introducing new matter which is consistent, and which merely amplifies this allegation; and if the declaration, after being thus amended, is

consistent, and sets forth a cause of action under the statute, it should not be dismissed on general demurrer. Lumpkin, J., dissenting.

3. Where it plainly and unmistakably appears from the allegation of the plaintiff's declaration, in an action against a telegraph company for the statutory penalty, that the gist of the action was that the company failed to transmit correctly the message delivered to it, although the declaration did allege that the message "was never transmitted," yet, it being perfectly obvious from the other allegations therein that the pleader meant, by the words quoted, merely to allege that the message was incorrectly transmitted, it is not allowable by striking out these latter allegations, or otherwise amending the declaration, to make it aver unequivocally that the message was never in fact transmitted at all. Properly construed, the original declaration was based on incorrect transmission only. The amendment sought to introduce as a basis of the action actual nontransmission, which makes an entirely new and distinct cause of action.

(Syllabus by the Court.)

Error from superior court, Jackson county; N. L. Hutchins, Judge.

Action by D. F. Chandler against the Western Union Telegraph Company and the Georgia, Carolina & Northern Railway Company, for failure to deliver a telegraph message. To a judgment sustaining demurrers to his declaration, plaintiff brings error. And to a judgment overruling its demurrer the railroad company files a cross bill of exceptions. Judgment reversed as to the telegraph company, and affirmed as to the railroad company. Cross bill of exceptions dismissed.

The following is the official report:

Chandler sued the Western Union Telegraph Company and the Georgia, Carolina & Northern Railway Company, his declaration alleging: The telegraph company, a corporation with a line of wires partly in this state, engaged in telegraphing for the public, and having an office and an agent in Jackson county, where the suit was brought, and the railroad company, a company operating a line of electric telegraph wires partly in this state, and engaged in telegraphing for the public, and having an office and an agent in said county, are liable to petitioner in the sum of \$100, as penalty, for that on July 20th, during the usual office hours at Harmony Grove, Ga., being an office and station in said county, petitioner delivered to the telegraph company a message to be transmitted to Jug Tavern, also in said county, by that company, and paid it the usual charges required by its regulations. The message was: "To L. F. Sims, c/o Postmaster, Jug Tavern, Ga., via Athens, Ga: One of the twin babies dead. Bury to-morrow, three o'clock. D. F. Chandler." This message was never transmitted. About noon on July 21st the message was delivered to the postmaster at Jug Tavern in these words: "L. F. Sims, c/o Postmaster, Jug Tavern, Ga.: One of the twin babies died. Bury to-morrow, three o'clock. P. T. Chandler." Jug Tavern is located on the Georgia, Carolina & Northern Railroad Company, and the delivery of said message was made by the company at Jug Tavern. The telegraph com-

pany is liable to petitioner for having failed to faithfully and correctly transmit the message delivered to them by petitioner, and the railroad company is liable for its telegraph agent's having failed to deliver any message in time. Demand was made upon both defendants within 60 days from July 20, 1892, and each refuses to pay the penalty. Process was prayed against the telegraph company and the railroad company. The railroad company demurred on the grounds: "(1) The petition sets forth no cause of action against this defendant; (2) defendant is improperly joined with the other defendant." The telegraph company demurred on the ground that the declaration set forth no cause of action against it. The case coming on for trial, the demurrer of the railroad company was first taken up; and the presiding judge sustained the demurrer, on the second ground thereof, and dismissed the case, so far as the railroad company was concerned. The other demurrer was then taken up, upon intimation of the court that the declaration, as it stood, failed to make a case, plaintiff offering an amendment as follows: "Defendant did not transmit and deliver the message with impartiality, good faith, and due diligence, nor did it transmit it at all. Plaintiff further amends by striking all allegations as to any sort of transmission or delay." This amendment was refused, upon the ground that it set up a new cause of action, and the judge then sustained the demurrer of the telegraph company. Plaintiff excepted to the ruling sustaining the demurrer of the railroad company upon the second ground thereof, to the refusal to allow the amendment, and to the sustaining the demurrer of the telegraph company. By cross bill of exceptions, the railroad company excepted to the refusal to sustain its first ground of demurrer, insisting that it is not an electric telegraph company, and not subject to the penalty prescribed in the statute.

Thomas & Strickland, for plaintiff. Erwin & Cobb, Dorsey, Brewster & Howell, and Geo. Dudley Thomas, for defendants.

PER CURIAM. Judgment reversed as to the telegraph company (LUMPKIN, J., dissenting), and affirmed as to the railroad company (all concurring). Cross bill of exceptions dismissed.

(94 Ga. 681)

#### HARDY v. MARVIN.

(Supreme Court of Georgia. Aug. 14, 1894.)

PAROL AGREEMENT—ADMISSIBILITY TO AFFECT  
CONSENT DECREE.

Where several parcels of real estate were in controversy, and the parties to the action, by mutual consent, procured a decree to be made declaring and adjudicating that some of the property should belong to one of the parties and some to the other, without imposing any trust, limitation, or condition upon the title of either, the decree, until vacated, modified, or reformed for fraud or mistake, is conclusive upon both; and one of them cannot, after it has been fully executed, set up and enforce a parol agreement alleged to con-

stitute a part of the terms of the settlement from which the decree resulted, and by which the other undertook and promised to devise to the former, by will, one of the parcels disposed of by the decree, and declared by it unconditionally and absolutely to be the property of the latter.

(Syllabus by the Court.)

Error from superior court, Dooly county; W. H. Fish, Judge.

Action by Helen Hardy against Theodora Marvin, administratrix de son tort, for double the value of property sold by defendant's intestate. An amended demurrer to an amended petition was sustained, and plaintiff brings error. Affirmed.

The following is the official report:

The petition of Mrs. Hardy against Mrs. Marvin was demurred to. An amendment was allowed, and the demurrer was also amended. The demurrer as amended was sustained, and Mrs. Hardy excepted. The original petition alleged: On September 15, 1866, Mrs. Georgia A. Pitts made and delivered to petitioner, or to her mother for her, a deed to certain lands in Atlanta, described, some of the land being city lots on Broad, Walton, and Marietta streets, Atlanta, Ga. After making this deed, said Georgia, who was petitioner's aunt, married one Parks. Afterwards, and during the lifetime of Parks, without obtaining any valid divorce, she married one Marvin, with whom she lived until her death, which occurred prior to August 28, 1888. She was the widow of John R. Pitts, from whom she inherited the property deeded petitioner. The said Georgia remained in possession of the property conveyed to petitioner, except some parts of it, which were sold, and the funds arising from which were reinvested in other property, until her death, after which time Marvin took possession and remained in control of the property. Petitioner then brought suit in the superior court of Fulton county against Marvin for the recovery of the property described in the deed, which had not been sold, and for the property which had been purchased with funds derived from the sale of other property described in the deed. After said suit had been filed, and Marvin had answered the same, and the trial had been had, upon an application for injunction and receiver, Marvin compromised the case with petitioner, and settled the suit as follows: He deeded to her a tract of land on the corner of Broad and Walton streets, Atlanta, described, and delivered possession of it to her. At the same time he made a verbal agreement with her, as part of the consideration of this compromise that, in consideration of petitioner's settling the suit, he would not only convey to her the property which he did convey, but would make his will, and in it would devise to her a tract of land on Marietta street, near the corner of Broad street, Atlanta, described, so that at his death she would be the owner of the property in fee simple. Prior to said law suit he had lived with petitioner's aunt as her husband up to her death, and

had been very intimate and friendly with petitioner and her family, which friendship existed until the time of said lawsuit. After the pendency of said lawsuit, for some time he made friends with petitioner, and represented to her that he was very anxious to treat her right in the premises, and wanted to control the property in the litigation as long as he lived; that he was perfectly willing she should have the property on Marietta street above mentioned after his death, and would cheerfully will it to her. She was inexperienced in business, and agreed to said compromise without consulting and without the consent of her attorney. Marvin, by his promises and flattering representations of what he would do in the future, induced her to make the settlement without the knowledge or consent of her attorney. In fact, he insisted that, if her counsel knew of the settlement, they might advise her against it, to her great detriment and injury. She believed that Marvin would do what he promised, and, relying upon such representations, did make the settlement, without the knowledge or consent of her lawyer, and without having the same reduced to writing, except to get her deed to the Broad street property. After making the settlement, Marvin had his lawyer take a consent verdict and decree. Notice of this compromise was brought to the attention of petitioner's attorneys by Marvin and his counsel, and they agreed to the verdict and decree, without any knowledge, however, of the facts connected with the willing, or the agreement on Marvin's part to will the Marietta property to petitioner. After this settlement, Marvin married again, and moved into Dooly county, Ga. (where this petition was filed), where he died in 1891, leaving his widow a resident of that county, and who now resides there. Prior to Marvin's death, he sold and conveyed by warranty deed the tract of land on Marietta street, which he had agreed to will to petitioner, to one Coolidge, for \$50,000. Marvin converted the funds arising from this sale to his own use. Coolidge had no knowledge of petitioner's rights, and, of course, will be protected. By reason of the facts above stated, the estate of Marvin is indebted to petitioner for the value of said lot, which is \$50,000; and petitioner is entitled, under the law, to recover the sum from his estate. The defendant, Mrs. Marvin, is an executrix de son tort of said Marvin, is administering the estate in her own wrong, and without authority of law. The funds arising from the sale of the said Marietta street lot were invested, as petitioner is informed and believes, by Marvin, in bank stock and other personalty, which fell into Mrs. Marvin's hands after her husband's death, who is disposing of and managing the same as she sees fit, and without accounting to petitioner for the value of the land. Marvin died intestate, and did not will to petitioner the Marietta street lot, nor any other property in its stead. She has

made demand on Mrs. Marvin for a settlement of said claim, who refuses to settle it. By reason of the facts above stated, petitioner is entitled to recover from Mrs. Marvin, executrix de son tort, double the value of the property sold by Marvin as above mentioned. Among the exhibits attached to the petition were the petition and decree referred to therein. It appeared from such petition that Mrs. Georgia A. Parks, Pitts, or Marvin had another sister besides the mother of Mrs. Hardy, who also was proceeding against Marvin to assert her claims as an heir at law of said Georgia, alleging that said Marvin was never married to said Georgia, etc. This sister was Mrs. Amanda Parker. The matters appear to have been consolidated. The decree was for Mrs. Parker, against Marvin, \$7,000, and against her, in favor of Marvin, upon all her other claims as to any of the real estate described in the pleadings or any other claim of hers against him; the \$7,000 being in full of all such claims, and in full of all claims of Mrs. Parker against Mrs. Hardy or any of the real estate thereafter described as being confirmed in and deeded to Mrs. Hardy. In addition to a cemetery lot, the decree was for Mrs. Hardy for the lot corner of Broad and Walton streets, and confirming the deed made by Marvin to her to that lot, and that said property satisfied all the claims of Mrs. Hardy against Marvin, or any of the real estate described in the pleadings or possessed by him. All the other issues were settled in favor of Marvin, and especially was there confirmed in him the title to various pieces of property, among them the Marietta street lot. This decree appears to have been signed by the judge presiding and by the attorneys for all the parties. The demurrer of Mrs. Marvin was general; further, that the alleged contract relied on is too vague and indefinite to be the foundation of an act, and that the same was without consideration, and, being so, is void; further, that the decree is conclusive, between the parties thereto, of all matters which were heard or ought to or could have been heard upon the matters at issue, and the alleged contract involved matters concluded by the decree; further, that it is incompetent to add to, take from, or alter the decree for the causes set forth in the petition, and that the decree could only be attacked for fraud, accident, or mistake, none of which are alleged in the petition; further, that the allegations contained in the petition are wholly insufficient to authorize an attack upon the decree, and otherwise totally insufficient in law.

By her amendment, Mrs. Hardy alleged: She was partially raised by her aunt, the former wife of Marvin. Had been a constant visitor to the house of Marvin after her marriage, and Marvin had been a constant visitor to petitioner's house, up to the time the suit was brought in Fulton superior court. For some time after the filing of

said suit, Marvin did not visit petitioner's house. Prior to the bringing of said suit, petitioner had great confidence in him, and believed whatever he told her. After the hearing of the application for injunction and receiver in said suit, Marvin came to her, and told her he wanted to be friendly with her; that she was about the only relative of his deceased wife that he cared anything for; that he had always cherished most friendly feelings for her and her children; that he still entertained such feeling for her and her children, and wanted to see them prosper; he was growing old, and had heart trouble, and could not expect to live long; that probably in a very few years his disease would kill him; that he was willing petitioner should have the Broad street property immediately, but he wanted to own and retain possession of the Marietta street property so long as he lived. He said he wanted to enjoy the rents of that property, which, together with his other property, would render him very comfortable during his old age, and that he was perfectly willing to make his will, and devise to petitioner the Marietta street property. He said the matter could be closed in that way, and would be perfectly legal, and that she could enjoy Walton street property and he enjoy the income from the Marietta street property during his life, and at his death she would own and take possession of the latter. He insisted that she should make the settlement with him, as he was offering to do the square thing with her, and would take no advantage of her, without her consulting any one. He said he had a good, honorable lawyer, who would draw the papers and fix the matter up in legal shape, and it would be much better for her than to go further and take the risk of losing all in the end. She had renewed confidence in him after he came back and made what seemed to her a fair proposition. She felt that if she could get the Broad street property at that time, and the Marietta street property at his death, she would virtually have obtained her rights. She thought Marvin would carry out his contract, and did not know or suppose it was necessary to have him give her a writing to that effect; that he would either convey or will her the Marietta street property. He told her that he would have the papers put in proper shape. If it was necessary for him to have made a written agreement by which he was to will her the property, or convey it to her in any other way, she was ignorant of it. He represented to her that it was unnecessary, and she believed what he said. If the verbal agreement was not good, he, whether intentionally or not, perpetrated a fraud on her by reason of said representations. She would not have settled with him had she suspected for a moment that he would not have been bound to convey her the property by will, as he had agreed. The decree was prepared by

Marvin's attorney, and her attorneys simply assented to the taking of it, without any knowledge that Marvin had agreed to make a will as stated. Marvin represented that the papers his lawyer had drawn were all properly drawn, and that petitioner's rights would be fully protected under them. She did not know the legal effect of the decree, and did not consult with her lawyers about it, but simply told them the matters had been settled. If she cannot be protected with the contract made with Marvin, it will be because he took an undue advantage of her, and misrepresented to her her legal rights in the premises. The amended demurrer was general; further, that the contract to make a will to the land, being in parol, is void under the statute of frauds; further, that the petition as amended is too vague, indefinite, and uncertain to relieve the contract from the bar of the statute of frauds, and is insufficient as a charge of fraud; further, that the petition as amended fails to authorize an attack on the decree, and the decree is conclusive of all the issues presented in the amended petition, and is a complete estoppel to petitioner as to the relief prayed.

Simmons & Corrigan and Busbee & Crum, for plaintiff in error. Allen Fort, for defendant in error.

PER CURIAM. Judgment affirmed

(94 Ga. 444)

WESTERN UNION TEL. CO. v. GEORGIA COTTON CO.

(Supreme Court of Georgia. Aug. 14, 1894.)

ACTION AGAINST TELEGRAPH COMPANY—DELAY IN DELIVERING MESSAGE—AGENT'S ABSENCE FROM OFFICE—JUSTIFICATION—OFFICE HOURS—NOTIFICATION TO CUSTOMER.

1. Where, at one of its minor offices, a telegraph company does not directly employ an agent of its own, but by some arrangement with a railroad company obtains the services of its agent in the business of sending, receiving, and delivering telegraphic messages, the office hours established by the railroad company, if reasonable, are upon the same footing as if they were established directly by the telegraph company. Although the operator so employed may voluntarily, and as matter of accommodation, habitually return to his office after the office hours have expired, and in this way may be more attentive to the interests and wishes of the public than his duties require him to be, the company will not be bound to keep the office open on all occasions because the operator has done so habitually, on most occasions.

2. It is a question for the jury, and not for the court, to determine whether the condition of the operator's family on a particular occasion would justify him in closing his office and absenting himself therefrom somewhat earlier than usual; and, although he may have foreseen that his duty to his family would probably require him to do this on that occasion, it was not obligatory upon him, as matter of law, to forewarn the telegraph company, nor upon the company to employ a substitute for him at that time.

3. In the absence of a special contract to transmit immediately, or of an express request for information, it is not obligatory upon a telegraph company to acquaint a customer with the



office hours of the company at the point to which a message delivered by him for transmission is directed.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action by the Georgia Cotton Company against the Western Union Telegraph Company for the statutory penalty for delay in delivering a telegram. There was a verdict for plaintiff, and, a motion for a new trial being overruled, defendant brings error. Reversed.

The following is the official report:

The Georgia Cotton Company sued the telegraph company for the statutory penalty, as to two telegrams which it alleged it delivered at the office of defendant in Dougherty county, during its usual office hours, on September 17 and 18, 1891, for transmission to Pelham, Ga., and that the first message was not delivered until September 18th, and the second until September 19th, although Hand, to whom they were addressed, lived in Pelham, within a mile of the telegraph station, and was at home in said town on all the dates above mentioned. There was a verdict for plaintiff, and, defendant's motion for new trial being overruled, it excepted. The motion contained the grounds that the verdict was contrary to law, evidence, etc.; also because the court erred in charging: "If you believe from the testimony that the Georgia Cotton Company sent the two dispatches, delivered two dispatches to the office in Albany of the Western Union Telegraph Company to be sent to Pelham, to J. L. Hand, and paid for the dispatches to be sent, it was the duty of the Western Union Telegraph Company to transmit and deliver these dispatches with due diligence, using all ordinary care and diligence in transmitting and delivering these dispatches, and to transmit and deliver them within a reasonable time, according to the office hours and rules of the company; and, if they did not do it, they would be liable for this penalty, one hundred dollars on each dispatch,—such penalty as the law fixes, neither more nor less." "The Western Union Telegraph Company has the right to fix its office hours under the law,—to fix any office hours it pleases; but on that subject I charge you that the Western Union Telegraph Company, by its agents, exercises certain office hours, so far as the public is concerned; that they hold themselves out to the public as exercising certain office hours. Those are the office hours you are to be governed by, and not by any secret office hours they might fix themselves. As an illustration, I will state to you, suppose the company were to fix as office hours one hour per day in their rules and regulations, but their agents would stay there all day, and receive and send dispatches, you would not be governed by the one hour per day rule, but by the all-day rule. The actual time, under the evidence, that they held the offices open for the purpose of receiving and sending dispatches for the public, is the office hours of the company, and not any

private hours they might fix that the public was not aware of. So, in determining the want of diligence at Pelham, you will consider what office hours the testimony fixes as the actual office hours,—whether it was by the accommodation of the agent or by the requirement of the company. If the agent was only required to be there up to 6.30, and was then allowed by the railroad company or the telegraph company to go and leave the office until next morning, but if it was his usual custom as agent of the telegraph company to remain there until eight o'clock at night, and he held out to the public ordinarily and usually the opportunity of receiving and sending messages up to that hour of eight o'clock, that would be the office hours of the company by the act and conduct of that agent, whether they had fixed other hours or not in their own rules and regulations, that the public are not aware of. If it was usual and ordinary for senders and receivers of dispatches to find the agent in the Pelham office up to the hour of eight o'clock, and that they usually sent and received dispatches up to that hour, the fact that the agent had instructions that he might quit there at 6.30 would not alter the fact. The company is bound by the acts of the agent, and if he stays there voluntarily or not, for the purpose of sending dispatches ordinarily and usually, that would be the office hours that would bind the company by the act of the agent." "The Western Union Telegraph Company, if it had an agent at Pelham, and any extraordinary, sudden, providential cause required the agent to leave the office suddenly to attend to, would be excused for the delay that might occur by reason of the agent being required, by an extraordinary providential occurrence, leaving the office suddenly, it would not be liable, although there was delay; but if the cause of the agent leaving the office, and not being there at the usual hours he had before, was of a nature that the agent could have notified his company to have some one else there to have received the dispatches, then the telegraph company would not be excused on account of the agent leaving the office under that emergency. In other words, if the agent's wife was about to be confined, and it was not a sudden emergency that required him immediately to drop everything and go to his house, without having time to notify his company, or for the company to make any necessary arrangements to have some one there in his place, that would be a providential occurrence, that would excuse the company on account of the agent having to leave so suddenly before he could notify the company; but, if the emergency was only of such slow progress that the agent was aware of what would happen beforehand, it was the duty of the agent, as he was agent of the company, to have had some way that the dispatches could be received and forwarded at that office when he left. If his wife was about to be confined, and he knew it, and there was no sudden or dangerous emergency that required him



to rush off from the office at once, if he had plenty of time to notify the company to have an agent there to take his place, so the public would not be inconvenienced, then the telegraph company would not be excused for the delay." "The agent at Pelham was only bound under the law to receive and deliver messages at his office during the usual office hours fixed by his superior officer or employer, if the hours so fixed are reasonable. If the agent was employed by the S. F. & W. Ry. under this employment, and by direction of this company, then the railroad company could fix his hours. He was only bound by such office hours as it fixed for him; but if he went on and exercised other office hours beyond them, usually and ordinarily, and led the public, by so doing, to believe that they could receive and send dispatches up to [that time], the Western Union would be bound up to that time. The distinction is this: The agent was not compelled, nor the Western Union Company compelled, to have any other office hours except those fixed by the railroad company. The agent could have left there every evening at 6:30 if he had seen proper, and if he did leave there at 6:30 every day the Western Union Telegraph Company would not be bound for any dispatch sent to Pelham after 6:30 on account of the delay, or that was delivered in Albany after 6:30, but although the agent had the privilege of leaving at 6:30, under the rules established by the railway company, if he, notwithstanding, usually and ordinarily went back there, and remained there until 8 o'clock, sending and receiving dispatches for the company, that conduct on his part would make that the usual office hours, and the company would be bound by it."

Gustin, Guerry & Hall, for plaintiff in error.  
D. H. Pope, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 369)

**FREEMAN et al. v. PRENDERGAST.**

(Supreme Court of Georgia. June 18, 1894.)

PROCEEDING TO SUBSTITUTE TRUSTEE—NECESSARY PARTIES—MINOR BENEFICIARIES—POWER OF SALE—CONSTRUCTION OF DEED.

1. Where, in the year 1847, before the adoption of the Code, the superior court of the appropriate county entertained the petition of trustees praying that they be discharged from their trusteeship, and that another be substituted in their place, and where the court, in acting upon the petition, undertook to guard and protect the interest of remainder-men, all of whom were minors at the time, and for that purpose exacted bond and security of the newly-appointed trustee, and where the creator of the trust, who was the father of the remainder-men, expressly assented, in writing, to the discharge, and to the appointment of the particular person who was selected to fill the vacancy, the infant remainder-men were not indispensable parties to the proceeding, but it was discretionary with the court to require them to be made parties or not, and to proceed with or without having them notified, and with or without an express order appointing a guardian ad litem to represent them. And the court, in the exercise of

its discretion, having granted the prayer of the petition, and appointed a new trustee, and he having given the bond and security required, the judgment or decree, even if irregular, was not void, and when attacked collaterally, more than 40 years afterwards, will not be disregarded, or treated as a nullity, but will be upheld as good and valid, so far as necessary to protect third persons in rights of property fairly acquired under it, or in consequence of authority which it was intended to confer upon the court's appointee. Under all the circumstances, the father of the minors should be treated as their guardian ad litem, recognized by the court, though not formally appointed, as such. As to the substance of the matter, he was their guardian ad litem.

2. The power of sale conferred by the trust deed upon the original trustees passed to, and could be legally exercised by, the new trustee appointed by the court, the order of appointment expressly providing that he was to be clothed with all the powers which they possessed. The power of sale, being not merely unilateral, but matter of express covenant in the deed between the parties thereto, was not one involving personal trust or confidence, but was a power pertaining to the trusteeship, or the office and character of trustee, and was, moreover, a power coupled with an interest; the trustees, as such, being clothed with the legal title and estate in the trust property, which estate was the entire fee, inasmuch as the beneficiaries consisted of a married woman as tenant for life, and of minor children in remainder, and the holding in trust being expressly declared by the deed to be for the remainder-men as well as for the life tenant, and some of the objects of the trust clearly indicating that they were to be executed irrespective of whether she were alive or dead.

3. No extinction of the power of sale resulted from the payment, prior to the exercise of the power, of all the debts of the creator of the trust, the power being broad enough to comprehend all the trust property, and to embrace a sale for reinvestment, as well as a sale to pay debts.

4. On the facts in evidence, there was no error in directing a verdict for the defendant.

(Syllabus by the Court.)

Error from superior court, Chatham county; Robert Falligant, Judge.

Action by Elizabeth D. Freeman and another against Mary A. Prendergast, individually, and as executrix and trustee. From a judgment for defendant, plaintiffs bring error. Affirmed.

Lanier, Anderson & Anderson, Preston, Giles & Polhill, R. R. Richards, and Norwood & Cronk, for plaintiffs in error. Garrard, Meldrim & Newman and Denmark & Adams, for defendant in error.

LUMPKIN, J. Under a decree of the superior court of Chatham county, George D. Millen became entitled to certain real and personal property, as his distributive share in the estate of John Millen. The realty included land in that county and in the county of Jasper. On the 14th day of June, 1845, George D. Millen executed and delivered to Cornelia M. Millen and Jacob Waldburg, as trustees, a deed, which, after reciting the conveyance to Jacob Waldburg, upon certain trusts, of a tract of land in the county last mentioned, proceeded as follows:

"And whereas, the said George D. is now desirous of conveying the rest and residue

of his distributive share of the real and personal estate of the said John Millen to said parties of the second part [Cornella M. Millen and Jacob Waldburg], upon the uses and trusts hereinafter mentioned: Now, this indenture witnesseth that the said George D., for and in consideration of the natural love and affection which he hath and beareth unto his wife and children, and in further consideration of the sum of one dollar to him in hand paid by the said Cornella M. and Jacob, and for other good and valuable consideration him hereunto moving, hath bargained, sold, and delivered unto the said Cornella M. and Jacob, and to the survivor of them, and to the executors or administrators of such survivor, all the estate, property real and personal, claims, demands, choses in action, and ready money, which he, the said George D., is entitled to as distributee of the estate of the late John Millen, as aforesaid, except the land in Jasper county, above mentioned, as conveyed to Jacob Waldburg upon certain trusts. To have and to hold the same unto the said Cornella M. and Jacob, and the survivor of them, and the executors and administrators of such survivor, in trust, nevertheless, to pay out of the proceeds derived from the sale of the said property herein conveyed, or any part thereof, in the first place, any debts lawfully and justly due or owing by the said George D. to any person or persons, without any preferences, except such as are or may be given by the laws of Georgia; and after such debts have been paid or compromised, so as to leave no legal or just claim which now exists against him, then, in further trust, to hold the rest and residue of said estate, real and personal, for the sole use, benefit, and behoof of Mary S., the wife of said George D., for and during the term of her natural life, and not subject to the future debts, contracts, or engagements of the said George D., or of any future husband with whom she may intermarry; and, from and after the death of the said Mary S., then in further trust to and for the children of the said George D., to them, their heirs, executors, administrators, and assigns forever, as tenants in common, and not as joint tenants; but if any or either of said children shall die unmarried, or under legal age, then the share of him or her shall go to the survivors, and so on to the last survivor, and to and for no other use, intent, or purpose whatsoever. And, for the purpose of carrying this instrument more fully into effect, he, the said George D., doth hereby appoint the said Cornella M. and the said Jacob, and the survivor of them, and the executors and administrators of such survivor, his attorneys or attorney irrevocable, to ask, demand, receive, sue for, any and all of the estate and premises hereby conveyed, and to defend, either in their own names or in the name of the said George D., any suits that may be brought against

them or him, having any relation to the matters herein contained; and it is also hereby covenanted and agreed by and between the parties to these presents that the said Cornella M. and Jacob, and the survivor of them, and the executors and administrators of such survivor, shall have power to sell and dispose of any or all of the premises herein mentioned, to such purchaser and purchasers, and upon such terms, as may to them, or the survivor of them, or the executors or administrators of such survivor, seem advisable, reinvesting, however, so much of the proceeds derived therefrom as may not be necessary to pay off the debts of the said George D., upon the same uses and trusts as are hereinbefore mentioned."

In April, 1847, Cornella M. Millen and Jacob Waldburg filed in the superior court of Jasper county a petition, which, after reciting, among other things, the making of the above-mentioned deed of June 14, 1845, alleged that after the payment of the debts of the said George D. Millen there were left in their hands, as trustees, a certain described lot of land in Chatham county, containing 10 acres, more or less, and a balance of \$107.56 in ready money. The petition further alleged that the petitioners resided in the city of Savannah, "far removed from the cestuis que trustent," and, because of "the great inconvenience and trouble necessarily incurred in the management and direction of said estate," prayed that they "be discharged from said trusteeship, and some other fit and proper person be substituted in their place." Accompanying this petition were the following papers:

"We \* \* \* do hereby express to his honor, Judge Meriwether, our entire willingness to the discharge of Jacob Waldburg and C. M. Millen, as trustees for said Mary S. Millen and her children, made by said G. D. Millen, conveying the portion of the estate of Col. John Millen, late of Savannah, which accrued to said G. D. Millen, and for the appointment by the court of Grief Linch as trustee to carry out and execute said trust. [Signed] G. D. Millen. Mary S. Millen. 23 April, 1847."

"At the request of George D. Millen and his wife, Mary S. Millen, I have consented to be appointed trustee for said Mary S. and their children in room of J. Waldburg and C. M. Millen, the present trustees. [Signed] Grief Linch. Witness: John W. Burney."

An order was passed, and entered upon the minutes of Jasper superior court, the material portion of which is as follows:

"Upon the application of Cornella M. Millen and Jacob Waldburg, trustees of Mary S. Millen, the wife of George D. Millen, and the children by said marriage, asking for a discharge from said trusteeship, and the appointment of Grief Linch as trustee, \* \* \* it is ordered that Grief Linch be appointed trustee, and be clothed with all the powers,

and subject to all the responsibilities, of the original trustees, upon his giving bond, with good and sufficient security, in the sum of five thousand dollars \* \* \*; and that this order shall not discharge Cornelia M. Millen and Jacob Waldburg, as trustees as aforesaid, from any liability whatever for any of their former acts and doings."

Grief Linch gave the bond required by this order, and undertook to discharge the duties of the trust. The children of George D. and Mary S. Millen were not made parties to the proceeding for a change of trustees, nor was a guardian ad litem appointed for them. Afterwards, on the 6th day of April, 1849, Grief Linch, as trustee, under and by virtue of the appointment made as above stated, sold and conveyed to Michael Prendergast, of Chatham county, under whom the defendant in the present case holds, certain land embraced in the property conveyed by George D. Millen under the deed of June 14, 1845, and which includes the land now in controversy. This deed from Grief Linch recited the deed of 1845, the resignation of the trustees therein named, his appointment and qualification as trustee in their stead, and purports to have been executed by virtue of the power conferred by the original trust deed, with which he, under the order appointing him trustee, had become clothed. The plaintiffs in the present action, being the children and a grandchild of George D. and Mary S. Millen, claim title under the deed of June 14, 1845, as remainder-men, after the death of Mary S. Millen, the life tenant, who died September 5, 1884. Among other things, the plaintiffs contended (1) that the appointment of Grief Linch as trustee was entirely void; (2) that, even if his appointment was valid, the powers conferred upon his predecessors in the trust did not pass to him, and that, therefore, the deed made by him April 6, 1849, was without authority, and passed no title to Michael Prendergast; and (3) that the power of sale conferred in the original trust deed upon Cornelia M. Millen and Jacob Waldburg had been exhausted by them before any change of trustees was made, because, as the plaintiffs insisted, this power was given to the trustees only for the purpose of raising money to pay off the grantor's debts, and their petition to be relieved of the trust itself recited that they had paid off all the indebtedness of George D. Millen. The record of this case is exceedingly voluminous. Many intricate legal questions were raised by counsel for the plaintiffs in error, upon which able arguments on both sides were made, and elaborate briefs were also filed; but, under the view of the case taken by this court, it is unnecessary to consider all the points made in the record. We shall confine ourselves to a discussion of those questions only which are decisive of the case upon its merits, and the foregoing preliminary statements set forth all the facts essential to this purpose.

1. The first of these is whether or not the appointment of Grief Linch as trustee, in lieu of the original trustees named in the deed, was valid, the contention being that it was not, because the minor remainder-men, who were beneficiaries of the trust, were not made parties to the proceeding for the appointment of the new trustee. It must, at the outset of this discussion, be borne in mind that the appointment in question was made in the year 1847, which was long before the adoption of the Code, and that the provisions of section 4223 and 4224—prescribing that, in all cases of applications for the removal of trustees, all persons interested must have notice, and, if minors having no guardian are interested, that guardians ad litem for them must be appointed and notified before the case proceeds—were not then in force. The petition for the removal of Cornelia M. Millen and Jacob Waldburg, and the appointment of Grief Linch in their stead, was, of course, an equitable proceeding; and the question as to who are necessary parties to proceedings in equity is often a very difficult and uncertain one. Probably the greatest uncertainty exists as to when cestuis que trustent should be made parties. In *Calv. Parties*, \*212, reference is made to the oft-quoted assertion of Lord Eldon, that in most cases respecting trust property the cestuis que trustent should be made parties, following which is the statement that "this expression naturally suggests an inquiry in what cases they are not to be made parties." Referring to cases in which it was held that they were necessary parties, the author continues: "In the cases just quoted the existence or enjoyment of the property is affected by the prayer of the suit. But there are cases in which the existence of the property is not affected, and the only object is to transfer it into the hands of the trustees. These two classes of cases must not be confounded together. In cases of the former class the interest of the cestui que trust is immediately affected by the proceedings. Not so in cases of the latter class, for they will not lose their lien upon the property, whether the trustee does or does not reduce it into possession." And the conclusion seems to be that in cases falling within the second class the cestui que trust need not be a party. The classification above stated is perhaps as nearly accurate as any which could be made, and we will undertake to show that the rule deduced, so far at least as relates to cases involving only the appointment of new trustees, is well supported. Before referring to authorities, it is perhaps well to observe that many of the cases cited by counsel, and many not cited, but which have been examined, are cases having a two-fold purpose: First, the appointment of a new trustee; and, second, an accounting for and settlement of the trust estate by the retiring or discharged trustee, thereby releasing him from further liability for the trust property. This latter purpose necessarily in-

volves the trust property itself, brings the interests of the trustee in direct conflict with those of the cestui que trust, and puts the case clearly within the first class referred to by Calvert, in which the cestui que trust is an indispensable party. Such cases are manifestly no authority for holding that the cestui que trust must be made a party where the sole prayer is for the appointment of a new trustee, or, whatever may be the prayer, where the sole relief granted is such an appointment. And although it may be the more common practice to include in the bill or petition a prayer for a settlement of the trust estate, as between the retiring trustee and the one to be appointed, yet it is not indispensably necessary that the proceedings should have this twofold purpose. We see no reason why a trustee may not be discharged, and a new one appointed, without the proceedings for that purpose extending, or being intended to extend, any further than the mere substitution of trustees, without involving any settlement of the trust accounts, or any release of the old trustee from his liability to account for the trust property which came into his possession. The case in hand is exactly one of this kind, for it must not be overlooked that the order appointing Grief Linch trustee expressly declares "that this order shall not discharge Cornelia M. Millen and Jacob Waldburg, as trustees as aforesaid, from any liability whatever, if any, for their former acts and doings." It is not essential to go into the question whether or not the new trustee so far represented the minor beneficiaries as to bind them by any settlement he might make with the old trustees as to their accounts. If so, there is much strength in the position that the minors should have been heard upon the question as to who should be appointed. It may be that, under the above-quoted terms of the order, these beneficiaries still had the right personally to hold Cornelia M. Millen and Jacob Waldburg accountable for the trust funds in their hands, or for any waste or mismanagement of the trust property which may have occurred before the change in trustees was made. Be these things as they may, it must not be forgotten that we are dealing with specific realty, the title to which could pass, and we think did pass, to the new trustee, upon the uses and trusts expressed in the original trust deed, and as to this particular property no "accounting" was at all necessary. It was precisely the same property, neither more nor less, and could be nothing else, no matter who was trustee. The beneficiaries, therefore, as to it, could not suffer by a mere change of trustees. Neither skill nor integrity, nor the want of either, in the new trustee, could make any possible difference as to the interests of the beneficiaries in this real estate. Their equitable ownership in remainder of the identical property itself was exactly the same after the substitution of trustees as it was before; and according-

ly, under the doctrine asserted by Calvert, they were not necessary parties to the proceedings by which the substitution was effected. After the appointment of the new trustee, they were protected by his bond; and, of course, he then became accountable to the cestuis que trustent for all the trust property which came into his hands, and for the proper management and disposition of the same. Under the English practice, when there was a change of trustees there was a formal conveyance from the old to the new trustee. It was therefore very properly said in *Hill, Trustees*, p. 196, that: "The appointment of the new trustee by the court would not be complete without a conveyance or transfer of the trust property to him. The decree therefore usually goes on to direct a proper conveyance of the legal estate." Under our system, however, there is no formal conveyance from the old to the new trustee, but the title passes to the latter by virtue of his appointment. We see no good reason why there may not be proceedings for the appointment of a new trustee which do not involve a final settlement with, and release of, the retiring trustee; and as, in such case, the only question to be passed upon is merely the substitution of trustees, we are satisfied that the cestuis que trustent are not indispensable parties. There certainly seems to be no serious difficulty in reaching this conclusion, in so far, at least, as the title to definite and specific realty may be affected by a substitution of one trustee for another.

Keeping in mind the distinction between the two classes of cases mentioned by Calvert, some of the difficulties arising from the apparently conflicting decisions will be removed. In the case of *Ellison v. Cookson*, 2 Colly. 52, the object of the bill was to have new trustees appointed in the place of the heir at law of the survivor of two persons who were trustees for preserving contingent remainders. Antecedent to the estate of these trustees, and to the life estate preceding it, was a limitation of a term of years to other trustees to raise portions. The vice chancellor held that the trustees of the term should be made parties, but that the portionists (beneficiaries) were not indispensable parties. This case, however, is entitled to but little weight, for, as the estate of the portionists could not be affected by the change in the remainder trustees, and as the proceedings could not involve any conflict between the portionists and their trustees, the former might appropriately be represented by the latter. In *Hunter v. Gibson*, 16 Sim. 158, the report is very brief; but it appears that the master was directed to appoint a new trustee, although some of the cestuis que trustent were infants, and another was out of the jurisdiction. The suit appears to have been only for the purpose of having a new trustee appointed. In *Noble v. Meymott*, 7 Eng. Law & Eq. 94, 20 Law J. Ch. 612, which case, though de-

cluded in 1851, was not under the English trustee act of 1850, the facts were somewhat complicated, but the ruling sufficiently appears from the following headnote: "E. M. N. and his wife, under a power of their marriage settlement, directed the trustees, after the decease of the survivor of them, to receive a sum of £3,000 and pay it to their three daughters, equally. F. M. N., one of the daughters, upon her marriage with S. D., assigned all her interest in the appointed fund, by way of settlement, to C. R. and T. L. Upon C. R. requiring to be discharged from being a trustee, T. L., who had never accepted the trusts, executed a deed of disclaimer, upon which B. W. N. and J. N. were appointed trustees in the place of C. R. and T. L., and C. R. assigned the trust fund to them; but the trustees of the original settlement alleged that T. L. had accepted the trusts, and that B. W. N. and J. N. were not trustees, and they refused to pay the share of F. M. N. to them. Held, upon a bill filed by B. W. N. and J. N., that they were duly appointed trustees, and, upon an objection for want of parties, that the cestuis que trust and T. L. were not necessary parties to the suit." In *Milbank v. Crane*, 25 How. Prac. 193, it is said that the jurisdiction in this class of cases is "a quasi jurisdiction in rem,—a power over the trust,—and is not acquired by the service of process upon the cestuis que trust, or other person interested in the trust fund or its preservation. It is undoubtedly proper and usual, in most cases, to call those more immediately interested before the court, that they may be heard in the appointment of a new trustee. But this is in the discretion of the court." That the question as to who are the necessary parties in such a case is one resting in the sound discretion of the court is also recognized in several other cases. In *re Robinson*, 37 N. Y. 261, is a leading case on the subject. In it the question as to parties was raised directly; and, as the views expressed coincide closely with those which we have adopted, we cannot do better than quote the language of Bockes, J., delivering the opinion: "It is next urged that his [the trustee's] appointment was improper, without notice to the infant cestuis que trust. This was not an application for the removal of a trustee, and for the passing and settling of his accounts. Had it been such, all parties interested in the trust property and estate should have been notified, and made parties to the proceeding, in the absence of all excuse for the omission. But in a proceeding simply for the appointment of a trustee to execute trust duties and powers, for the faithful performance of which security is always required, it is a matter of discretion with the court as to who notice shall be given to. The court in which the application is made may determine and direct in that regard; the appointment being always open to review on the application

of any party interested, and who may not have been informed of the proceeding. In applications of this character, especially, the determination of the question, as regards parties, rests very much upon considerations of convenience. Indeed, Judge Story, in speaking of the subject of parties in actions and proceedings in equity generally, remarks that the rule 'does not seem to be founded on any positive and uniform principle, and therefore it does not admit of being expounded by the application of any universal theorem as a test.' He adds, 'It is a rule founded partly in artificial reasoning, partly in considerations of convenience, partly in the solicitude of courts of equity to suppress multifarious litigation, and partly in the dictates of natural justice, that the rights of persons ought not to be affected in any suit without giving them an opportunity to defend them.' In *Harvey v. Harvey*, 4 Beav. 215, it was said that it was a question of convenience whether the court would require all the parties interested in the subject-matter to be made parties. And in *Birdsong v. Birdsong*, 2 Head, 289, it was held to be a question of discretion, rather than of absolute right. So it was held in *Wiser v. Blachly*, 1 Johns. Ch. 439, by Chancellor Kent, that the general rule that all persons whose interests may be affected by the decree must be made parties was founded on convenience, and subject to exceptions and modifications according to the discretion of the court." In *De Peyster v. Beekman*, 55 How. Prac. 90, it was held that the person creating the trust was not a necessary party to a proceeding to remove a trustee, and that the question as to who should be made parties to such a proceeding was within the discretion of the court. In *Re Estate of Brick*, 9 Civ. Proc. R. 401, it was held, in a proceeding before the surrogate to remove a trustee and appoint another in his place, it was not necessary that all persons interested should be made parties, but that it was within the discretion of the court to say who should be made parties. Similar rulings were made in *Tompkins v. Moseman*, 5 Redf. (Sur.) 405, and in *Lane v. Lewis*, 4 Dem. (Sur.) 468. In *Barclay v. Goodloe's Ex'r*, 83 Ky. 493 (cited in note on page 85 of *Am. & Eng. Enc. Law*), it was held that beneficiaries are not necessary parties to a petition by a trustee for his discharge and the appointment of a new trustee. Here the trust deed conferred upon the trustee the power to name his own successor, but the case is nevertheless applicable, for it is well recognized that where such a power is not used, but resort is had to the court, the rules of law apply the same as if no such power had been conferred.

From the foregoing cases it will be seen that there are very high authorities supporting the proposition that the question as to who are necessary parties in a proceeding to appoint a new trustee in lieu of one who has

resigned, or been removed, is one resting in the sound discretion of the court. And the rule to this effect is as well supported by reason as it is by authority. One of the reasons upon which it rests we have already noticed before citing the authorities. Another reason arises out of the practice in such cases. Under the English chancery practice, it was customary to refer the appointment of a new trustee to the master, usually to approve of a new trustee to be appointed. And it seems that the chancellor would not appoint a new trustee without a reference to the master, except where all persons were represented, and consented to the appointment. *Hill, Trustees*, 193, 196, and citations. *O'Keeffe v. Calthorpe*, 1 Atk. 18. The question being referred to the master, it was his especial duty to hear evidence and investigate fully as to the suitability and eligibility of the person proposed as the new trustee, and, if no one was proposed, then to select a fit and suitable person to be appointed. The master, therefore, protected the interests of the cestuis que trustent, and all others interested, so far as the selection of a fit and suitable person to be appointed as trustee was concerned; and inasmuch as the sole question involved in cases of this character related to the suitability of the person to be appointed, as we have already shown, it follows that every possible interest of the beneficiary was as fully protected and guarded by the master as it could possibly have been by a guardian ad litem especially appointed for that purpose. But under our practice the duties of a master in chancery are more circumscribed; many matters devolving upon the chancellor himself, which, under the English practice, would be referred to the master. So far as we know, in Georgia the selection of a trustee has never been referred to a master. The chancellor hears evidence, and selects a suitable person to be appointed trustee, just as he would act in selecting a person to appointed receiver; and, this being so, we see no reason why the interests of the cestuis que trustent would suffer at his hands more than under the English practice of referring the question to the master. Why might not a judge of the superior court, before there was an express provision of law to the contrary, appoint a trustee without having the minor cestuis que trustent actually represented by a guardian ad litem? After carefully selecting and appointing a discreet and suitable person as trustee, and requiring ample security for the faithful performance of the duties of the trust, it may be safely assumed that as this action was favorable towards, and could not reasonably be expected to injure, the interests of the cestui que trust, it was not of vital importance that he should be a party. It is always, however, within the discretion of the court to determine whether or not the cestui que trust should be formally made a party, and a guardian ad litem appointed for him. As a guide to the exercise of that discretion

in the present case, the court could assuredly take into consideration the facts that it had before it both parents of the cestuis que trustent, and knew their wishes; that one of these (the father) was the creator of the trust, and the other (the mother) was the life tenant of the trust estate; and that there was nothing in the proceedings hostile to the minor cestuis que trustent, who were remaindermen, or which had any tendency to bring their interests in conflict with those of the life tenant. Under such circumstances, it might well be expected that the father would be no less vigilant in guarding the interests of the minors than a guardian ad litem formally appointed would be. Virtually, the father was their guardian ad litem, without the formal appointment. In *Brandon v. Carter* (Mo. Sup.) 24 S. W. 1035, it was held that the fact that minor beneficiaries were represented by attorney, and not by guardian ad litem, did not vitiate the appointment of a new trustee; and in *Ross v. Railroad Co.*, 53 Ga. 514, a decree affecting the rights of minors, for whom no guardian ad litem was appointed, but for whom an answer was filed by their mother, who was their guardian by appointment under the laws of New York, was allowed to stand. Although this decree was pronounced irregular and unwise, it was held to be not void, if had in good faith, without fraud, and with intent to protect the minors. The fact that the mother was guardian by appointment in another state did not make her guardian here, nor authorize her to represent the children as guardian in the courts of this state. She was really no more than a de facto guardian ad litem, if such an expression may be used. After citing authorities, Judge McCay says (page 528): "The failure to appoint a guardian ad litem in a regular chancery suit would seem, therefore, rather an irregularity than a defect, like want of service." Again, on pages 530, 531, he says: "Their mother [meaning the mother of the minor defendants] appeared by acknowledgment of service, as their guardian, and by eminent counsel. The only defect, so far as the parties are concerned, was that no formal order was passed appointing a guardian ad litem. A guardian did appear, the court recognized that guardian, and throughout the whole proceeding the rights of the infants were taken care of." In *Watkins v. Lawton*, 60 Ga. 672, it was held that where one, for himself, and as next of kin for certain minors, filed a bill in equity, and there was a cross bill, to which the minor complainants were made respondents, they were, in the absence of fraud, bound by the decree rendered, though there was no formal order appointing the principal complainant in the main bill their guardian ad litem. But if we are correct in holding that the court, in its discretion, could lawfully pass the order to change the trustees without making the minor cestuis que trustent parties, it is unnecessary to further pursue the inquiry as to the grounds upon

which that discretion was exercised, or as to whether the discretion of the court was wisely exercised in this particular instance. Even if the court erroneously exercised its discretion, yet, as it had jurisdiction, its judgment or decree would not be void, and would therefore be upheld, as against a collateral attack like that in the present case. The presumptions which attach in favor of judgments and decrees rendered by courts of general jurisdiction apply even to formal orders passed by a chancellor at chambers. See *Pense v. Wagon*, 23 Ga. 361, 20 S. E. 637. In *Milbank v. Crane*, supra,—a case involving the legality of the appointment of a new trustee, but being a collateral attack on such appointment,—it was said: "The appointment of the new trustee is valid, even if it should be thought to be irregular, or even imprudent and indiscreet, to make the appointment without formal notice to and summons of those interested." And in *Dyer v. Leach*, 91 Cal. 193, 27 Pac. 598,—a case involving the same question,—it is said: "As the attack made here upon the order of the court appointing Hibbard trustee is collateral, it cannot be successful unless such order is absolutely void, but we do not think it void. The current of authorities is to the point that in such a case it is discretionary with the court what, if any, notice shall be given." To the same effect is the language of Smith, J., in *Curtis v. Smith*, 60 Barb. 12: "It is also urged by the demurring parties that the appointment of the plaintiff as trustee was void for several reasons, among which are the following: That he was appointed on petition, merely, and not by bill; that the cestui que trust was not a party to the proceeding; and that the other persons contingently interested in the fund were not made parties. It is a sufficient answer to these several points to say that they are mere irregularities, at the most, and do not touch the validity of the appointment." We do not care to enter into a discussion of the numerous cases cited and relied upon by the counsel for the plaintiffs in error. Many of them, by the application of the principles stated, can be distinguished from the case at bar; and such of them as cannot be, but which are in direct conflict with the conclusion we have reached, we feel constrained to say are not, in our opinion, supported by the weight of reason or authority. We are very well satisfied that the court below correctly upheld the appointment of Grief Linch as trustee.

2. The next question of vital importance is whether or not the powers conferred upon the trustees named in the deed made June 14, 1845, passed to, and could be legally exercised by, Grief Linch, as their successor in the trust. In so far as the order of appointment could accomplish this purpose, it did so, for it expressly declared that Grief Linch, the new trustee, "be clothed with all the powers, and subject to all the responsibilities, of the original trustees, upon his giving bond, with good and sufficient security, in

the sum of five thousand dollars." We do not wish to be understood as asserting that the order appointing the new trustee could confer upon him a power of sale, if none existed in the original instrument by which his predecessors were appointed. Nor do we mean to say that, where the original instrument did confer upon the trustees thereby appointed a power of sale, their successor could not exercise it unless the order appointing him expressly so declared. But, certainly, if the power was one which could legally pass from the first trustees to their successor, it was appropriate to so provide in the order of appointment. At any rate, the order appointing Grief Linch having undertaken to clothe him with all the powers possessed by Cornelia M. Millen and Jacob Waldburg, it is at least free from attack because of a failure so to do. It seems to be a well-settled and time-honored principle that where a will or deed confers upon trustees or executors a power involving a purely personal trust or confidence, and it is apparent that the testator or grantor expected and intended that the person appointed to carry out his direction should exercise a personal discretion in so doing, the power conferred will not pass to a successor appointed by the court. Thus, in *Hibbard v. Lamb*, 1 Amb. 309, it appeared that the testatrix, Esther Blunden, by will, gave several legacies, payable out of her estate; the residue to be disposed of in charity to such persons and in such manner as her executors, or the survivors of them, should think fit. Four executors were nominated; two of them died, and another became very infirm; and thereupon Lord Hardwicke referred to the master the appointment of additional trustees to sustain the annuities, but said the new trustees could not dispose of the residue in charity, it being a trust confined to the executors personally. Again, in 4 Vin. Abr. \*485, we find reported a case involving the construction of the will of one Timothy Wilson, wherein the testator provided that in a certain contingency the executors were to dispose of his real and personal estate "to such of his relations, of his mother's side, who were most deserving, and in such manner as they saw fit, and for such charitable uses and purposes as they should also think most proper and convenient." One of the trustees declined to act, and was compelled by decree to assign the trust as the master should direct. The master of the rolls held that the power given by the will to the trustees of distributing the testator's estate as they saw fit was at an end, and could not be assigned over; and accordingly directed that one-half of the estate should go to the testator's relations on the mother's side, and the other half to charitable uses. The doctrine of these ancient and respectable authorities has, so far as we are informed, been followed down to the present day. We happen to have before us just now a case



in point on this question,—that of *Drummond's Adm'r v. Jones* (N. J. Ch.) 13 Atl. 611; and others to the same effect, and in great numbers, could easily be found. The question, however, is an entirely different one when the power conferred is not merely unilateral, but matter of express covenant in the deed, and not one involving personal trust or confidence, but properly pertaining to the office of trustee, and especially is this so when it is a power coupled with an interest. We think it becomes obvious, from an inspection of the deed of George D. Millen, that it was not his intention to create in Cornelia M. Millen and Jacob Waldburg a mere personal trust as to the sale of his estate. The instrument, as will have been seen, expressly confers upon them, "and the survivor of them, and the executors and administrators of such survivor," a power to sell "upon such terms as may to them, or the survivor of them, or the executors or administrators of such survivor, seem advisable." It is therefore manifest that the maker of this deed did not contemplate that the power should be exercised by the named trustees and none others, or that it should cease to be operative in case of their death or resignation. Undoubtedly, under this deed, the power of sale would have gone to the "executors" or "administrators" referred to, for the deed expressly so declares. If the word "successors" had also been used, there would be no room to doubt that a successor duly appointed by the court would have succeeded to the powers of sale belonging to the original trustees. As, however, the deed did not expressly extend the power of sale to the successors of the trustees named, and as the sale upon the validity of which this case turns was not made by Cornelia M. Millen and Jacob Waldburg, or the survivor of them, or by any executor or administrator of such survivor, but by a trustee appointed by the court, the question is, did the power of sale go to that trustee? If so, he acquired it under the order of court, and by operation of law, upon a proper construction of the deed, and not by the donor's express declaration. Under this deed, the trustees were clothed with the legal title and estate in the trust property, and the same was an estate in the entire fee, because the beneficiaries consisted of a married woman, as tenant for life, and of minor children in remainder; and the deed plainly and distinctly declares that the holding in trust shall be for the remainder-men as well as for the life tenant. Besides, some of the objects of the trust clearly indicate that they were to be executed irrespective of whether the tenant for life were alive or dead. For instance, the power to sell for the purpose of paying the debts of George D. Millen was evidently to be exercised even if Mrs. Mary S. Millen, the life tenant, should die before the debts were all paid. Such being the character of the deed, we think the power of

sale passed to the duly-appointed successor of the original trustees. "A trustee who has been duly appointed under a power, and in whom the legal estate in the trust property has been vested by a proper conveyance or assignment, stands precisely in the same situation, and is invested with the same powers and privileges, with reference to the trust estate, as if he had been originally appointed a trustee, with the exception, indeed, of discretionary powers personally given to the original trustees." Hill, *Trustees*, 188. To the same effect, see 2 Perry, *Trusts*, § 503, where the following language is used: "But, where the estate is transferred to trustees duly appointed under a power, the transferees take the estate and office together, and can exercise the power. But, where the court appoints new trustees, it cannot communicate arbitrary or discretionary powers to them, unless the instrument of trust confers such powers upon the trustees for the time being, or they are annexed to the office. If a power is given to a trustee, he holds and assigns, and a new trustee is appointed, and a vesting order made, the new trustee may execute the power under the word 'assigns.'" In *Johnson v. Cushing*, 4 Shars. & B. Lead. Cas. Real Prop. p. 5, we find an elaborate discussion concerning the execution of powers by a surviving donee, or by substitute. On page 53 the following language occurs: "As to a power given to executors, the old rule was that where a mere power was given to executors, by name, then, if one died, the survivor or survivors could not execute the power; but if there were a devise to the executors, to sell, then the survivor or survivors, having a power coupled with an interest, could execute the power. Co. Litt. 133a. This distinction is recognized in many modern authorities, and the conclusion may be drawn that, while a power coupled with an interest will survive the death of one of its donees, a naked power will not"; citing *Franklin v. Osgood*, 14 Johns. 553; *Bartlett v. Sutherland*, 24 Miss. 895; *Peter v. Beverly*, 10 Pet. 532; *Williams v. Veach*, 17 Ohio, 171; *Parrott v. Edmondson*, 64 Ga. 332; *Coleman v. McKinney*, 8 J. J. Marsh. 246; *Ross v. Clore*, 3 Dana, 189. It must not be understood that the "interest" referred to in the expression, "power coupled with an interest," means a personal beneficial interest on the part of the donee of the power. The phrase just quoted simply means that the donee is possessed of the legal estate, or of a right therein. See page 24 of the volume last above mentioned, and the cases there cited. In *Drummond's Adm'r v. Jones*, supra, it was held that "where the power is annexed to the office of executor, and it is created to enable an executor to perform his duties there, although the words creating it indicate that the donee may exercise discretion, yet it will be held to belong to the office, and may be exercised by any person who may



happen to fill the office." And see *Farrar v. McCue*, 89 N. Y. 142, in which it was held that a power of sale conferred by will upon executors passed to new trustees appointed by the court in their stead. The case which, upon its facts, is most nearly in point upon the question now under consideration is that of *Park Heights Co. v. Oettinger*, 53 Md. 46. We commend to the careful consideration of all interested the able opinion of Irving, J., and the authorities cited by him, which we think abundantly sustain our conclusion in the present case that the power of sale conferred by the deed of George D. Millen upon Cornelia M. Millen and Jacob Waldburg passed to, and could be legally exercised by, Grief Linch, their successor in the trust under the court's appointment.

3. There is one other question requiring brief notice at our hands. It will have been observed that, in the petition presented to the court by Cornelia M. Millen and Jacob Waldburg to be relieved of the trust, it was recited that they had paid all the debts of George D. Millen; and it was accordingly insisted by counsel for the plaintiffs in error that inasmuch as the trust deed declared that, out of the proceeds derived from the sale of the grantor's property, the trustees should pay all of his debts, and, after the payment of the same "to hold the rest and residue of said estate, real and personal," upon the trusts already mentioned, the power of sale had become exhausted before any change of trustees was made. We think a complete answer to this contention will appear from an examination of the deed of trust. The power of sale was undoubtedly broad enough to comprehend all the property conveyed by the deed, and it is evident that the grantor did not intend to confine the exercise of this power to the one purpose of raising a sufficient sum of money to pay off his indebtedness. He evidently believed the property in question was worth more than enough to settle all his debts, and the facts show that he was right in so believing. The language of the deed itself leaves no room to doubt that George D. Millen intended that the original trustees should have the power to sell, not only for the purpose of paying his debts, but also for reinvestment. This will become apparent from a mere glance at the words used in the deed at the conclusion of the clause investing the trustees with the power of sale. After expressly giving to them the power to sell and dispose of any or all of the property conveyed, the following words are used: "Reinvesting, however, so much of the proceeds derived therefrom as may not be necessary to pay off the debts of the said George D. Millen, upon the same uses and trusts as are hereinbefore mentioned." The language just quoted, in connection with other portions of the deed, establishes beyond controversy, we think, the correctness of the proposition stated in the third headnote.

4. The charge of the court amounted, in substance, to a direction that the jury should find in favor of the defendant. The case was absolutely controlled by the legal principles which we have announced and endeavored to sustain in the foregoing divisions of this opinion. Our views of the law coincide entirely with those entertained by the eminent trial judge; and if these views are correct the only verdict legally possible, from the undisputed facts, was that which the jury returned, and consequently, his honor committed no error in giving the direction above mentioned. Judgment affirmed.

(94 Ga. 640)

# CENTRAL RAILROAD & BANKING CO. v. JACKSON.

(Supreme Court of Georgia. July 23, 1894.)

## CONTINUANCE IN CIVIL CASES — ALTERATION OF COMPLAINT—IGNORANCE OF DEFENDANT.

The declaration, as filed, recorded, and served, being for damages to lot of land No. —, and the same having been altered by adding an "s" to each of the words "lot" and "No.," and by filling the blank with four numbers, so as to make the complaint apply to four lots of land instead of to one only, and it appearing that the counsel representing the defendant at the trial had no previous knowledge of this alteration, and it not appearing that any notice of the same had been given to or served upon them, or upon their predecessor in the management of the cause, who was dead, it was a good ground for a continuance that counsel were surprised to find the declaration in this condition, they stating in their places that they were wholly ignorant of the alteration until the case was called for trial, and for that reason were not prepared to go to trial on the question of damages to three of the lots, but were prepared as to one only. The court erred in refusing a continuance, or, at least, in not postponing the trial for such time as would be reasonable for making preparation, in view of the changed state of the declaration.

(Syllabus by the Court.)

Error from superior court, Houston county; A. C. Riley, pro hac Judge.

Action by C. H. Jackson, trustee, against the Central Railroad & Banking Company for damage to land. Judgment for plaintiff, and defendant brings error. Reversed.

Steed & Wimberly and John R. Cooper, for plaintiff in error. M. G. Bayne, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 648)

# ROCKMORE v. CULLEN et al.

(Supreme Court of Georgia. July 23, 1894.)

## SUIT IN JUSTICE'S COURT—OPEN ACCOUNT—AFFIDAVIT OF PLAINTIFF—SWORN DENIAL BY DEFENDANT.

Under the act of September 26, 1883, when the plaintiff in a suit upon an open account in a justice's court has duly proved his account by written affidavit, the introduction of that affidavit in evidence to the jury, on the trial of an appeal taken by the defendant, is conclusive upon the right of the plaintiff to recover, unless the defendant has filed his written affidavit denying the

justice and fairness of the whole or some part of the account. An unsworn plea will not suffice as a substitute for the affidavit required of the defendant by the statute, nor will a sworn plea, unless the oath thereto be in writing.

(Syllabus by the Court.)

Error from superior court, Walton county; N. L. Hutchins, Judge.

Action by Cullen & Newman against E. M. Rockmore on an open account. After a verdict for plaintiffs, the cause was removed to the superior court by certiorari, where the writ was overruled, and defendant brings error. Affirmed.

The following is the official report:

Cullen & Newman obtained a verdict in a magistrate's court against Rockmore, who took the case by certiorari to the superior court, where the certiorari was overruled, to which ruling Rockmore excepted. The judge of the superior court ruled that while the verdict was not technically legal, because of the method of calculating the interest, it appearing that substantial justice was done, the certiorari was dismissed, and judgment affirmed. The suit was upon an open account for \$42.37 principal, \$26.03 interest, was returnable to the May term of the magistrate's court, and there was personal service. No plea was filed nor appearance made at that term, and judgment was rendered by the magistrate against defendant. In his petition for certiorari, petitioner alleged that he was prevented from being at the court and entering his plea, on account of a sudden attack of severe illness on his way to court, information of which he sought to and did convey to the justice before the case was brought, who disregarded the information and entered judgment. The magistrate in his answer said that the case was called in its order; that the court sent after Rockmore, after he had been called by the constable, and the parties returned and answered that Rockmore was drunk; that the court had no notice from defendant that he could not attend or had any intention of filing a defense; and that the court met Rockmore that morning, and had a conversation with him, and had no notice of his being dissatisfied with the judgment until he came to give bond and appealed to a jury; that when the trial came on appeal both parties announced ready, and plaintiffs' counsel introduced the account, and closed; that then defendant's counsel offered to introduce some of the goods as bought of plaintiffs, and to testify himself, which was objected to by plaintiffs' counsel upon the ground that there was no plea filed at the first term, nor any filed at that term under oath, as required by law; that at that time defendant offered to swear to the plea orally, without attaching affidavit, which was objected to by plaintiffs' counsel, and this objection was sustained; and that, there being no more evidence offered, defendant picked up his plea and walked out, the case closed, and the jury found for plaintiffs,

principal \$42.37, interest \$26.03, and costs. The pleas offered were pleas of not indebted, and that the goods and other articles purchased of plaintiffs were not such as were recommended to defendant, and defendant was not bound by the contract made with plaintiffs. The answer was not traversed. The petition for certiorari alleged that when the case was called for trial before the jury petitioner offered to file his pleas, which was objected to because they were not sworn to, which objection the court sustained; that petitioner then offered to swear to or verify the same then and there, and asked the magistrate to swear him to the same; that plaintiffs' counsel objected, because the pleas were not filed and sworn to at the first term, which objection the court sustained; that plaintiffs then tendered their open account in evidence, and closed; that petitioner was then sworn in his own behalf, and proceeded by his own testimony to show why plaintiffs were not entitled to recover on the account, but plaintiffs' counsel insisted that petitioner was not entitled to be heard and sworn in his own behalf, which contention was sustained by the court, and the jury retired, and returned their verdict; that petitioner insisted that part of the account sued upon was for a lot of jewelry set forth in a list attached to this petition (no such list was attached, so far as the record shows), and that the jewelry as sold and sent him was of no merchantable value, and not of the best quality of jewelry to be had, as guaranteed by plaintiffs and shown by said list, because it was nothing but brass, and not gold plated, and hence the plea of failure of consideration, and, this item being more than the principal sued for, plaintiffs were not entitled to recover any sum. The errors alleged were: Because the verdict was contrary to law and evidence; because of error in refusing to allow the plea to be filed; error in refusing to allow petitioner to swear to and verify the pleas; error in refusing to allow him to testify in his own behalf; and because instead of \$26.03 interest being due, if plaintiffs were entitled to recover at all, the correct amount is only \$12.26.

C. H. Brand, for plaintiff in error. Napier & Cox, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 668)

MONTAGUE et al. v. CHATTANOOGA, R. & C. R. CO.

(Supreme Court of Georgia. July 30, 1894.)

LIEN FOR MATERIALS — SUIT TO FORECLOSE — AMENDMENT OF DECLARATION — SUIT AGAINST OWNER ALONE — DISMISSAL.

1. An action against a railroad company by a material man to enforce a statutory lien upon the railroad for the price of materials sold, not to the company, but to a contractor, is not amendable so as to charge the company as a debtor to

the plaintiff for the value of the material, as goods sold and delivered, or as goods of the plaintiff used and appropriated by the company in constructing its railroad. Such an amendment would introduce a wholly new and distinct cause of action.

2. In respect to the dismissal of the action after the proposed amendment was disallowed, the case is ruled by *Lombard v. Trustees*, 73 Ga. 322, and *Castleberry v. Johnston*, 17 S. E. 772, 92 Ga. 499.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Montague & Co. against the Chattanooga, Rome & Columbus Railroad Company for materials furnished, and to foreclose a lien for the same. On a judgment dismissing the action, plaintiffs bring error. Affirmed.

The following is the official report:

The petition of Montague & Co. alleged: They are material men, and persons furnishing material for improving real estate. As such, on March 5, 1888, they furnished the Chattahoochee Brick Company railroad culvert pipe, for which it promised to pay them \$167.40 principal, besides interest, which sums are past due, unpaid, and owing to petitioners, and due them for 165 pieces of such pipe sold and delivered by them to the brick company, which was of the value of said sum of money. The Chattahoochee Brick Company are the principal contractors for the building and equipment of the Chattanooga, Rome & Columbus Railroad through the counties of Floyd and Chattooga, and used said pipe in building the said railroad through Floyd county. The pipe is fastened and otherwise secured to the railroad track, roadbed, and right of way, and especially to that part of the same in Floyd county, at a certain portion of the road mentioned. Petitioners have fully complied with their contract for furnishing the pipe to the brick company, and have taken no personal security for the debt, and have no security therefor except under their lien herein asserted. Within three months from the time the pipe was furnished, petitioners recorded their claim of lien, in the office of the clerk of the superior court of Floyd county, the claim of lien being set out in the declaration, and being a claim on the railroad, and a certain part of it described, lying in Floyd county, which was sublet to J. H. Powers by the Chattahoochee Brick Company. The lien was claimed for furnishing the railroad company with 165 pieces of railroad culvert pipe, shipped March 5, 1888, of the value of \$167.40, which, with accrued interest, is due Montague & Co. for said material, "which was used by said company in the construction of its line of railroad in said county of Floyd, and the same and every part thereof is now unpaid. Said pipe or material was received and used and put in said company's roadbed by said Chattahoochee Brick Company, the chief or principal contractors of said line of road. Montague & Co. assert this their lien for said sums

against said railroad as against the true owner or owners, as by statute provided."

The petition further alleged that petitioners began this action for the recovery of the amount due them within 12 months from the time the same became due and payable. Process was prayed against the railroad company, and for foreclosure of the lien claimed. The action was brought in Floyd superior court July 21, 1888. On June 21, 1888, plaintiffs served the railroad company with notice of their lien, and their purpose to establish the same to enforce the payment of their debt. In October, 1888, the railroad company pleaded not indebted, and denying that plaintiffs had any lien on the railroad and its property. In January, 1890, plaintiffs amended their declaration, alleging: Defendant was served with notice in writing of their lien, and their purpose to foreclose it, on June 21, 1888,—nine months before defendant settled with the brick company, on March 21, 1889. Defendant paid the brick company a sum largely in excess of plaintiffs' debt, in full settlement of their contract for the construction of the road. The brick company had actual notice of plaintiffs' lien and its record, and in May, 1888, admitted their liability to plaintiffs on this debt, and promised to pay it, but have never paid it, nor any part of it, and now refuse to pay it. The brick company is liable therefor to plaintiffs, because it used the pipe in the construction of the railroad, knowing it was plaintiffs' property, and not paid for by any one, and though it so used the pipe, and promised at that time, and shortly afterwards, to pay for it, it delayed the fulfillment of the promise until it finally refused to pay. The brick company has either been paid the funds due plaintiffs, and holds them for plaintiffs' use and benefit, or the railroad company has the funds held back in the final settlement with the brick company, and now holds the same for plaintiffs' use, but refuses to pay plaintiffs. Both the railroad and brick companies, on the day of their final settlement, and long before, knew that the debt was owing to plaintiffs, and unpaid, and that they, and each of them, were liable therefor, and yet each is seeking to evade the same, as if by common consent. The brick company has actual notice of the pendency of plaintiffs' suit, and had at and long before the final settlement, and expressed its indifference with regard to the suit. The debt was due plaintiffs, in the first instance, by the brick company, and afterwards became due plaintiffs, in the second instance, by the railroad company, and it is now due by each. Plaintiffs prayed that the brick company, a corporation domiciled in Fulton county, might be made a party defendant, and required to interplead therein. On January 17, 1890, this amendment was allowed, and an order passed that the brick company be made a party defendant, and be served. On December 4, 1890, an order was passed reciting that the brick com-

pany had not been served, and it was ordered that it be served at once; and on January 27, 1891, it was served by the sheriff of Fulton county. It demurred on the following grounds: Because it appears from the petition that it is a citizen of Fulton county, and the superior court of that county alone has jurisdiction of plaintiffs' suit; because the suit should have been brought within one year from the filing of plaintiffs' lien; and because no sufficient or legal cause of action is set out against the brick company. The case coming on for hearing, plaintiffs amended as follows: Powers, as a subcontractor on the railroad, ordered the pipe from them, but never used it, because he failed, as such contractor, before the pipe arrived on the road, and it was used by the brick company, who took from Powers his contract, and did the work Powers undertook to do by his contract. Before this suit was begun, or their lien filed for record, Powers became insolvent, and is so at the time of filing this amendment, and for these causes was not sued. The brick company has been paid by the railroad company for the pipe, but at no time has the brick company paid therefor, but is indebted to plaintiffs for the same \$167.40, with interest. Plaintiffs offered the following amendment, which the court refused to allow: "If, for any reason, plaintiffs are not entitled at law to have their special lien established against the railroad company, the railroad company having got the pipe, and appropriated it to its exclusive use, plaintiffs are entitled to recover the value thereof, and pray they may recover generally against the railroad company, and have verdict and judgment accordingly for the sum due, as in ordinary actions for debt on implied contracts. For these causes, and others set out in this cause, plaintiffs pray that they may recover generally against the railroad company, as in suits on accounts and other ordinary debts, and for this reason they ask it may be converted into a suit for that purpose." The action was dismissed upon the written demurrer, and upon an oral motion to dismiss made by the defendants. To this ruling, and to the refusal to allow the amendment last above mentioned, plaintiffs excepted.

Henry Walker, for plaintiffs in error. Fouché & Fouché and J. Branham, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 669)

#### BOOZ v. BATTEY.

(Supreme Court of Georgia. Aug. 6, 1894.)

APPEAL FROM JUSTICE—PLEA FILED IN SUPERIOR COURT.

After the defendant in a suit upon a promissory note, brought and tried in a justice's court, has established in that court the defense of payment, failure to reduce the defense to writing before the jury is stricken in the supe-

rior court to try an appeal taken by the plaintiff will not preclude the filing of a proper plea of payment then tendered, unless it affirmatively appears that some injustice will be done the plaintiff by allowing the plea to be filed. Where, on the contrary, it affirmatively appeared that the same defense sought to be set up by the plea was litigated in the justice's court, it was error not to permit the plea to be filed. This ruling is made in full view of the acts of September 26, 1883 (Acts 1882-83, p. 103); October 15, 1885 (Acts 1884-85, p. 97); and October 16, 1891 (Acts 1890-91, p. 111).

(Syllabus by the Court.)

Error from superior court, Polk county; W. M. Henry, Judge.

Action by G. M. Battey, transferee of Battey & Hamilton, against M. A. Booz, on promissory notes. Judgment for plaintiff. Defendant brings error. Reversed.

The following is the official report:

G. M. Battey, as transferee of Battey & Hamilton, sued Mrs. Booz in three separate suits in a justice's court, upon promissory notes made by her to Battey & Hamilton, three in number, aggregating \$180 principal, one dated February 26, 1885, and the other two November 26, 1885, and all transferred to Battey, by Battey & Hamilton, on February 1, 1888. The three cases were appealed to the superior court, and there, on motion of plaintiff's counsel, were consolidated. Plaintiff moved for a judgment for the amount of the notes, because no written pleas had been filed to the suits in the court below, they being on unconditional contracts, nor had any written pleas been filed in the superior court. Defendant's counsel then offered the following written pleas, in brief: Before the institution of the suit she fully paid and discharged all of the notes, in the following manner: For the year 1885 she had an arrangement with Bonner & Bonner, tenants on her farm in Floyd county, that the rents due her by them, \$500, were to be paid Battey & Hamilton, who then owned the notes sued on. Said tenants, during the fall of 1885, turned over to Battey & Hamilton, as agents of defendant, enough cotton to pay off the \$500 rent, to wit, 14 bales, and she directed Battey & Hamilton to keep enough of the rent cotton to pay off all the notes, and to pay her the balance. They collected said rent of \$500, appropriated the money to their own use, and failed to give her credit on the notes. When the notes were given, it was agreed between her and them that the notes were to be paid off in this manner, and they were so paid. During 1886 and since, and during the fall of 1885, after the notes were so paid, she demanded the notes from Battey & Hamilton, and the balance of the rent due her, and so paid to them, and they refused to cancel the notes or turn them over to her, and pay her the balance due on the rents. Further, that G. M. Battey, as her agent, on December 16, 1885, swore out a distress warrant against the Bonners for rent due her during 1885, and on the first Tuesday in March, 1886, col-

lected \$115 which was due her, and appropriated it to his own use, which, according to the agreement, should have been applied to the payment of said notes, if anything remained due on them. On March 29, 1888, he collected \$100 on the distress warrant, which he appropriated to his own use, and which should have also been credited on the notes, if anything was due on them. Defendant's counsel also proposed to show to the court that all of the cases were defended in the justice's court on the defense of payment, gained by the defendant, and appealed by plaintiff to the superior court; that no point or objection was ever made in the court below on the trial, nor at any other time, because the defense set up and insisted upon was not reduced to writing in the court below, these facts all being stated by counsel and taken as true by the court,—all of which was overruled by the court, and upon motion of plaintiff's counsel the plea above set out was disallowed, and, over the objection of defendant's counsel, judgment rendered by the court for the whole amount of the notes. Defendant excepted to the refusal to allow her to make the showing above stated, to the refusal to allow her plea, and to the refusal to allow any issue to be submitted to the jury, and rendering judgment for plaintiff.

A. Richardson, Blance & Fielder, and Colville & Noyes, for plaintiff in error. Irwin & Bunn, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 656)

#### CARTER v. DARNELL.

(Supreme Court of Georgia. July 30, 1894.)

SUIT BY ADMINISTRATOR—EXPULSION OF INTRUDER ON LAND—PARTITION OF ESTATE—EFFECT.

An administrator does not lose possession of land, or the right to expel an intruder, by reason of having, previously to the intrusion complained of, caused the lands of his intestate to be partitioned in kind among the heirs at law; the parcel in controversy not having been taken possession of by the heir to whom it was assigned, and the administrator not having parted with his possession to any one, but, on the contrary, having made arrangements with a stranger to occupy the land as his tenant for the current year, and the intrusion consisting of an entry by the alleged intruder when the administrator's tenant was about to enter, and would have entered, but for being excluded by the intruder.

(Syllabus by the Court.)

Error from superior court, Rabun county; C. J. Wellborn, Judge.

Action by W. J. Carter, as administrator, to eject A. A. Darnell from a house, and the land upon which it is situated. From a judgment for defendant, plaintiff brings error. Reversed.

The following is the official report:

W. J. Carter, as administrator of his father, Thomas Carter, made affidavit to eject A. A. Darnell, as an intruder, from a house, and small parcel of land on which it

is situated, in the Second district of Rabun county; it being a narrow strip of land, about 50 rods wide, running from east to west across one entire lot, and heretofore recognized as the southern portion of lot No. 181; it being near, at, and along the line between lots 181 and 156, in said district, and immediately north of the line run between said lots by Obedir Dickerson, and known as the "Dickerson Line"; the house on said land being where Jack Hopper resided in the year 1892; containing 60 acres, more or less. Defendant made a counter affidavit, alleging that he claimed in good faith a legal right to the possession, and adding, "I do not claim any portion of lot of land No. 181, but I do claim that the above-described house and parcel of land claimed by W. J. Carter is on lot of land No. 156, in the Second land district of said county." The jury found for the defendant, and the plaintiff's motion for a new trial was overruled. The grounds of the motion are that the verdict is contrary to law and evidence, and that the court erred in charging the jury as follows: "If you believe from the evidence that the plaintiff petitioned the ordinary for a division of the lands of his father's estate in kind, and that commissioners were appointed for that purpose, and their report had been filed with the ordinary, and recorded by him, previously to the bringing of this suit, and that the commissioners so appointed allotted this land in dispute to the plaintiff's brother John, or some one of the heirs, then I charge you that the title had passed out of the plaintiff, and he could not recover in this action."

W. S. Paris and J. J. Kimsey, for plaintiff in error. W. F. Findley and W. C. Glenn, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 657)

#### LUMPKIN COUNTY v. WILLIAMS.

(Supreme Court of Georgia. July 30, 1894.)

JUDGMENT IN FAVOR OF COUNTY—LEVY OF EXECUTION—STIPULATION AS TO RIGHT OF SET-OFF—CONSTRUCTION.

A judgment in favor of a county against one of its debtors for a specific sum of money may be enforced by execution, notwithstanding an agreement by counsel, which was incorporated in the judgment, stipulating that the judgment should in no wise be in the way of a certain claim for extra compensation, which the defendant then had pending before the grand jury of the county. This stipulation could not be construed as entitling, or as intended to entitle, the defendant to any deduction or delay of payment by reason of said claim, either before or after its allowance by the grand jury, since the statute (Code, § 3697) requires the imposition of a tax to pay claims for extra compensation, and does not render them a charge upon the general funds of the county.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; C. J. Wellborn, Judge.

Petition by F. M. Williams to restrain the sheriff of the county of Lumpkin from collecting an execution on a judgment in favor of said county. From a judgment overruling its demurrer to the petition, the county of Lumpkin brings error. Reversed.

The following is the official report:

On July 4, 1893, Williams presented a petition praying that a restraining order be granted, directing the sheriff of Lumpkin county to desist from further proceeding to collect an execution in favor of that county against petitioner (which execution had been levied on petitioner's property) until the April term, 1894, of the superior court, and that petitioner have such other and further relief in the premises as the nature of his case requires. The judge of the superior court thereupon ordered that the sheriff be "restrained from further proceeding to enforce the execution until the next term of Lumpkin superior court, and until petitioner has an opportunity to present his claim to the grand jury at said term." On August 30, 1893, the attorney for Lumpkin county entered and signed upon the petition the following: "I acknowledge service of the within petition and order of the judge for Lumpkin county, and waive copy of the same, but waive nothing further." At the October term, 1893, the county demurred to the petition, and moved to dismiss it, and to vacate the order thereon, upon the grounds that there was no process attached to the petition, and the same had not been waived; that the petition is imperfect in not setting out the agreement alleged therein, and a copy of the same; that the petition sets out no facts which would authorize the grant of an injunction or any other relief; and that the order granted on the petition was without previous notice to defendant, and without any opportunity to be heard. The court overruled the demurrer, and passed the following order: "The hearing of the application for temporary restraining order in this case having been set for this term of the court, and it appearing that the grand jury at the present term have recommended that the case be continued, and that no further proceedings be had until the next term of this court, it is ordered by the court that the further hearing of said application be continued to such time as the court shall hereafter determine; and that in the meantime, and until the further order of the court, the temporary restraining order heretofore granted be continued." The county excepted to the overruling of the demurrer, and to the denial of its motion to dismiss the petition for want of process. In the bill of exceptions the judge makes this statement: "The demurrer was overruled for the reason that the petition was simply for a temporary restraining order until the grand

jury could act upon petitioner's claim. The application for temporary restraining order is undisposed of, and the court specifies the last order made in reference to the hearing of said petition, which was passed in accordance with the recommendation of the grand jury, as necessary to a clear understanding of the court's rulings." The allegations of the petition are: At the April term of Lumpkin superior court, a judgment was rendered against petitioner in favor of the county for about \$360, founded upon a suit brought by the county against petitioner as ordinary thereof, for alleged overcharges against the county. At the time the judgment was rendered, it was agreed between the attorneys for the county and petitioner that said judgment was in no wise to be in the way of a certain claim for extra compensation which petitioner then had pending before the grand jury. Said agreement was in writing, and is a part of the judgment. Petitioner has a valid, subsisting, bona fide claim for extra services against the county, for more than sufficient to pay off and discharge the judgment, which claim is a legal and valid charge against the county. At the time he permitted judgment to be entered against him, he thought and believed that the grand jury would pass upon his claim, and allow him at least a sufficient amount to balance the judgment agreed upon; but, before the judgment was signed against him, the grand jury refused to consider his claim, the foreman of the jury absolutely refusing to give him or his counsel a hearing before the jury. Execution has been issued and levied on petitioner's property by the sheriff, and the property will be sold on the first Tuesday in August, unless petitioner should pay the same, or unless the sheriff is restrained by the writ of injunction. Petitioner cannot, under the law, present his claim for adjudication before another grand jury until the April term, 1894, of the superior court. It was only by the arbitrary and illegal conduct of the foreman of the grand jury that petitioner's account for extra compensation was rejected. The grand jury in their general presentments simply reported against his account, on the ground that it was barred by law. It would be inequitable and unjust to require him to pay the judgment, when the county is already indebted to him in a much larger sum, and especially when it was distinctly agreed that he should be heard before the grand jury.

M. L. Smith, Howard Thompson, G. K. Looper, and Perry & Dean, for plaintiff in error. Price & Charters, M. G. Boyd, and R. H. Baker, for defendant in error.

PER CURIAM. Judgment reversed.

(40 W. Va. 543)

**HORN BROOK et al. v. TOWN OF ELM GROVE et al.**(Supreme Court of Appeals of West Virginia.  
April 13, 1895.)**MUNICIPAL CORPORATION — FORFEITURE OF CHARTER—PARTIES TO SUIT.**

1. A forfeiture of the charter of a municipal corporation cannot be enforced or taken advantage of in any legal proceeding collaterally or incidentally. That forfeiture must be declared in a proper, direct way. The state only can enforce such forfeiture, as it alone has the right to waive or enforce it.

2. The forfeiture of charters of towns for the causes defined in Code, c. 47, § 44, must be governed by the principles above stated. Quære, can such forfeiture be declared by any judicial proceeding?

3. A suit to enjoin the collection of municipal taxes, on the ground that they were illegally imposed by reason of want of authority to impose them from forfeiture of the municipal charter, is not wrongly brought, from the mere fact that the town is sued in its corporate name. So bringing the suit does not admit its continued existence.

(Syllabus by the Court.)

Appeal from circuit court, Ohio county.

Bill by Henry H. Hornbrook and others against the town of Elm Grove and others for an injunction. Decree for defendants, and plaintiffs appeal. Affirmed.

Wm. Erskine and W. P. Hubbard, for appellants. Henry M. Russell, for appellees.

BRANNON, J. Henry H. Hornbrook and others, for themselves and all other taxpayers of the town of Elm Grove, filed a bill in equity in the circuit court of Ohio county against that town and its officers, praying that the collection of taxes imposed on them by the town might be enjoined, and an injunction which was granted was afterwards dissolved, and the plaintiffs appeal. The single ground on which the counsel for the plaintiffs in this court seek to rest their case is that the town has for more than one year failed to keep its streets, alleys, walks, and gutters in good repair, and has thereby forfeited its charter, and become extinct, and therefore has no power to impose taxes. This position rests on section 44, c. 47, Code, reading: "Any city, town or village which shall fail for one year to keep its roads, streets, alleys, sidewalks and gutters in good order and repair, or which shall fail for one year to exercise its corporate powers and privileges, shall thereby forfeit its charter, and all the rights, powers and privileges conferred thereby." It will be seen at once that this suit is not one having for its purpose to ascertain and declare the fact working the forfeiture of the town's charter, but that it seeks to do this collaterally, and thus make the forfeiture effectual, without any direct judicial declaration of the forfeiture. It is said the very letter of the Code above quoted says that, because of certain defaults, the town shall "thereby forfeit its charter" ipso facto; that, if that default be found, no matter about the

form of proceeding, it paralyzes the acts of the town. It is true that that omission is made by the Code a cause of forfeiture; but is that to be inquired into, and, if found, to be enforced, in a purely collateral proceeding? Or must there be some judicial inquiry in a proceeding proper to ascertain and declare the cause of forfeiture? Must there not be a direct judgment of death upon the municipal corporation? The general rule is well established that the corporate existence of a municipal corporation cannot be questioned collaterally. Beach, Pub. Corp. § 55; Cooley, Const. Lim. 254; 15 Am. & Eng. Enc. Law, 964; 2 Kent, Comm. 312. "An incorporated town retains its corporate capacity until its charter is declared forfeited in a direct judicial proceeding. It cannot be held, in any collateral proceeding, to have forfeited its charter by non user." Harris v. Nesbit, 24 Ala. 398. In an action by a town to collect taxes, it was held that the legal existence of the corporation could not be tested in such action. Town of Geneva v. Cole, 61 Ill. 397. Of course, this rule will apply whether the existence of the town depends on invalidity of its charter in the start or subsequent forfeiture. Suppose this were not the rule. Chaos would reign. Whenever the town would proceed to punish one for any offense against its order and peace, or enforce its taxes, or sue to enforce its rights, or take any step under color of its charter, there must be an investigation before every court, high or low, as to whether it had kept its streets, alleys, walks, and gutters in order, and minute inquiries would be made into the sufficiency of their order, and in some instances the mayor or alderman, if he thought the streets were not in proper order, would have to abdicate his seat, because of the forfeiture of the town's life. Where would be the end of the confusion? What towns would it afflict? What towns would it not afflict? Is it possible that our legislature has changed this salutary rule by the section of the Code quoted? We are under that principle, unless by reason of it. And what is there peculiar in it,—so peculiar as to revolutionize the rule in West Virginia? It merely declares that for nonuser and misuser it shall forfeit its charter. The words "thereby forfeit" in the statute are not unusual in such cases where the purpose is to declare a certain fact a cause of forfeiture, fine, or other legal result. It means only that "by reason of" or "because of" such and such facts the charter shall be forfeited. It is only equivalent to the word "because," in the language, "shall because of such failure forfeit its charter to the state." Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227. It states the cause of forfeiture, and states that such cause shall of itself work a forfeiture. But why not in this as well as in other instances apply the rule that there must be a direct proceeding to ascertain and adjudge that fact? There is no reason why this instance is out of the general rule, and

every reason why it is within it. We must have a clearer expression than is here found of a legislative purpose to specify a cause of forfeiture, and dispense with direct judicial inquiry as to the existence of that fact, and an affirmative judgment of the forfeiture of the charter. We are referred to our statutes forfeiting lands for omission of assessment or nonpayment of taxes as instances of forfeiture by statute, *proprio vigore*, without judicial sentence; but that legislation was declared by the court in *Levasser v. Washburn*, 11 Grat. 572, as having a certain public policy "to remedy certain evils for which prompt, summary, and decisive measures were indispensable," as stated in that case. That legislation specified the cause of forfeiture, declared that cause should forfeit the land, and gave the land at once by legislative grant to certain persons, thus evincing an intent to dispense with any inquest upon the facts producing forfeiture. That decision depended on that particular legislation, which to answer a certain public policy, plainly evinced, for reasons stated in that case, a design to at once forfeit the titles of certain persons, and at once give them to others. No such policy or necessity here exists. There is no analogy of force between legislation to forfeit lands of private individuals for neglect of public duty and legislation forfeiting the very existence and cutting short the functions of public corporations constituting a part of the machinery of governmental administration. Even as to private corporations, our rule is, as it is everywhere, that there must be direct judicial adjudication of the fact causing the forfeiture and of that forfeiture, and I think the reasons for requiring it in the case of towns are tenfold stronger than in cases of private corporations. In *Baltimore & O. R. Co. v. Supervisors, etc., of Marshall Co.*, 3 W. Va. 323, the court declared the principle that a forfeiture of a corporate charter must be judicially declared before its forfeiture could be recognized in any court. The charter act provided that, if the road should not be completed by a certain date, "then this act shall be null and void"; thus abrogating the very act giving corporate life, — a stronger case for forfeiture without judicial sentence than this. Could there be a stronger? The court said the question of forfeiture could not be raised except by a proceeding in the name of the state against the company to declare and determine judicially the forfeiture and annul the charter. As regards the language of the act, that was as strong an instance of legislative intent to at once forfeit as this, if not stronger. So in *Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227, it was held that "a cause of forfeiture cannot be taken advantage of or enforced against a private corporation collaterally or incidentally, or in any other manner than by direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer; and the state can alone in-

stitute such a proceeding, since it may waive a broken condition of a compact with it as well as an individual can."

But it is said that the reason of such decisions, as to private corporations, is that they are contracts with the state, and can only be forfeited by due process of law, by judicial hearing, as mere laws cannot impair the obligation of contracts. I fail to be impressed that this draws a substantial difference. In both cases the state created or granted the franchise. It is with it to enforce or condone the forfeiture as much in the one as in the other case, contract or no contract. Indeed, it is more necessary to vest this right of enforcement or condonation of the forfeiture in the state in case of a town than in case of private corporations, because a town is a part of the government, delegated as the agent of the state to administer government in its stead in a given locality and in certain respects; and, the powers of government being vested in the state, it ought to be left to it to say whether the interests of the people to be affected will be better promoted by the abolition or continuance of the municipal charter. If the idea is that the power to end the charter being with the legislature, it has in advance provided that in a certain event it shall *ipso facto* instantly cease, it is plain that the theory of contract is not an element of this proposition, and cannot be used as a reason why we should dispense with the rule requiring a direct declaration of forfeiture. As stated above, I do not think the words "thereby forfeited" amount to a legislative forfeiture in advance, without sentence. The statute merely specifies a cause of forfeiture, leaving its ascertainment to be governed by the general law on the subject.

The case of *Oakland R. Co. v. Oakland B. & F. V. R. Co.*, 45 Cal. 365, is specially called to our attention. It was an injunction to restrain a company from building a railroad because the charter limited its construction to certain time, and provided, in case of failure, the franchise should "utterly cease and be forfeited," and it was held it was a forfeiture by the act without judicial declaration. Variant decisions, as confusing as an Egyptian labyrinth, can be found in the vast number of decisions in different national and state courts in the endless series of reports. We must select those most persuasive to us. But we must follow our own Reports. Shall we leave the cases of *Baltimore & O. R. Co. v. Supervisors, etc., of Marshall Co.*, and *Lumber Co. v. Ward*, *supra*, and follow the *California* case? *Upham v. Hosking*, 62 Cal. 250, followed the case just cited. It was a franchise granted to individuals, not a corporation. The remarks of Marshall, C. J., in *U. S. v. Grundy*, 3 Cranch, 337, that where the forfeiture is by common law nothing vests in the government until some legal



step has been taken to assert the right, but a statutory forfeiture is different, were made as to a statute declaring a vessel forfeited if a false oath were taken to procure a register. It was a forfeiture by a private individual of private property, not like the government's solemn grant of incorporation for municipal purposes, or a private corporation. Per contra the California case, I may cite the case of *Bank v. Dawson*, 13 La. 497. The statute enacted that, if a bank suspend specie payment for more than 90 days, "the charter shall be ipso facto forfeited and void." Here was a much stronger statutory declaration of forfeiture than in this case. It was held that a cause of forfeiture cannot be taken advantage of or enforced against a corporation incidentally, or in any other mode than by a direct proceeding instituted by the government, because it may waive a broken condition of a contract or charter, as well as an individual, and that it continued to exist as long as the state did not claim the forfeiture. I think this decision supported abundantly by authority almost universal.

But it is argued that no proceeding in any court by quo warranto or other process lies to declare the forfeiture of a municipal corporation, and therefore the section of the Code declaring that for certain causes the charter shall be forfeited would be a dead letter, and not enforceable, unless it may be enforced in a collateral way, such as is proposed in this suit. This is not a quo warranto or other such direct proceeding, and we are not called upon to decide whether quo warranto or other judicial process would lie, and it would be perhaps obiter dictum to decide it in this case. Speaking for myself, I do not think quo warranto or any other judicial process lies to forfeit the charter of a municipal corporation, and this because it is a part of the government itself, and it lies only with the legislature to take away its charter. Think of a court declaring the charter of the city of New York forfeited. "Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies, and repeated by text writers. There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control." *Meriweather v. Garrett*, 102 U. S. 511. So has said this court in *Probasco v. Moundsville*, 11 W. Va. 501, and *Board of Ed. v. Board of Ed.*, 30 W. Va. 424, 430, 4 S. E. 640; 1 *Beach, Pub. Corp.* § 63. Such a corporation being thus a part of the very government itself. Its agent by it constituted to perform certain functions, even legislative functions, which belong exclusively to

the legislature as a separate department of the government, if the judiciary can annul the charter, it invades the domain of the lawmaking department by abolishing the agency, and its power to administer government as directed by the legislature, in opposition to its will that such functions shall be administered by its own chosen agent. The very power to constitute the agent is here a legislative prerogative, and that power is nullified by a court, and the powers committed to that agent, confessedly pertaining to the legislature, can no longer be exercised as commanded and deemed wise by the legislature, and its powers to that extent thwarted and crippled. In England the power is exercised by quo warranto and scire facias. The charters of London and of the colonies of Massachusetts, Rhode Island, and Connecticut were thus abrogated. Mr. Beach expresses the opinion, as also Judge Dillon, that the judiciary cannot here exercise this power, since these corporations being purely public corporations, composed of citizens, formed only for local government by the legislative department, to give the judiciary the power of dissolution would make it co-ordinate with the legislative power in control of local government and local legislation, and the power over municipal corporations vested in the legislature is limited only by the constitution, and in it the legislature can have no rival, and neither the judiciary nor the executive can create or destroy a municipality, which is but a subdivision of the state government. *Dill. Mun. Corp.* §§ 112, 168, 720, 896; *Beach, Pub. Corp.* §§ 118, 119. There are cases, however, holding that the power to declare a forfeiture exists. *People v. City of Riverside*, 66 Cal. 288, 5 Pac. 350; *State v. Independent School Dist.*, 29 Iowa, 264; *Dodge v. People*, 113 Ill. 491, 1 N. E. 826.

But grant that there is no judicial process directly to declare the forfeiture. Does that compel us to say that it can be enforced judicially in collateral proceedings? By no means; but the legitimate, logical conclusion therefrom would be that, as there is no direct, there can be no indirect, process; that, if you cannot accomplish the result directly, you cannot collaterally. It is enough for us to say that, in the indirect way proposed in this suit, the power of taxation essential to the exercise of the powers of a town, and which is lawful unless the corporation is defunct, cannot be denied. But there is a remedy, and in my judgment the only remedy, and that is with the legislature. It gave; it alone can take away. It is with it, as it ought to be, to say whether the public interest involved will be better promoted by looking over the misuser of the corporate powers, and trusting for better things from the present or another set of officers, or to blot out the municipality. The fact that our constitution in article 6, § 39,

provides that the legislature shall not pass local or special laws incorporating cities, towns, or villages, or amending the charter of any city, town, or village containing a population of less than 2,000, but it shall provide by general law for those cases, does not take away that power residing in that body to repeal or declare forfeited a charter of a town. The legislature can do anything not prohibited. The object of the provision was to prevent multitudinous special acts creating or amending municipal charters consuming the time of the legislature; but this limits only the power to create or amend charters, and it does not prohibit the repeal of a charter by special act, or anything trenching on the power of the legislature over municipal corporations existing. See *State v. Steen*, 43 N. J. Law, 542. Were this a proceeding directly assaulting the corporation, I should say private individuals could not maintain it, but only the state. There would be more reason for confining this power to the state's election than in cases of private corporations. It ought not to lie with individuals, from mere personal interest, caprice, or impulse of prejudice, to make suggestions of misuser, and make the existence of towns the football of litigation. *Cooley*, Const. Lim. 254.

Counsel for appellees suggests that this suit is wrongly brought against the town, and should be only against its officers, and that in suing the town its continued existence is admitted. *People v. City of Spring Valley*, 129 Ill. 169, 21 N. E. 843, supports this contention. But reputable authorities cited in it say that there is a distinction between private and municipal corporations in this respect, and that an information against a municipal corporation by its corporate name, even where its corporate existence is challenged, is rightly brought as a corporation de facto, though not de jure. *State v. Bradford*, 32 Vt. 50; *People v. City of Riverside*, 68 Cal. 288, 5 Pac. 350. In the latter case other California cases are cited justifying that rule. In *State v. Brown*, 31 N. J. Law, 355, an action to have it adjudged that a corporation was never legally constituted, it was held that the proceeding must be one that will bring the corporation itself directly before the court. It occurs to me that, even in a proceeding to directly test the existence of a corporation, it ought to be a party by its assumed corporate name, as its existence as such is the very thing to be tried,—its right to live and act in that name,—and that its lawful existence is not admitted simply by impleading it in that name, when the pleading denies it. If so, a suit like this to enjoin taxes assessed in the name of a corporation is more properly brought against it as a party, and it does not estop the plaintiff from contesting its validity, so far as this objection goes. For reasons stated above, the decree is affirmed.

(40 W. Va. 506)

**CROFT v. HANOVER FIRE INS. CO. et al.**

(Supreme Court of Appeals of West Virginia.

April 13, 1895.)

**FIRE INSURANCE—ORAL CONTRACT—AUTHORITY OF AGENT—MISTAKE AS TO INSURED—CORRECTION IN EQUITY.**

1. An oral executory contract for fire insurance is valid, the statute of frauds not applying to it.

2. If an oral contract for fire insurance has been made, and before the issuance of the policy the property is destroyed by fire, equity has jurisdiction to compel payment of the indemnity.

3. Though the assured understands the term to be covered by the insurance to be one year, and the agent of the insurance company understands it to be three years, costing in either case the same premium, this does not render the contract incomplete, so as not to warrant recovery for loss by fire occurring within one year.

4. Where an agent represents several insurance companies, and is intrusted with blank policies, signed by the officers, with authority to negotiate policies and issue them without referring them to the companies, and it is agreed by the insured that the agent shall place the risk in such company as he selects, and he does place it with a company, as shown by a memorandum made by him, the agreement is binding on the company.

5. Where, by agreement between the insured and the agent, the agent is to fix such amount of indemnity as he sees proper, and he does fix it, as shown by a memorandum made by him, the oral agreement is binding on the company.

6. An agent of an insurance company authorized to negotiate risks may give credit in such executory agreement for the premium.

7. Unless in such agreement prepayment is made a condition precedent, the premium need not be paid until the policy agreed upon is ready to be delivered.

8. The agent, by mistake, entered in his memorandum the name of the wrong person as the assured. This will be corrected in a suit in equity on such executory oral agreement, and the person who owns the property insured and who negotiated the insurance may recover in his own name.

(Syllabus by the Court.)

Appeal from circuit court, Wood county.

Bill by Walter L. Croft against the Hanover Fire Insurance Company and the Citizens' Fire Insurance Company. Decree for plaintiff, and defendants appeal. Affirmed.

Hutchinson, Hutchinson & Camden, for appellants. Van Winkle & Ambler and Wm. G. Peterkin, for appellee.

**BRANNON, J.** This was a suit in equity in the circuit court of Wood county by Walter L. Croft against the Hanover Fire Insurance Company and the Citizens' Fire Insurance Company for the specific performance of an agreement to issue a policy of insurance upon a dwelling house, which was consumed by fire. The court decreed that the insurance companies pay the insurance stipulated for, and the companies appeal.

No policy was actually issued, but the suit is based on an oral contract to insure and to issue a policy accordingly. As the "Statute of Frauds and Perjuries," so called (Code, c. 98), does not apply to insurance, an agreement to insure need not be in writing. *Wood, Ins. § 4; May, Ins. § 14; Insurance Co. v.*

Colt, 20 Wall. 560. I do not think clause 7 of chapter 98 of the Code applies to the case, even if the policy agreed upon was for three years. *Kimmons v. Oldham*, 27 W. Va. 258. When a contract for insurance has been made, but no policy to evidence it has been issued, the remedy of the insured, after loss, may be by bill in equity, on the principle of specific performance; and the court does not simply decree the specific performance of the agreement by the actual execution of a policy of insurance, and then compel the insured to bring an action on that policy, but, to avoid multiplicity of actions and delay, having the parties before it properly for specific performance, will at once decree the payment of the amount which would be recoverable under the policy if issued, agreeably to that principle of equity practice that, as all the necessary parties are before the court for one purpose, it will give full and complete relief, and not send them to another court. *Woody v. Insurance Co.*, 31 Grat. 362; *May, Ins. § 565*; *Wood, Ins. §§ 11, 12*; *Insurance Co. v. Colt*, 20 Wall. 560. Or he may sue at law, by same authorities.

But the defendant companies say there was no contract to sustain a suit, because the contract was vague, uncertain, and incomplete. Herein lies the turning point of the case. As to proof, there is nothing peculiar in contracts of insurance. As in other cases, the contract must be definite and certain, and the parties must have agreed upon all essential terms. The contract must be such as to bind both parties,—the one to insure, the other to pay the premium. All elements must be agreed upon, and if anything is left open or undetermined, so that the minds of the parties have not met, no contract exists, and there is no liability for a loss; as, where the rate of premium is left undetermined, or the time when the policy shall attach, or the apportionment of the risk has not been agreed upon, or the insured retains control over the premium note or any papers the delivery of which is a condition precedent, or if anything remains to be done by the insured as a condition precedent, as the payment of premium, or if the duration of the risk is not agreed upon, or any condition precedent has not been complied with. The aggregatio mentium (union of minds) must be fully established, and nothing must remain to be done but to deliver the policy. The details of the contract must be fixed, and, if the agreement or understanding of the parties in reference thereto is not mutual,—that is, if one party understands the matter one way, the other another,—the minds of the parties have not met, and there is no contract in law or equity. Of course, the burden of proof to show such a contract as is enforceable is on the plaintiff. *Wood, Ins. § 6*.

The chief point of question in the contract, as it seems to me, is as to the length of time the policy was to run. It has been stated

above that this is an essential element in a valid contract. The parties must agree upon a time for the duration of the policy. The plaintiff says that he applied for a policy on his dwelling house for one year, and understood that the agreement with the agents was for one year. One of the agents says he understood it to be three years. The agent says he made no memorandum in writing on this occasion. According to the evidence on both sides, in that interim an agreement was made for the insurance of the dwelling house in such sum as the agents should fix, at a certain rate, and the policy was to be made out and sent by mail to the insured, and he was then to pay the premium, or it was to be charged to his father, who had other insurance with these agents, as the agents preferred. The agents agreed and promised to send the policy. They had policies in blank, signed by the officers, and they had authority to fill out and deliver them without application to the chief officers of the companies. About one month after this, a brother of the plaintiff, by authority of his brother, met the one of the agents who had negotiated for the policy, and asked the agent for it, and was told that it had not been made out, as he had not satisfied himself as to the amount for which the policy should be written. The plaintiff's brother told the agent he wished it fixed up, and the agent himself says that he told the brother that he would fix it then as far as he could, as he was on his way to the train to go on a trip, but would attend to it; and he then wrote in a private memorandum book this memorandum: "W. M. Croft, \$600.00 on one-story fr. shingle roof dwell., near Davisville, 1¼-3 yrs. N. Y. Underwriters." The brother told him to send the policy, and he would send the money to pay the premium, to which the agent assented. The evidence shows the agent agreed to credit; did not demand prepayment. It is not claimed otherwise. About a month after this interview between this agent and the plaintiff's brother, the house was destroyed by fire, and this brother, the next day, called on the agent, and asked for the policy. The agent said he had written it, but had mislaid it, and searched and could not find it, and said he would look for it, and to call later, and then the brother informed him of the fire. In the afternoon the brother called again for the policy, but the agent had not found it. Later this agent concluded he had never written it up. After this the plaintiff tendered the agent the premium money, but he declined it, saying that he had informed the company of the fire, and the adjuster would soon come, and, "under the circumstances," he would not take the money.

We can say from the evidence on both sides that an agreement to insure was made, and nothing remained to be done but to issue the policy, and that the agent promised to do this. All the elements were settled, except as

to time to be covered by the policy, let us say. The property was named. The plaintiff gave its value. The amount of the indemnity was left by the plaintiff absolutely to the decision of the agent. He would have right to fix that anyhow. It was with him to say just how much he would insure it for. He did fix it, as the memorandum shows. The rate of premium was fixed. The discretion to select the company was left to the agent. The agent, as a witness, says it was only through his neglect or forgetfulness that the policy was not issued. He says the policy should have been issued. But the insured asked and understood that the insurance was to be one year, while the agent understood it to be three years. What effect can this have? The defense would use it to show there was no finished agreement, under that principle of law, stated above, that all elements must be agreed, and time is an essential element, and that when one party understands an essential element of the contract in one way, and the other in another way, the minds of the parties have not met on that essential element. But what practical harm can this circumstance do the companies? The fire occurred within one year. The plaintiff says to the companies: "You are liable to me. You agreed to insure me for one year, and the fire occurred within one year." The companies plead in reply: "We are not liable, because we agreed to insure you for three years." The plea is not good. It confesses the fact of insurance. It does not deny that the fire was in one year, and the fact that the term was three years is not material, the three years covering one year. The rate agreed was the usual one for three years. Croft's evidence, however, is that the term was one year. It is a case of conflicting evidence as to this. If he is believed, their minds met on one year. We should not, where two witnesses thus disagree, reverse the decree, there being no other evidence as to that.

It is contended for the defense that no company was named as the insuring company at the time the agreement was made, and that never until a month later, when, in the memorandum above mentioned, the agent wrote the New York Underwriters as the insurers, was there any particular insurer mentioned. Here the evidence of the plaintiff and the agent conflicts, the former saying that the New York Underwriters were named as the insuring parties. The defendant companies did business under that name. Let us say that no insuring party was named at the time of the agreement. The firm of K. S. Boreman & Son were insurance agents, doing business for the defendant companies, and also other companies, and both plaintiff and the one of said firm acting in this matter (to whom I have often referred above, and may below, as agent) say that it was left to the agents to assign the risk; that is, give the insurance to what company they pleased. Croft, having confidence in the experience of the agents with the various companies, committed this discretion

to them. This is often done. It is lawful and binding on the company selected by the agent, when they had policies signed in blank, to issue to whom they choose. It does not render the agreement incomplete as for want of contracting party. Wood, Ins. § 25, and note; May, Ins. § 59, end. The agents clearly had power to make a contract binding these companies by name as insurers at the time of the contract. Then, when the party insuring leaves it with the agents to select any of the companies represented by them, why is it not binding? If the party insured does not object, how can the company object? These two companies had an agreement that in all policies taken in the name of the New York Underwriters they should share premiums and liabilities in certain proportion. Until the agent does select the company, there is no contract; but, when he does, then there is. Let the date of the memorandum naming the underwriters as the insurers be at the date of the agreement or afterwards, it was before the fire. It became, as to this point, a contract before the loss. The agent wrote to the companies after the fire that he had assigned the risk to them. *Sheldon v. Insurance Co.*, 65 Wis. 436, 27 N. W. 315, cited, is not in point. An agent agreed to insure in some company represented by him, but not designated, on certain terms. The defendant decided to insure on different terms, but, before acceptance, the company declined to do so. Held, there was no contract. The judge, admitting that, where it is left to an agent to select the company, it is binding when he designates the company, said it is not a contract until he designates. The memorandum of designation there showed a rejection by the company, and the court held it a departure from the order of the company in designating a less premium than it had proposed to accept. The case of *Association v. Boniel*, 20 Fla. 815, is not in point. A subagent agreed to insure in a company not designated, and there is no showing that he was to select it, and he never did designate one, and he had no authority.

There is an indirect allusion in brief of counsel to the nonpayment of the premium, but the point is not distinctly made. It would be untenable. The proof is full that the agreement was that, when the policy should be sent, Croft would bring or send the money, or it could be charged to his father, and the agents assented. Now, insurance can be sold on credit as well as anything else. The agent can give credit. *Eagan v. Insurance Co.*, 10 W. Va. 583, 588; Wood, Ins. § 28; May, Ins. § 360 D; *Insurance Co. v. Colt*, 20 Wall. 560; *Long v. Insurance Co.* (Pa. Sup.) 21 Am. St. Rep. 883, note, 20 Atl. 1014. Prepayment is not necessary to the conclusion of an oral contract. Wood, Ins. §§ 22 A, 43 B. But, in addition, if credit had not been given, there was no obligation to pay until the policy was ready to be delivered, and the companies were to do that, and did not, though asked to do so. Wood, Ins. §§ 29, 30; May, Ins. §§ 22 A, 43 C

The agent made out the memorandum in the name of W. M. Croft, not in that of plaintiff, Walter L. Croft, by mistake. The plaintiff owned the house, and applied for the insurance, and made the agreement. From the fact that his father, W. M. Croft, had insurance from these agents, and the latter thought that the father owned the house, the mistake was made by the agent. The plaintiff says he told him the house was his. No pretense or claim of falsehood or concealment is made against the plaintiff. The agent swears that it would have made no difference, as he would have as readily insured in the son's name. This mistake is mentioned in the brief, but merely mentioned. It can have no effect. Even a policy in a wrong name may be reformed and rectified after loss. This is a suit on an oral, executory agreement, and we are in a court of equity. May, Ins. § 566 A; *Thompson v. Insurance Co.*, 136 U. S. 295, 10 Sup. Ct. 1019; May, Ins. §§ 479, 482. This court decided in *Deltz v. Insurance Co.*, 33 W. Va. 526, 11 S. E. 50, that where, by mistake, the agent wrote the name of the husband as the assured instead of the wife, it would not defeat recovery by the true owner. See, also, opinion in *Travis v. Insurance Co.*, 28 W. Va. 583. But this memorandum is not the contract. There is evidence to sustain the court in holding the agreement was with the plaintiff. The suit is on the oral contract. The memorandum is only important as showing a designation of the insuring companies; it is not the contract. Plaintiff in person applied for the policy and told the agent the house was his. The agent accepted the risk of the plaintiff in person, and why should we or the agent say the contract was with the father? The agent, as a witness, does not claim he was misled; attributes no bad faith whatever to the plaintiff. He inferred, because the plaintiff was a young man of 30, and the father had a mill property close by, and was a man whose name was on the insurance book as to other insurance, that the father owned the house. It was merely his inference. The real contract was in fact and in law with the plaintiff. Prima facie, if the plaintiff did not mislead, it would be his contract. The agent says it was merely his inference. I repeat, the memorandum is not the contract. If it were, the mistake could be corrected.

Variance. This is relied on in a brief of counsel. As regards the matter last spoken of,—the name,—there can be no variance between allegation and proof. The bill alleges the oral contract as made with the plaintiff, and, as I have shown, the proof is of a contract made with the plaintiff. The memorandum is not the contract sued on; and, if it were, the bill states the mistake in it, and gives reasons of mistake, why it, if the gravamen of the suit, should be treated as one made with plaintiff. Either party may have even a written contract specifically enforced with such corrections as parol evidence may show to be necessary to correct a mistake. *Creigh v. Boggs*, 19 W. Va. 240.

Variance as to Date of Contract. There is no variance between bill and proof in this respect. The bill says that "about the middle of July, 1891, the plaintiff applied to the agent for the insurance," etc., "and that at that time, to wit, July, 1891," a certain agreement was made. The proof shows. I think, that this was on the 11th of August. Is it possible that we must, in a suit in equity, overthrow the decree for this? There is no variance. The substance and real point of the allegation is that a contract of insurance was made. The date is not material. Even if the bill said it was on a fixed day in July, it would not be fatal, the agreement not being a writing. Even in formal law actions, allegations of "time, place, quantity, and value, when not descriptive of the identity of the subject of action, will be found immaterial, and need not be proved strictly as alleged. Thus, in trespass the material fact is the assault, the time and place not being material." 1 Greenl. Ev. § 61. A distinction exists between allegations of matters of "substance," and matters of "essential description." The former may be substantially proven; the latter must be proven with a degree of strictness extending in some cases even to literal precision. Id. § 56. But here the bill does not tie itself to a fixed date, but is "about the middle of July." Now, if it were a note or instrument described by date, it would then be, in the words of Greenleaf, "matter of essential description," the earmark of identity, and strict proof would be required, and such cases as *Scott v. Baker*, 3 W. Va. 285, would apply. This date is not matter of substance, but the substance is the contract and its essential elements. If there were a variance in them, it would be different. Therefore, cases like *Railroad Co. v. Skeels*, Id. 556, and *James v. Adams*, 8 W. Va. 576, do not apply.

Substantial and even-handed justice has been done in the case by the decree, and, when that is so, there ought not to be a reversal, though on some point it may be open to question. 4 Minor, Inst. 870; *Bartom*, Ch. Prac. 1139.

The agents agreed with the plaintiff, for a given consideration, to insure a particular house owned by plaintiff, in a sum which the agent was to and did fix, and for a period of time covering the date of the loss by fire. Nothing remained to be done but issue the policy, which the agent promised to do. These things he himself proved. Both parties understood that the plaintiff was insured. Every element was final to base that policy on. The agents were authorized to issue it. His own memorandum told him every single element from which to issue it, except the name of the insured; and, had he issued it in the wrong name, the mistake could be corrected, and a suit maintained upon it. The only thing wanting is the policy to perfect the insurance. Whose fault that it was not issued? Where is the plaintiff, in fault or default? To decide the case against the

plaintiff, his house is lost, without the indemnity he fairly contracted for; to decide it against the defendants is only to make them do what they fairly contracted to do. The defense set up at first blush inspires some questions; but, on consideration, it becomes a figment, which withers away. Courts must not let insurance companies evade their policies through mere technicalities. They must be treated fairly, and only held up to their fair engagements. They are very valuable institutions, deserving patronage and encouragement; but when their contracts of indemnity prove worthless, for unsubstantial reasons, to those who are in distress and poverty from the waste of fire, against which their prudence sought to provide, it derogates from the efficacy of the policies and the confidence of the public in fire insurance.

For these reasons, we are clearly of opinion to affirm the decree.

(40 W. Va. 207)

### CLIFTON v. MONTAGUE.

(Supreme Court of Appeals of West Virginia.  
March 27, 1895.)

#### IMPLIED COVENANT IN LEASE—DESCRIPTION OF PROPERTY.

1. Where a party in a written lease describes the property as "the premises known as the 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same," there is no implied covenant on the part of the lessor that there are on said premises six salt wells of any particular productive capacity, or suitable for the purposes for which they are leased.

2. The recitals contained in said lease as to the number of salt wells included in the premises after the lease has been accepted and acted on for more than two years by the lessee, with ample opportunity of knowing, not only the contents of the lease, but the character and quality of the property leased, must be regarded as conclusive of the fact between the parties to said lease.

3. The words "including six salt wells," contained in said lease, create no implied warranty that there were six salt wells on said premises of any particular quality or fitness for manufacturing salt.

4. Where a written lease of property provides that the lessee shall keep the same in repair except as to unavoidable accidents and natural wear and tear, the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents.

(Syllabus by the Court.)

Error to circuit court, Mason county.

Action by George Clifton against T. G. Montague. Judgment for defendant, and plaintiff brings error. Affirmed.

Malcolm Jackson, Tomlinson & Wiley, and C. E. Hogg, for plaintiff in error. John U. Myers, for defendant in error.

ENGLISH, J. This was an action of covenant brought in the circuit court of Mason county by George Clifton against T. G. Montague. The action was predicated upon a lease executed by said T. G. Montague to said George Clifton and W. H. Cavan, dated August 23, 1890, whereby, in consideration of

the rents and covenants therein contained, the said T. G. Montague leased unto said Clifton and Cavan, for the period of three years from that date, the premises known as the "Bedford Salt Furnace Property," together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same, and the buildings of the party of the first part located thereon, situated in and near the village of Clifton, Mason county, W. Va., with the right to mine coal in the manner therein prescribed, to run said furnace, etc., upon the considerations and limitations therein set forth. The plaintiff, in his declaration, averred that the defendant by said lease, for himself, impliedly and by operation of law, did covenant with the said George Clifton and W. H. Cavan that said premises and property included six salt wells as in the said deed specified, suitable for pumping brine therefrom and supplying the same to said furnace in the manufacture of salt on said premises, and that the defendant had not performed, fulfilled, and kept the covenants contained in said deed according to the tenor and effect, true intent, and meaning thereof, in this: That there were not six salt wells on said premises, as called for in said deed, suitable and proper for pumping brine therefrom and supplying brine to said furnace for the manufacture and sale of salt, but that there were only five salt wells on said premises suitable for pumping brine therefrom and supplying brine to said furnace in the manufacture and sale of salt. On the 10th day of February, 1893, the defendant cravedoyer of the lease, and demurred to the plaintiff's declaration, which demurrer was overruled, and thereupon the defendant pleaded covenants performed and covenants not broken, and issue was thereon joined. On the 8th day of May, 1893, the plaintiff was allowed to amend his declaration at bar by inserting an additional count, in which count the breach was alleged as follows: "And plaintiff avers that, after said lease had been made and entered into as aforesaid, the said defendant, through his agent and employes, continued to work on said well in the act of putting it in proper order and repair for some time thereafter, but said defendant failed and refused to finish the work of repairing said well; and by the negligence of his (defendant's) agents and employes, while said repairs were in progress, said well was rendered wholly worthless and made incapable of use by said lessees, Clifton and Cavan, and said well was practically destroyed, leaving in effect but five salt wells on said premises; and by reason of said negligence of the said defendant, through his agent and employes, in working on said well as aforesaid, said well was so much injured and impaired as not to be practically susceptible of being put in proper and suitable condition for use in connection with salt furnaces. And plaintiff avers that the defendant, in thus holding out to Clifton and Cavan before said lease was executed his purpose

and intention of repairing said sixth well, whereby said lessees were induced to enter into said lease, after the execution to abandon as aforesaid the repairs of said well, and by defendants' own acts, as aforesaid, to render said well wholly worthless, was and is a gross fraud thereby practiced upon said lessees." On the 16th day of May, 1893, the demurrer to the declaration as amended was sustained, and the plaintiff filed a second amended declaration by adding two new counts thereto, in the first of which counts the plaintiff averred that "the said defendant, since the making of said deed, hitherto had not performed, fulfilled, and kept the covenants in said deed contained on his part to be performed, fulfilled, and kept according to the tenor and effect, true intent, and meaning of said deed, in this, to wit: That there were not six salt wells on said premises, as called for in said deed, but that there were only five salt wells on said premises, and not six, as stipulated in said deed of lease. And plaintiff further averred that, in consequence of there being but five salt wells on said premises, the said George Clifton and W. H. Cavan were forced and compelled to provide another salt well at their own cost and expense, and at great delay and loss of time, and they were thereby greatly hindered and injured in the business of the manufacture and sale of salt on the said premises described and leased in and by said deed, of all of which the said defendant afterwards, to wit, on the 1st day of December, 1892, and long prior thereto, had notice." In the second count the plaintiff avers, as a breach of covenant, "that the said defendant, since the making of the deed aforesaid, hitherto has not performed, fulfilled, and kept the covenants in said deed contained on his part to be performed, fulfilled, and kept according to the tenor and effect, true intent, and meaning of said deed, in this, to wit: That the said defendant failed and neglected to deliver unto the said plaintiff and said W. H. Cavan the six salt wells in said deed of lease stipulated for, and only delivered unto them five salt wells, instead of the six wells called for in said lease, and that in consequence of the failure and neglect of the said defendant to deliver unto the said plaintiff and said W. H. Cavan the six salt wells stipulated for in said deed of lease, and by reason of his delivery of only five salt wells unto said plaintiff and said Cavan, the said George Clifton and W. H. Cavan were forced and compelled to provide another salt well at their own cost and expense, and at great delay and loss of time, and they were thereby greatly hindered and injured in the business of the manufacture and sale of salt on the said premises described in and by said deed, of all of which the said defendant afterwards had notice." At the September term, 1893, the defendant cravedoyer of the writing obligatory sued on in this action, and demurred to the plain-

tiff's declaration as amended, and to each count thereof, in which the plaintiff joined, which demurrer was sustained by the court as to counts Nos. 1 and 2, and overruled as to counts Nos. 3 and 4, being the last two counts added, by way of amendment, to said declaration; and the defendant pleaded covenants performed and covenants not broken, and issue was joined thereon. The case was submitted to a jury, and after the plaintiff had introduced all of his witnesses, and examined them before the jury, and rested his case, the defendant, by his attorney, moved the court to exclude from the jury all the evidence introduced by the plaintiff, which motion was sustained by the court; and the plaintiff, by his counsel, excepted, and asked that the evidence so excluded be certified by the court and made part of the record, which was accordingly done; and the jury found a verdict for the defendant, and thereupon the plaintiff moved the court to set aside the verdict and award him a new trial, because said verdict was contrary to the law and the evidence, which motion the court overruled. The plaintiff excepted. Judgment was rendered for the defendant, and this writ of error was obtained.

The first error assigned and relied upon by the plaintiff in error is as to the action of the circuit court in sustaining the demurrer to the plaintiff's declaration and first amended declaration; and, in considering the questions raised by this assignment of error, we turn to the rules prescribed by the elementary works in regard to the action of covenant as a remedy, and we find in Chitty's Pleading (16th Ed. vol. 1, p. 129) the author says: "The rules respecting this action are few and simple. It is a remedy provided by law for the recovery of damages for the breach of a covenant or contract under seal. It cannot be maintained except against a person who, by himself or some other person acting on his behalf, has executed a deed under seal, or who, under some very peculiar circumstances, which will be noticed hereafter, has agreed by deed to do a certain thing. In the case of a covenant under seal an action of covenant may be supported, whether such covenant be contained in a deed poll or indenture, or be express or implied by law from the terms of the deed." Upon this question as to the existence and extent of implied covenants, Mr. Justice Swayne, in delivering the opinion of the court in the case of *Sheets v. Selden*, 7 Wall. 423, says: "The tendency of modern decisions is not to imply covenants which might and ought to have been expressed if intended. A covenant is never implied that the lessor will make any repairs. The tenant cannot make repairs at the expense of the landlord unless by special agreement. If a demised house be burned down by accident, the rent does not cease. The lessee continues liable, as if the accident had not occurred. In the case under consideration the lessees

covenanted and agreed to pay to the lessor, his personal representative or assigns, \$250 per month, at the end of each calendar month, for the use of the furnace and the bittern flowing therefrom, and for the use of stable and 10 dwelling houses upon said premises, and, in addition thereto, to pay a royalty for the coal to be mined by them in the quantity and manner therein prescribed." And it was further provided that, if said lessees failed or neglected to pay the party of the first part the rent and royalty for the space of five days after the same became due without further demand, the said lessor might re-enter and take possession of said premises without legal process, and put an end to said tenancy, without waiving any security held by him for such rent and royalty. Said lessees also covenanted to keep said furnace plant in proper and sufficient repair, and, at the termination of the lease, to surrender and deliver possession of the premises and property therein described unto the said lessor, his heirs or assigns, in good working order and condition, unless destroyed by fire or other unavoidable casualty not caused by the negligence or carelessness of said lessees, their servants or agents. Now, oyer was craved of this lease when the demurrer was entered; and, in determining the questions raised by the demurrer, we must take the lease by the four corners, and gather from the entire instrument the true intent of the contracting parties. It appears therefrom that \$250 per month was to be paid for the use of the furnace and the bittern flowing therefrom, and that the lessees expressly covenanted and agreed to keep the furnace plant in proper and sufficient repair. Now, what is meant by the words "furnace plant"? Webster defines the word "plant," in a commercial point of view, as follows: "The whole machinery and apparatus employed in carrying on a trade or mechanical business, also sometimes including real estate and whatever represents investment of capital in the means of carrying on a business, but not including material worked upon or finished products; as the plant of a foundry, a mill, or a railroad." By the express terms and provisions of the lease, then, the lessees were to keep said furnace plant in proper and sufficient repair. The words "furnace plant," under the above definition we must regard as broad enough to cover the six salt wells, and especially is this the case when the lease on its face describes the property leased as the "Bedford Salt Furnace Property," together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same, etc.; and, when we look further, it is apparent that the lessees covenanted and agreed to surrender and deliver possession of the premises and property thereinbefore described unto the party of the first part, his heirs or assigns, in good working order and condition, unless destroyed by fire or other unavoidable casualty not caused by the negli-

gence or carelessness of said lessees, their servants or agents. Now, it is not to be presumed that said lessees would have covenanted to return the property described in the lease (which, in express words, includes six salt wells) if there were only five salt wells on the property, or that they would have entered into a covenant under seal for the lease of six salt wells when in reality there were only five on the property. Bigelow, in his valuable work on Estoppel, in page 611, says: "Generally speaking, it is often said that a man is presumed to know the truth in regard to facts within his own special means of knowledge. More definitely the rule has been stated thus: What a person is bound to know has regard to his particular means of knowledge, and to the nature of the representation, and is then subject to the test of the knowledge which a man, paying that attention which every man owes to his neighbor in making a representation, would have acquired in the particular case by the use of such means." In the case at bar, the lessor, in describing the property leased, speaks of it as the following premises and properties, to wit: "The premises known as the 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells," etc., located thereon. The lessees, we must conclude, had the means of knowledge within their power as to the number of salt wells on this salt property. The number of salt wells on the property was not a matter of insignificance, but, on the contrary, the gravamen of the complaint in the plaintiff's declaration is that there were only five salt wells instead of six, as set forth and described in the lease. We must, then, regard the words "including six salt wells" as a particular and definite recital of a material fact, and under the head of Estoppel (7 Am. & Eng. Enc. Law, p. 7) the law is stated thus: "Particular and definite recitals are conclusive evidence of the material facts stated;" meaning the material facts stated in a deed. And Bigelow on Estoppel, on page 345, says: "Between grantor and grantee the recitals of the deed will, doubtless, be conclusive evidence in a proper case." The recital contained in the deed of lease as to the number of salt wells on this property we must regard as conclusive of the fact; and the lessee, having accepted and acted upon said lease for more than two years, with ample opportunity of knowing not only the contents of the lease, but the character and quality of the property leased, is estopped from saying there were only five salt wells instead of six upon said salt property.

The plaintiff, then, having placed himself in a position which precludes him from denying that there were six salt wells on said property, the next question to which we direct our attention is as to whether the defendant, Montague, by his lease, covenanted that the said wells should yield any



particular quantity of salt water, or have any particular productive capacity. So far as express covenants are concerned, the lease is silent as to the fitness of these wells for producing salt water. Is there any implied covenant, or covenant by operation of law, that said wells shall be fit for the purpose for which they were leased? If the wells were deficient, the lessees, by a provision contained in the lease, might have terminated their tenancy at the end of any month by failure to pay the rent for five days; but they saw proper to run the furnace for more than two years, and this would indicate that the property had some fitness for salt making. The weight of authority, however, as we understand it, is that there is no implied warranty as to the fitness of the leased premises for the purposes for which it is leased. So, in the case of *Harlan v. Navigation Co.*, 35 Pa. St. 287, it was held that "a lease of the right to mine coal in the land of the lessor is the grant of an interest in the land, and not a mere license to take the coal. In such a case there is no implied warranty that the land contains coal veins"; and that, "if the parties to a coal lease were under a mutual mistake as to the existence of coal veins in the land demised, the proper remedy of the lessee is by a proceeding to rescind the contract; he cannot have relief in an action in affirmance of it." In the case of *Sutton v. Temple*, 12 Mees. & W. 52, Park, B., held as follows: "With respect to the other and principal question in this case, viz. whether a contract or condition is implied by law, on the demise of land, that it shall be reasonably fit for the purpose for which it is taken, if the question were res integra, I should entertain no doubt at all that no such contract or condition is implied in such a case. The word 'demise' certainly does not carry with it any such implied undertaking. The law merely annexes to it a condition that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term. If it included any such contract as is now contended for, then in every farming lease, at a fixed rent, there would be an implied condition that the premises were fit for the purposes for which the tenant took them, and it is difficult to see where such a doctrine would stop." In the case of *Clark v. Babcock*, 23 Mich. 164, it was held that a lease of a salt well implies no covenant that the well shall be of any productive capacity. In the absence of any distinct agreement, the lessee takes it as he finds it. And in the case of *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 11, this court held that "a lessee of a store room cannot recover in an action of assumpsit against his lessor for damages sustained by reason of the failure of said lessor to repair damages to such building caused by unavoidable accident, where there is a written lease between said

contracting parties, in the absence of an express covenant that said lessor should make such repairs," and that where a written lease of such building provides that the lessee shall keep the same in repair, except as to "unavoidable accidents and natural wear and tear," the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents, and a demurrer will be sustained to a declaration setting forth these facts in a special count that "the lessee in such an action will be confined to the terms of the written contract declared upon, and cannot recover upon a verbal contract or understanding made or had contemporaneously with said written lease." Washburn on Real Property (volume 1, p. 537, § 7) states the law as follows: "Without an express contract on the part of the lessor, he cannot be held liable for repairs made by the tenant upon demised premises. Nor would he be bound by a parol promise to make repairs if such promise is founded only upon the relation of landlord and tenant. \* \* \* Among the cases which might be cited upon this point, a canal company made a lease of a water power which had been created by the construction of the canal. It was held not to constitute a covenant on the part of the lessors to keep the canal in repair or supply it with water; and, if the canal was discontinued, the lessee was without remedy. *Trustees v. Brett*, 25 Ind. 410. So, the lease of a water power out of a millpond then existing was not held to constitute an obligation on the part of the lessor to keep the dam in repair. *Morse v. Maddox*, 17 Mo. 569. And a grant of a right to take water from a well does not bind the owner of the well to repair it."

Reading, then, the lease upon which this action was predicated, in the light of the authorities I have had an opportunity of examining, I cannot construe the words "including six salt wells, tools and fixtures of the same," as implying six salt wells of any particular or peculiar fitness for the purpose of supplying salt water for the use of the furnace; neither can I hold that a salt well which is accidentally obstructed by the tubing is not a salt well; and, as we have seen, if the well is out of repair, in the absence of a special covenant the lessor is not bound to repair, but the lessee takes the property as he finds it. Under our construction, then, said lease contained no covenant, either impliedly or by operation of law, that said premises and property included six salt wells suitable for pumping brine therefrom and supplying the same to said furnace in the manufacture of salt on said premises. If it was true that there was a covenant implied that the six salt wells should be fit and suitable for pumping brine for said furnace, then it is true such implied covenant might be set forth in the declaration; but, as there is no

such implied covenant, the plaintiff must be confined in his pleading and proof to the covenants contained in the instrument sued upon; and the pleader in this instance having gone beyond the scope of the covenants contained in the lease, and being unauthorized to do so by any implied covenant, the circuit court, in my opinion, committed no error in sustaining the demurrer to said first declaration.

The plaintiff, in his amended declaration, avers that, "before said lease was executed, the defendant well knew that there were but five salt wells on said premises suitable to be used and pumped in the manufacture of salt; and defendant also knew that, to render said Bedford Salt Furnace fit to well and properly make salt in the usual and ordinary way, the other and sixth well complained of therein would have to be repaired and made suitable as a salt well to be used in connection with said furnace; and that while the defendant, through his agents, was proceeding to repair said well, the said lease was made; and that, after said lease was made, the defendant continued to work on said well in the act of putting it in proper order and repair for some time thereafter, but said defendant failed and refused to finish the repairs on said well, and by negligence of defendant's agents and employees, while said repairs were in progress, said well was rendered wholly worthless, leaving, in effect, but five salt wells on said premises; and that plaintiff was induced to enter into said lease by the defendant holding out to said Clifton and Cavan, before said lease was executed, his purpose and intention of repairing said sixth well, and afterwards to abandon said well, and by defendant's own acts to render said well wholly worthless, was a gross fraud upon said lessees," etc. Now, when it is remembered that this is an action of covenant, and the instrument sued on contains nothing implying an assurance that said well should be put in repair, and the law itself does not imply that the property leased shall have any particular suitability or fitness for the purpose for which it is leased, and when we consider, further, that the landlord is not bound to repair in the absence of a special covenant to that effect, we need but to refer to the ruling of this court in the case of *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 11, where it is held that "the lessee in such an action will be confined to the terms of the written contract declared upon, and cannot recover upon a verbal contract or understanding made or had contemporaneously with said written lease"; and I can reach no other conclusion than that the demurrer was properly sustained to the amended declaration.

The plaintiff filed a second amended declaration, including two counts, which was also demurred to; but the court overruled the demurrer to said second amended decla-

ration, as before stated. Did the court err in so ruling? These counts we regard, also, as demurrable, for the reason that our construction of the lease, which (oyer having been craved) must be read in connection with the declaration, contains, as we construe it, no covenant, express or implied, that the property therein described contained six salt wells of any particular capacity, or that they were fit for the purpose for which they were leased. In the case of *Cowen v. Sunderland*, 145 Mass. 364, 14 N. E. 117, Devens, J., delivering the opinion of the court, says: "It is a general rule, well established by the decisions of this court, that the lessee takes an estate in the premises hired, and takes the risk of the quality of the premises in the absence of an express or implied warranty by the lessor or of deceit. \* \* \* The rule of caveat emptor applies, and it is for the lessee to make the examination necessary to determine whether the premises he hires are safe and adapted to the purposes for which they are hired." In the first of said counts it is complained that there were only five salt wells on said premises, and not six, as stipulated in said deed of lease; and, while it is true that the lease describes the premises as including six salt wells, yet, when we remember that caveat emptor applies, and the plaintiff, under his hand and seal, has admitted that there were included in the premises six salt wells, he cannot be heard to deny it. The second count avers that the defendant, by said deed, impliedly and by operation of law, did covenant with plaintiff and said Cavan to deliver unto them six salt wells on said premises for the purpose of the manufacture of salt under said deed of lease, and the breach complained of is that only five salt wells were delivered to them instead of six, as called for in said lease. My construction of the lease, however, is that there was no implied covenant to deliver to said Clifton and Cavan any number of salt wells. The property leased to them is described in the lease as "the premises known as the 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells," etc.; and, in speaking of the six salt wells, the evident intention was to describe the property included in the lease.

The deed itself would carry the right of possession. Ample time was given for examination. The deed bears date the 23d of August, 1890; and, according to the averments of the declaration, possession was not taken thereunder until the 28th day of October following. So that, if the rule caveat emptor is applied, the plaintiff cannot complain, as he had ample time to examine the premises and ascertain what was included in the lease, and yet he took possession, and operated the property for more than two years thereafter; and, as to the implied

covenant averred, it was held in *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 278, that "in the case of a contract drawn technically in form, and with obvious attention to details, a covenant cannot be implied, in the absence of language tending to a conclusion that the covenant sought to be set up was intended." Looking to the contents of this lease, it is apparent that the same is carefully and technically drawn, providing for the mining of coal, and furnishing the same to the furnace and engines, and allowing a deduction from the royalty in the event the furnace is stopped for more than five days without fault of the lessees, allowing the lessor to re-enter and re-occupy the premises upon the failure to pay rent and royalty for five days after the same falls due, providing that the property should not be sublet without the written consent of the lessor, and also that, if the property should be seized by legal process for the debts of the lessees, the same should revert to the lessor; also containing a covenant that the lessees should keep the furnace plant in proper and sufficient repair, and setting forth in detail how the coal banks, entries, railroad tracks, and drains shall be managed, and further providing for the return of the property described, including the six salt wells, at the termination of the lease to the lessor, his heirs or assigns, in good working order, unless destroyed by fire or unavoidable casualty, not caused by the negligence or carelessness of the lessees, their servants or agents. Can it be presumed that, with more than two months' time to examine the property between the date of the lease and the time when the furnace was fired up, the plaintiff would accept and act under said lease, reciting, as it did, the vital and important fact that said premises included six salt wells, when in fact there were only five thereon? And the fact that under these circumstances, which appear on the face of the declaration, the lessees accepted the property under said lease, and actively operated the furnace thereon for more than two years, so far as appears, without any effort on their part to repair said sixth well, negatives the presumption that there was any implied covenant that there were six salt wells of any particular productive capacity on said premises. It appears, by averment in the first amended declaration, that this sixth well was being repaired in some way by the lessor at the time said lease was executed; but the fact that a salt well is out of repair does not prevent it from being a salt well still, any more than a coal bank which is obstructed at some point by fallen slate is no longer a coal bank; and, looking at the face of the lease, we cannot say that the recital in the description of the property leased, including six salt wells, implied a covenant that there were six salt wells of any particular productive

capacity on said premises, although the averments of the declaration show that there were six salt wells on said premises, one of which was being repaired at the time of the execution of the lease.

For these reasons, we think the plaintiff has shown no cause of action, and the demurrer should have been sustained to the entire declaration; and for the same reasons we are of opinion that the circuit court committed no error in excluding the plaintiff's evidence from the jury. The judgment complained of must be affirmed, with costs, etc.

(40 W. Va. 234)

### HENRY v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.

March 27, 1895.)

PLEADING—WANT OF REPLICATION—WAIVER OF ERROR—OBSTRUCTION OF CULVERT—RECOVERY OF DAMAGES—LIMITATIONS—ACCRUAL OF CAUSE OF ACTION.

1. There cannot be an issue, where there is a plea of new matter, concluding with a verification, without a replication.

2. Where there is a plea of new matter, concluding with a verification, and the plaintiff fails to reply to it, there ought to be a judgment of non prosecution against him, after a rule to reply, but such need not be served.

3. Such a judgment would not bar a second suit for same cause, it having the effect of a nonsuit.

4. Where there are two or more pleas, and one is good, though others be bad or found untrue, yet that plea defeats the action.

5. A plea introduces new matter, and concludes with a verification, and there is no replication to it or joinder in issue, but the case is tried on its merits upon the evidence, including the evidence touching the defense set up in such plea, and a verdict found responsive to such plea, and no exception made to it on that score in the circuit court. This court will not reverse for this cause, especially at the instance of him who failed to file a replication.

6. A railroad company makes an embankment in a street on which to lay its track, and so negligently constructs it as to obstruct or close a culvert already there for passage of water, and by reason thereof at times water from rain or snow collects and floods an adjoining lot. Its owner may recover damages.

7. The statute of limitations in such case begins to run, not from the date of the building of the embankment, but from the time of the actual injury from the invasion of the lot by the water; the injury being in law recurring, intermittent, and continuous.

8. Permanent injury from private nuisance. When there must be recovery of past and future damages in one suit, and when repeated suits as injury recurs may be brought, discussed.

9. When the evidence tends in a fairly appreciable degree to sustain the plaintiff's action, the court must not strike out his evidence or direct a verdict for the defendant.

(Syllabus by the Court.)

Error to circuit court, Mason county.

Action by Darius Henry against the Ohio River Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Charles E. Hogg, for plaintiff in error. V. B. Archer, for defendant in error.

**BRANNON, J.** Darius Henry brought trespass on the case in the circuit court of Mason county against the Ohio River Railroad Company, and by direction of the court the jury found for the defendant, and judgment was rendered for it, and the plaintiff appeals. The suit was for damages to a lot and residence thereon, injured by an overflow of water caused, as alleged, by an embankment raised by the company, on which it laid its track.

A question of law in the case is this: The defendant pleaded not guilty, putting itself on the country, and issue was regularly joined on that plea. The defendant also filed a plea of the statute of limitations, but the plaintiff made no replication to it, and the want of such replication introduces trouble in the case. When this plea came in, being one of confession and avoidance, it demanded a replication either by way of traverse or confession and avoidance; but, standing without replication, judgment should have been rendered upon it for the defendant, as it is a rule in the science of common-law pleading that a pleading introducing new matter must be met by demurrer or by some response of fact. There was an objection to the plea, operating as a demurrer, which was overruled, and the plea received; but there was no replication, and, standing unanswered, it alone called for judgment for defendant. This judgment is based on the ground, under the system of pleading, that the plaintiff, by failing to reply to the plea, does not further prosecute his suit. A suit may not reach an issue. It may be cut short by failure of one of the parties to pursue his litigation. As to the defendant, if he appears, and fails to demur or plead to the declaration, or if, after plea, he fails to maintain the course of pleading required of him by the law of pleading, judgment called judgment by *nili dicit* (he says nothing) is given against him. This would be a judgment *quod recuperet*, both final of the cause and conclusive in a second suit. On the other hand, judgment may be given against the plaintiff for not declaring, replying, surrejoins, or surrebutting, and these are called judgments by *non pros.* (*non prosequitur*,—he does not prosecute). Steph. Pl. 108, 109; 4 Minor, Inst. 866; Tidd, Prac. 730. This judgment of *non pros.* is a species of nonsuit, and does not bar another suit. The matter of the unanswered plea is not taken for true; for, if it were, the judgment ought to be one of *nili capiatur*, both final in the particular suit and a bar against another. It is based, not on the idea that the matter is true for all purposes, but only for failure to prosecute. It seems to be an unreasonable exception to that principle of the law of pleading which holds that whatever is well pleaded, and not denied, is taken to be true. 1 Saund. Pl. & Ev. 39. A much more logical principle would be to treat it as confessed, and render judgment final and conclusive, like the proceed-

ing in chancery, where an answer is filed responsive to the bill alleging new matter, which, in absence of replication, is taken to be true, and final decree rendered upon it. Clegget v. Kittle, 6 W. Va. 542.

At first thought, such judgment might be regarded as both final in the cause and conclusive upon the matter in controversy, as there is the declaration stating the cause of action, and the plea stating facts constituting a bar on its merits, and it remains unanswered, and we might expect a judgment of the law, which would ever be an end of controversy upon those facts; but such a judgment is not regarded as one on the merits, but only as a nonsuit, and, while final in the particular case, not conclusive upon the matter of action. It is treated as a nonsuit by 3 Bl. Comm. 296; by 4 Minor, Inst. 867; 2 Black, Judgm. § 702; 1 Freem. Judgm. § 261. Judge Summers regarded it as a nonsuit in *Pinner v. Edwards*, 6 Rand. 675. All authorities hold that a nonsuit does not bar a second suit for the same cause. The authorities just given say that a judgment on *non pros.* will not defeat a second suit. The question was fully discussed in *Howes v. Austin*, 35 Ill. 396, in a case where, just as in this case, the pleas were general issue, and a special plea in bar, and, the plaintiff failing to reply to the special plea in answer to a rule to reply, judgment was entered that the defendant go hence, not that the plaintiff take nothing by his suit. It was held to be a judgment of nonsuit, and not a bar to second suit. It was not necessary, before rendering such judgment of *non pros.*, to wait for trial on the plea of not guilty; for there was the plea of the statute, and no replication, and it alone called for judgment ending the suit. If there be two or more pleas, one a good bar to the whole declaration, though others be bad, or found against the defendant, he is entitled to judgment on that plea. He may now plead several defenses, and, if one only be good, that is enough to defeat the action. 2 Tuck, Bl. Comm. 260; Steph. Pl. 273; *Clearwater v. Meredith*, 1 Wall. 25. If the plea were bad, such judgment would be improper; but this was the ordinary plea that the action accrued more than five years before suit, and was on its face good and properly admitted. But the trial went on, notwithstanding there was no replication to the plea of the statute, court and parties treating the case as though there had been an issue on it, probably by mere inadvertence. After the introduction of the plaintiff's evidence, the defendant, without giving any evidence, moved the court to direct the jury to find a verdict for the defendant on the plea and issue joined on the statute of limitations, and the court instructed the jury to find such verdict, and it was found. The plaintiff in error says this verdict should be set aside, because there was no replication, and therefore no issue on the plea of the statute of limitations. I thought at first that

we might be able to say that there was an issue by the language of an order which says that the defendant moved the court to direct the jury to find for it "on the plea and issue joined on the statute of limitations," and thus treat the case as it was acted upon in the circuit court,—that is, upon issue properly joined; but I find no formal replication, or the informal one often resorted to, "And the plaintiff replies generally to said plea," which is simply entered in the order book, and, though informal, seems good (*Railroad Co. v. Bitner*, 15 W. Va. 459); and there is no reference to the joining of issue, save that incidental reference just quoted, and we cannot, by mere implication from it, create what should be directly and affirmatively stated, the filing of a replication and joinder of issue on it. And, at best, that language recognizes only an issue, not a replication; and replication is one thing, joinder of issue another, and from the mere recital in the record of the existence of an issue we cannot imply that without which no issue could exist, that is, a rejoinder. "Where a plea concludes with a verification, there cannot be a joinder of issue without a replication." *Lockridge v. Carlisle*, 6 Rand. 20; 1 Bart. Law Prac. 478, 480. In that case a statement on the record—stronger than in this case—that issue was joined on the special plea was held not to be sufficient. If the mere mention of an issue in the entry of said motion would be sufficient to show a replication, the statement in the record that the jury "was sworn to try the issue joined" would show the presence of a plea in such cases as *State v. Douglass*, 20 W. Va. 770, and *Ruffner v. Hill*, 21 W. Va. 152; but they hold otherwise. There is no statement in this record either of a replication or that issue was joined on the plea. Some cases hold that even where there is a statement that issue is joined, though there is none that the plea or other pleading was filed, there is still no issue, and the defect is fatal. *Wilkinson v. Bennett*, 3 Munt. 314; *Stevens v. Thornton's Adm'r*, 1 Wash. (Va.) 194; *Lockridge v. Carlisle*, 6 Rand. 20. Others hold, not that there is an issue in such case, but that it is merely misjoinder, and cured by statute of jeofails after verdict. *Moore v. Mauro*, 4 Rand. 488; *Huffman v. Alderson*, 9 W. Va. 616; *Railroad Co. v. Daniel*, 20 Grat. 344. There is conflict in these cases. See 1 Bart. Law Prac. 482.

So, tested by technical principles of common-law pleading, we shall say there was no issue on this plea. What then? What the result? There is considerable difficulty in reaching this result. It has been long and often held by our courts that when a judgment rests on a verdict of a jury sworn to try an issue joined in a case, criminal or civil, when no issue had in fact been joined, it would be ground for its reversal. *State v. Douglass*, 20 W. Va. 770; *Ruffner v. Hill*, 21 W. Va. 152. So often and indiscriminately has it been held that the rule seems

almost inexorable; but the courts have in some instances felt its inconvenience, in cases where there has been a fair trial on the merits, and no objection was made on that score in the trial court. In this case there was a plea of not guilty, and issue on it, and this plea of the statute, and all the evidence bearing on both, was heard, and a verdict responsive to issues under both pleas, had there been issues, was found; all parties treating the case as tried under both pleas. In *Huffman v. Alderson*, 9 W. Va. 616, it was held that, though some of the pleadings conclude with a verification, and no issues are formally joined thereon, though joined on others, yet if the record states that the jury were sworn to try the issues, and the instructions show that the case was fully tried on the merits, including the defenses set up by the pleadings, on which no issues were joined, and the verdict responds, not only to the issues joined, but to the defenses on which issues were not joined, such verdict cures such defects under the statute of jeofails, it being a case of misjoinder of issue. In *Griffe v. McCoy*, 8 W. Va. 201, Judge Haymond referred, with some expression of disapprobation, to the rigor of former decisions upon this subject, and thought they might need revision. He says he would follow the principles in *Southside R. Co. v. Daniel*, 20 Grat. 344. That was an action for damage to land caused by overflow from an embankment made for the railroad, as is this case, and, as in this case, the defendant pleaded not guilty, on which issue was joined, and a special plea, and there was a special replication, concluding to the country, but no rejoinder, nor any rejoinder of issue on it; but the parties went to trial, and the subject of the special plea and replication were contested before the jury, and a verdict for the plaintiff. The record, as here, showed that the jury was sworn to try the issue, not issues. It was held that, as there was no objection to the want of joinder in the court below, it could not avail in the appellate court. We know in the case in hand that the whole matter on this plea of the statute was contested, because the record states that the defense moved for a verdict "on the plea and issue joined on the statute of limitations," and the evidence covering that defense was before the jury. The case of *Moore v. Mauro*, 4 Rand. 438, supports this view. The case of *Curry v. Mannington*, 23 W. Va. 14, might seem at first view to forbid the application of this doctrine to this case. There the defendant pleaded not guilty and the statute of limitations, and there was no replication or joinder of issue on either plea, and the verdict for plaintiff was set aside at defendant's instance. There the defendant was not chargeable with the omission to reply to the pleas, and he could with consistency avail himself of the defect; whereas, in this case, it was

the plaintiff's duty to reply to the plea, and he is the party asking to have the verdict set aside, and take advantage of his own default in pleading, as the defendant could not rejoin till the plaintiff replied. This is a reason, in addition to others stated above, for not allowing the plaintiff for this cause to set aside the verdict. So it seems to me that the plaintiff cannot, under the circumstances, for this cause set aside the verdict. It may be better for him that he cannot; because, if we would do this, then it might be said that, as there is no replication, he could not have considered the evidence as regards the statute of limitation; but, as we hold to the same effect as if there had been such replication, we can consider the evidence as bearing on the issue raised by the plea of the statute.

Therefore I will now consider whether, under the evidence, the action was barred, so as to see whether the action of the court in directing the jury to find for the defendant, on the theory that the action was barred, is correct or erroneous. The ground of action averred in the declaration is that the plaintiff was owner of a lot of land in the town of Clifton, on which was his dwelling, bounding on a certain street, and the railroad company built its railroad across the street, and in so doing raised an embankment across the street on which its track was laid, and maintains it to the great detriment of the said property; that running along by the side of the street, and within its bounds, is a drain or culvert used to carry off water accumulating on the street from rain and snow; that the embankment was so carelessly, negligently, and unskillfully made that the water cannot pass off the street, as it had always done before the embankment was made, but, by reason of such improper construction of the embankment, gathers on the street in great quantity, and flows into the plaintiff's lot, and into the cellar under his dwelling, and remains in the cellar for weeks and months, and deprives the plaintiff of the use of the cellar, and renders the dwelling damp and unhealthy, and damages the use of the property as a home, and renders the property less valuable than it would be without the embankment. Though general detriment to the plaintiff's property is alleged, the specification is the overflow of water from rains and snows, transient and recurrent causes. When does the statute of limitations begin to run in such case? Shall we count from the making of the embankment, or from each overflow as it recurs? Here the lines of thought and demarcation are close, the application of principles of law in particular instances difficult, and the authorities differing. The statute begins to run from the time the cause of action accrues. But when did that accrue in this case? The act of the defendant was the building of the embankment, but that, in itself, alone did not harm

the plaintiff. He could not sue for that, as no harm as yet was done his property. Later on damage is done him by overflow. The water is the immediate agent doing the injury. We seek the cause of its presence, and find the embankment is the cause of its presence. The overflow is consequential from the embankment. Never till this overflow did the plaintiff have right to sue. Had he sued at once on the making of the road, what would have been the basis of damage? The building of the embankment was the remote or primal cause,—the *causa causans*,—in the line or process of the production of the injury; but the overflow consequent upon it is the direct cause of harm,—the *gravamen* of the action. If one put a log in the road, no individual can sue for that only; but if he fall over it he may sue, and the statute runs from the fall. There must be a wrong and some loss to warrant an action. The action accrues when the damage is sustained by the plaintiff, not when the causes are first set in motion ultimately producing the injury as a consequence. Wood, Nuis. § 865; Lewis, Em. Dom. § 666; Wood, Lim. § 180; 16 Am. & Eng. Enc. Law, 988; 13 Am. & Eng. Enc. Law, 667; Ang. Lim. § 300. As stated in the elaborate and valuable note to case of Wells v. New Haven & Northampton Co., 151 Mass. 46, 23 N. E. 724, in 1 Am. Ry. & Corp. Rep. 708, the fundamental question is one of damages, and may be put thus: When, in a suit for damages resulting from a wrongful act, must there be a recovery in one suit for all damages past and prospective, and when must the recovery be limited to damages prior to the suit, leaving future damages for future suits, as future damages occur? The question usually comes up in one of three forms: In considering the measure of damages, in considering whether the action is barred by limitation, and in considering whether it is barred by a former recovery. Now, when the case is one of such nature as to enable the party in one suit to recover future as well as past damages, there the statute runs from the original beginning of the nuisance; but, where there can only be recovery for past damages, the statute does not run from the institution of the nuisance, but from the injury, when it occurs or recurs as its consequence. Where the nuisance is permanent, so that it will continue unless labor be applied to change it, and it necessarily injures the plaintiff, there must be a recovery in one suit for all damage, and none other can be afterwards brought, and recovery of damages will give the defendant right to continue his nuisance without further claim from the individual; but, where it is otherwise, there cannot be recovery for future damages, but only from time to time as they occur, and one recovery does not justify the perpetuation of the nuisance, but there may be recovery after recovery, as long as continued. This doctrine is well set-

tled and is recognized by this court in *Hargreaves v. Kimberly*, 26 W. Va. 787; *Watts v. Railroad Co.*, 39 W. Va. 196, 19 S. E. 521; *Rogers v. Driving Co.*, 39 W. Va. 272, 19 S. E. 401. See *Wood, Nuis. § 865*; *Wood, Lim. § 180*. See exhaustive note to *Hargreaves v. Kimberly*, 53 Am. Rep. 123, being the opinion in *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536. In *Plate v. Railroad Co.*, 37 N. Y. 473, an action for maintaining railroad track and ditches, causing water to flow on land, just like this case, it was held that a former recovery was no bar to a second action, and that only past, not prospective, damages could be recovered in such case. The New York cases collected in the opinion of *Uline v. Railroad Co.*, just mentioned, strongly support our view. In our case of *Hargreaves v. Kimberly* it is stated as a criterion whether one recovery would give a right to continue the cause. The trouble is to see what cases they are; in what cases a recovery for a trespass would confer a right, pass title to occupy land, or permanently injure it. Can land be thus acquired? I, however, make no point on this, but the suggestion or doubt only strengthens the holding on the real point in this case. Can it be possible that an amount of damages could in this suit be recovered to cover all damages for all time to come from repeated overflows, when the company might, by small work, entirely remedy the evil? Could the jury or we act on any assumption that it would not do so, rather than suffer repeated actions? I think not. It seems settled that, if a milldam cause an overflow upon land of a riparian owner, the cause of action is continuous, and he can sue as long as the overflow continues, until the right to overflow is vested and justified by prescription. *Staple v. Spring*, 10 Mass. 72; *Fleld v. Brown*, 24 Grat. 74.

I would liken this case to the case of a milldam, save that, if any different, this is more plainly the case of continuous injury, actionable upon each recurring overflow. I think the general rule as to nuisances applies to this case, it being one of recurring, intermittent, or occasional injury. That rule is that every continuance from day to day is a new nuisance, for which a fresh action lies, so that, though action for the original nuisance be barred, damages are recoverable for the statutory period for injuries within it, provided enough time has not elapsed to give the person maintaining the nuisance a right to do so by adversary use. 4 Minor, Inst. 509 (472), 546 (507); *Wood, Nuis. § 865*; *Wood, Lim. § 180*. Now, this embankment itself has the element of permanency, it is true, and that far complies with the rule warranting recovery of past and future damages, in one action, but it does not necessarily per se injure the plaintiff's property in the respect to the mode of injury charged; that is, overflow. That happens only when rains or snows come. If the suit were for cutting off access by reason of

the embankment only, it would be different. *Smith v. Railroad Co.*, 23 W. Va. 451. To warrant final recovery for past and future damage, there must be a structure permanent in nature, and damage directly and at once necessarily arising from it. In *Miller v. Railway Co.*, 63 Iowa, 680, 16 N. W. 507, it was held that against a cause of action for damages from water flowing through a ditch wrongfully dug, the statute runs, not from the date of digging the ditch, but from damage caused by it. In *Wells v. New Haven & Northampton Co.*, supra, it was held that where a railroad company collected the water of eight natural streams, and discharged it with considerable surface water upon land where much of it had not been accustomed to flow, that the nuisance was continuous, and action was not barred in six years from the erection, and one subsequently purchasing the land could sue for damages. So one purchasing after the improvement recovered in *Canal Co. v. Lee*, 22 N. J. Law, 243, which he could not do if the cause of action accrued from the date of the work. Here the cause of action is not from the work, as it would be if the action were for the mere construction of the embankment on plaintiff's land without authority, or for cutting off access to his lot. The construction of the work was lawful and authorized, but it is the manner of construction, the negligent manner of construction, entailing injury later as a consequence by producing overflow, that is alleged as the wrong. The plea was properly received, but the evidence showed overflow within five years, and hence the plea could not justify judgment for defendant, as, although the embankment was more than five years old, the case was not such as would have warranted recovery of future damages had an action been brought within five years from the erection of the embankment, and, the damages being continuous, the statute ran, not from its erection, but from the overflow. So we hold that the court erred in directing the jury to find for the railroad company on the idea that the action was barred by time. That, though a work of improvement, like a railroad, is lawful and under authority, yet, if damage result to an individual by overflow of water by reason of negligent construction, he can recover, is well settled. *Gillison v. City of Charleston*, 16 W. Va. 282; *Knight v. Brown*, 25 W. Va. 808; *Taylor v. Railroad Co.*, 33 W. Va. 39, 10 S. E. 29. It is only an application of the maxim: "So use your own property or right that you do not injure another." I understand, indeed, that in this state negligence is not an essential to recovery, but only damage. *Gillison v. City of Charleston*, 16 W. Va. 282; *Johnson v. Parkersburg*, Id. 402. But, where the landowner has been compensated, negligent construction is required to maintain action.

Another error is in the record; that is, under the plea of not guilty. I treat the action of the court in directing the jury to find a verdict for the defendant, in the light of a motion to

exclude the plaintiff's evidence because insufficient, to warrant a verdict for the plaintiff. In this view we need not, ought not, and do not pass on the weight or effect of the evidence to warrant a verdict for the plaintiff, but leave that for what that evidence has not as yet received,—the consideration of the jury in another trial. All we have to say, under this plea of not guilty, is whether the evidence in any appreciable degree tends to support the action, and, if it does, that requires it to go before the jury for its verdict on it, and shows that the action of the court in directing a verdict was erroneous. *Powell v. Love*, 36 W. Va. 98, 14 S. E. 405. See note *Anth. Steph. Pl. p. 336*. The court gave as a reason for its action its opinion that the action was barred by statute. Had such been the case, then one defense would have been enough, and there would be no error to reverse under the plea of not guilty in directing a verdict. It may be suggested that as the plea of the statute was not replied to, and as judgment should have been given on it for the defense before the trial, there is no error in giving judgment later, though after trial; that judgment is only what the defendant was entitled to on that plea, and that which ought earlier to have been given, has been given at last; that the record merely states a wrong reason for judgment, but if judgment was properly given, on any ground, though not justified by the ground stated, the reason given, though wrong, does not affect the judgment. *Shrewsberry v. Miller*, 10 W. Va. 115. But the answer is that the judgment rendered is upon verdict on both issues, and is one of *nisi* capiat, forever barring the plaintiff from recovery in another suit for damage up to its institution, though it would not for after damages; whereas, the judgment called for by the failure to file a replication would be one of non prosecution, as stated above, which would not preclude another action, for reasons fully given above. For these reasons we reverse the judgment, set aside the verdict, and remand the cause, with direction to award a rule upon the plaintiff to file a replication to said special plea, and, if he does so, there shall be a new trial, and, if he does not, then for judgment of non pros. against the plaintiff. Reversed and remanded.

(40 W. Va. 278)

**WILSON v. ROSS, County Assessor.**

(Supreme Court of Appeals of West Virginia.  
March 27, 1895.)

**POWERS OF TOWN — GRANT OF LIQUOR LICENSE—  
CONSTITUTIONAL LAW.**

1. The act of February 24, 1869, amending the charter of the town of Ceredo, confers upon the council of that town the sole power to grant or not grant a state license for the sale of intoxicating liquors within the limits of said town.

2. Such act is not repugnant to the constitution of the state (see section 46 of article 6, and section 24 of article 8, of the state constitution), and such sole power to grant such license

or not is recognized by section 11 of chapter 32 of the Code as vested in the municipal authorities of such town.

(Syllabus by the Court.)

Error to circuit court, Wayne county.

Petition by B. F. Wilson against J. M. Ross for a writ of mandamus. The writ was awarded, and said Ross brings error. Affirmed.

J. S. Marcum, for plaintiff in error. W. W. Marcum and Vinson & Thompson, for defendant in error.

**HOLT, P.** Upon a writ of error to a judgment of the circuit court of Wayne county, rendered on the 6th day of June, 1894, awarding against appellant, J. M. Ross, as assessor of said county, a peremptory writ of mandamus, commanding him to deliver to the defendant in error, B. F. Wilson, a certificate and statement of the amount of the state tax assessed against the said Wilson as a retail liquor dealer. The case was decided upon the facts as they appear by the pleadings, and are in substance as follows: On the 22d day of May, 1894, the common council of the town of Ceredo granted to defendant, B. F. Wilson, a license to sell at retail spirituous liquors in the Millender Block, in that town; and thereupon he delivered to J. M. Ross, the assessor of the county, a copy of said order, and demanded a certificate of the license he wished to obtain, and the amount of taxes to be paid thereon to the state, but J. M. Ross, the assessor, refused to do so. On Wilson's petition, an alternative writ of mandamus was awarded against Ross as assessor on the 31st day of May, 1894, reciting the foregoing facts, and the additional fact that under and by virtue of the laws of the state of West Virginia, and of the power thereby granted to the common council of the town of Ceredo, it has the sole right to grant permits for the sale of intoxicating liquors within its corporate limits. To this Ross made answer admitting all the foregoing facts alleged, except the sole right as claimed on behalf of the common council of the town of Ceredo, and alleging that B. F. Wilson had not applied to and received from the county court of Wayne county, in which was situated the town of Ceredo, an order authorizing the issuance to him of such license, and that said council did not have, under section 11 of chapter 32 of the Code, the sole power of granting such license. On demurrer to said answer and return, the court held the same insufficient, and awarded the peremptory writ. The question is, does the common council of the town of Ceredo have such sole power to grant such license? The law upon the subject is as follows: No person without a state license therefor shall sell spirituous liquors, wine, porter, ale, or beer, or any drink of a like nature. See Code, c. 32, § 1. The state license mentioned in the first section shall be issued only when authorized by the county court of the county,



except that, where the act, occupation, or business for which such state license is necessary is to be done or carried on in an incorporated city, village, or town, the license shall be issued only when authorized under the charter of said city, village, or town, by the council thereof. Id. § 10. The constitutional provisions on the subject are as follows: Section 46 of article 6 provides that "laws may be passed regulating or prohibiting the sale of intoxicating liquors within the limits of this state." Section 24 of article 8 provides that the county courts shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties; provided, that no license for the sale of intoxicating liquors in any incorporated city, town, or village shall be granted without the consent of the municipal authorities thereof first had and obtained. These provisions were construed in the case of *Moundsville v. Fountain* (1885) 27 W. Va. 182, in which it was said (page 188) that the legislature may confer on the cities and towns the exclusive authority to regulate or prohibit the sale of liquors, which is understood to have been done in certain cases, the cities of Wheeling and Wellsburg for example. Section 11, c. 32, Code 1891, p. 234, recognizes and provides for such cases, "wherein the municipal authorities are vested with the sole power of granting such license." So that the sole question here is, is the town of Ceredo in such class? That is to be ascertained by reading its charter in connection with the general laws upon the subject. The charter was granted by act passed on the 23d day of February, 1866 (Acts 1866, p. 40). Section 21 reads as follows: "When anything for which a state license is required is to be done within the said town, the council may require a town license to be had for doing the same, and may impose a tax thereon for the use of the town, and the council may in any case require from the person so licensed a bond with sureties in such penalties and with such condition as it may determine." By act of the 24th of February, 1869, the above section was amended and re-enacted so as to read as follows: "When anything for which a state license is required is to be done within the limits of said town, the council may decide whether such license may be granted or not, and if granted it shall be assessed and collected, the same as if granted by the supervisors of Wayne county; in addition to the state tax for such license, the council may require an additional tax for the use of the town, and in addition to the bonds and sureties required by the state, the council may require such additional bonds and sureties as they may determine." Do these acts invest the municipal authorities of the town of Ceredo with the sole power of granting such license?

I cannot see what other reasonable construction can be given them. The council is expressly given the power to grant or refuse such state license, and that such power does not need the sanction of the county court is made plain by what immediately follows: "And if granted it shall be assessed and collected, the same as if granted by the supervisors of Wayne county"; by whom it was not granted, and need not be granted, being a plain and necessary inference. So, also, it is an inference from the authority given to take the bonds and sureties required by the state, and makes this construction still plainer by proceeding to say that, "in addition to the state tax for such license, the council may require an additional tax for the use of the town," and may require additional bonds to those required by the state. This charter, as amended, is older than the constitution of 1872, which for the first time gives an incorporated city, town, and village a constitutional protection against the licensed sale of intoxicating liquors, without the consent of their municipal authorities, and was evidently designed to subserve the same purpose.

The question remains, has the charter of incorporation been modified in this regard by any subsequent law? for such municipal charter is not a contract, nor of the nature of contracts. Therefore it cannot have the obligation of a contract, within the meaning of section 10 of article 1 of the constitution of the United States, and of section 4 of article 3 of the state constitution; and may be changed at pleasure, when the constitutional rights of creditors and others are not invaded. 1 Dill. Mun. Corp. § 63 (36); *Dartmouth College v. Woodward* (1819) 4 Wheat. 518, 624, 708, 712. Section 46 of article 6 of the constitution provides that "laws may be passed regulating or prohibiting the sale of intoxicating liquors within this state." This provision, so far from restraining the power of the legislature to confer such power upon the town as to granting license, would seem to grant and confirm it; and subject to this provision, and under such regulations as may be prescribed by law, the county courts shall have the superintendence and administration of the internal police and fiscal affairs of the counties. See *Moundsville v. Fountain*, 27 W. Va. 182, 187. Therefore it cannot be said that the constitution of 1872 has taken away from the municipal authorities of the town of Ceredo the power to grant such state license. I have not been able to find any statute that expressly or by necessary implication takes away such power. On the contrary, section 11, c. 32, Code 1891, plainly recognizes the continued existence of such power as solely vested in the municipal authorities of the town in question. This being so, the judgment complained of is right, and must be affirmed.

(40 W. Va. 372)

**PERDUE v. CASWELL CREEK COAL & COKE CO.**(Supreme Court of Appeals of West Virginia.  
April 3, 1895.)**MINING AND REMOVAL OF COAL — ACTION BY  
LANDOWNER — DEFENSES — CLAIM AS LESSEE —  
PLEA OF LIMITATIONS — CONDUCT OF TRIAL — RE-  
CEPTION OF EVIDENCE.**

1. In an action of trespass on the case brought for the recovery of damages for mining and removing coal, the defendants tendered a special plea, which averred that, more than three years before the commencement of the suit, they entered into and were in peaceable possession of the close and land in the plaintiff's declaration and amended declaration, and each count thereof, mentioned and described, claiming title under a lease of the same for the purpose of digging and operating for coal and oil and other minerals, and that they have continuously remained in such possession for the space of more than three years next before the commencement of this action, and have dug and bored, and in good faith expended money in such digging, boring, and operating, and this they are ready to verify." On objection, this plea is bad for want of certainty, and for the reason that it does not state under whom the lease mentioned is claimed.

2. Whether plaintiff shall be allowed to give further evidence after defendant's evidence is closed is within the discretion of the trial court; and its exercise will rarely, if ever, be the ground of reversal by an appellate court. Clearly, he is entitled to give evidence to rebut that of the defendant.

3. It is error for a court to instruct a jury as to the effect of a deed which is not in evidence before them.

(Syllabus by the Court.)

Error to circuit court, Mercer county.

Action by George W. Perdue against John Freeman and Jenkin Jones, doing business under the name of the Caswell Creek Coal & Coke Company. Judgment for defendants, and plaintiff brings error. Reversed.

Okey Johnson and A. C. Davidson, for plaintiff in error. J. S. Clark and A. W. Reynolds, for defendants in error.

**ENGLISH, J.** This was an action of trespass on the case brought by George W. Perdue against John Freeman and Jenkin Jones, late partners under the firm name and style of the Caswell Creek Coal & Coke Company, in the circuit court of Mercer county, to recover damages for coal mined and removed by said defendants from a certain tract of land containing 19.39 acres situated in said county. The defendants demurred to the declaration and each count, which demurrer was overruled as to the first and second counts, and sustained as to the third count, and the case was remanded to rules to file an amended declaration; but as the action of the court on the demurrer is not relied on as error either in the assignment of errors or in the argument, and we see no objection to the declaration, it is presumed to have been waived. On the 18th day of March, 1891, the defendants tendered a special plea in writing, No. 2 (a plea of license), to the filing of which the plaintiff, by his attorney, objected; but the court overruled said objec-

tion, and allowed said plea to be filed, to which plea the plaintiff replied generally. Defendants also tendered a special plea, No. 3, denying the title of the plaintiff to the land in the declaration mentioned, which plea was objected to, and the objection was sustained, and the defendants excepted. The defendants then tendered another special plea, No. 6, denying that the plaintiff was seised and possessed of the close in the declaration mentioned at the time of the commission of the alleged trespass, to which plea the plaintiff also objected. The objection was sustained, and the defendants excepted. The defendants then tendered a special plea, No. 4, which was a plea of *liberum tenementum*, which was filed, and issue was joined thereon; another special plea, No. 5, which was a general plea of *liberum tenementum*, alleging title in the "Bluestone Coal Company," in the close mentioned in the declaration and each count thereof, and that the defendants are the lessees thereof, which plea was also objected to, the objection overruled, and the plea was permitted to be filed, the plaintiff replied generally, and issue was thereon joined. The defendants then tendered another plea in writing, marked No. 6, setting up three years as a bar under the statute to the plaintiff's right of action, which plea was objected to. The objection was overruled, and issue was joined thereon. The defendants then offered another special plea, No. 7, which is a plea of the statute of limitations of three years, to which plea the plaintiff objected. The court sustained said objection, and the defendants excepted, and the plaintiff replied specially to the plea of *liberum tenementum*. On the 6th day of January, 1892, an order of survey was directed. On the 22d day of December, 1892, the death of John Freeman was suggested, and the case was directed to proceed against Jenkin Jones, surviving partner of John Freeman and Jenkin Jones, partners, trading as the Caswell Creek Coal & Coke Company; and the case was submitted to a jury, who, after several adjournments, found a verdict for the defendants, and thereupon the plaintiff moved the court to set aside the verdict, and grant him a new trial, because said verdict was contrary to the law and the evidence, which motion was overruled, and the plaintiff excepted. Said plaintiff also moved in arrest of judgment, which motion was overruled, and the plaintiff excepted, and judgment was rendered for the defendants, and the plaintiff obtained this writ of error.

The first error assigned and relied on by the plaintiff in error is as to the action of the court in allowing, against the objection of the plaintiff, pleas Nos. 2, 4, 5, and 6 to be filed. In argument, however, counsel for the plaintiff in error do not insist on their objection to the action of the court in overruling their objection to any of the pleas tendered by the defendants, with the exception of plea No. 6, which plea is in these words: "And

the defendants, for further plea in this behalf, say that the plaintiff in his action against them ought not to have and maintain, because they say that more than three years before the commencement of this suit they entered and were in peaceable possession of the close and land in the plaintiff's declaration and amended declaration, and each count thereof, mentioned and described, claiming title under a lease of the same for the purpose of digging and operating for coal and oil and other minerals, and that they have continuously remained in such possession for the space of more than three years next before the commencement of this action, and have dug and bored for and in good faith expended money in such digging, boring, and operating, and this they are ready to verify." Now, while it is true that this plea is substantially in the language of the statute under which the defendants are seeking to shield themselves, the question is whether it is sufficient to give the plaintiff notice of the true character of their defense. To merely say that the defendants are in possession under a lease gives the plaintiff no information as to the party under whom they claim as landlord, so that, if the plaintiff should wish to reply specially to said plea, he is precluded from so doing by reason of the fact that the lease is not sufficiently described in the plea to enable him to determine whether it constitutes a valid defense or not, or whether it should be met by a general or special replication. And, *Steph. Pl. p. 355, § 183*, under the heading "The Pleadings must Show Authority," states the rule thus: "In general, when a party has occasion to justify under a writ, warrant, precept, or any other authority whatever, he must set it forth particularly in his pleading." *Co. Litt. 283*, says: "Regularly, whensoever a man doth anything by force of a warrant or authority, he must plead it." And on page 342 the same author says: "When, in pleading, any right or authority is set up in respect of property, personal or real, some title to that property must, of course, be alleged in the party or in some other person from whom he derives his authority." And the same author, on page 347, § 176, says: "With respect to particular estates, the general rule is that the commencement of particular estates must be shown. If, therefore, a party sets up in his own favor an estate tail, an estate for life, a term of years, or a tenancy at will, he must show the derivation of that title from its commencement,—that is, from the last seisin in fee simple; and, if derived by alienation or conveyance, the substance and effect of such conveyance should be precisely set forth." Again, we find the law stated in 6 *Rob. Prac. p. 669*. In speaking of a case in 2 *Salk. 642*, the author says: "The case, however, in *Salkeld*, settled that it was sufficient for a man to justify upon his possession against a wrongdoer; but it does not go to the length

of showing that such a justification is good as against a person who has the title to the land, and who makes an entry in pursuance of that title. When the justification is under the right of another person, there should be an allegation of authority from the principal under whose right the act complained of was committed. Thus, if the defendant justifies breaking a close, on the ground that it is the freehold of another, he is bound to state that he did so enter by the command and as the servant of the owner of the close; and so it is in similar cases, for non constat that the party entitled would have ever insisted on his right, and there can be no reason, if he thinks proper to waive it, why a stranger should justify himself in standing in his place." That this plea is defective for lack of certainty is manifest for the following reason: Suppose the plaintiff desired to reply specially thereto, the plea in its present form does not afford him an opportunity of thereby controverting the validity of the title of defendants' lessor, for the reason that is not named. The plea merely says that they were in possession, claiming title under a lease of the same for the purpose of digging and operating for coal and oil and other minerals. The lease mentioned may have been valid and formal in every respect, and may have been executed by one having an unimpeachable title to the land, and may have conferred ample authority upon the defendants to enter upon the land, and mine and remove the coal, or it may have emanated from a stranger, and not been worth the paper upon which it was written; but this plea affords the plaintiff no light or information as to its character in that regard, and it cannot be presumed that the legislature ever intended that a man with a lease in his pocket from some stranger should open a seam of coal on the mountain side, and, after three years' possession, be allowed to plead the facts in bar of a recovery for such trespass. Such a construction would be dangerous, indeed, to property owners in this state, who are absent from the state, or for any cause fail to keep an eye upon their coal lands; and for these reasons we think the court erred in overruling the objection to said plea, and permitting the same to be filed.

The third and fourth assignments of error relied upon by the plaintiff in error are as follows: "(3) The court erred in excluding from the jury the record in the case of *Straley & Johnston v. Perdue*, because the parties were in privity, and *Straley & Johnston* had conveyed by deed of general warranty the *Perdue* tract to *Bartholomew*, trustee, only a few days before they accepted the deed from *Perdue*, and filed the bill to perfect the title in their vendee. (4) The court erred in refusing to permit *A. C. Davidson*, a witness introduced for plaintiff, to prove that the suit of *Straley & Johnston* was prosecuted for the benefit and at the instance of their vendees. This evidence was clearly proper, and could

better be introduced in rebuttal than in chief, because the defense claimed that the land was included in the Bell deed, which was derived by plaintiff, and the record was relied on to rebut that claim." These assignments of error may be considered together, and, in order that the questions presented by these two assignments may be better understood, it is necessary to state briefly the circumstances connected with this case, which gave rise to the effort on the part of the plaintiff in error to introduce the record in the case of *Straley & Johnston v. Perdue* as evidence therein, and to show by the witness A. C. Davidson that said suit of *Straley & Johnston v. Perdue* was prosecuted at the instance and for the benefit of their vendees. In the month of November, 1885, said *Straley & Johnston* brought suit in equity in the circuit court of Mercer county against said George W. Perdue, in which they claimed to have purchased from said Perdue all of the coal underlying his home tract of land which had been conveyed to him by one Henry Bell, with the exception of the coal underlying 25 acres thereof, which was to be laid off so as to include his house and buildings and two springs, which tract they alleged was afterwards surveyed for the purpose of making conveyances, and by mistake the 19 acres in controversy was omitted from the description furnished by the surveyor. It was claimed that the title bond called for all of the coal under the land conveyed to said Perdue except said 25 acres. The facts alleged in the bill were put in issue by answer and proofs taken, and the circuit court proceeded to specifically enforce said contract, and directed that said strip of coal land of 19.39 acres be paid for at the contract price, and that said G. W. Perdue should execute and file among the papers a deed, in which his wife should unite conveying said 19.39 acres of land to said *Straley & Johnston*. From this decree an appeal was taken to this court, and the same was reversed, and the plaintiff's bill was dismissed. See 33 W. Va. 375, 10 S. E. 780. The plaintiff in this action was seeking to introduce as evidence the record of the chancery suit in the case of *Straley & Johnston v. Perdue* and the mandate of this court, with a view of showing that the question as to the ownership of said 19.39 acres was res adjudicata. By the ruling of this court in said chancery suit the record in the case of *Straley & Johnston v. Perdue* was excluded from the jury by the court, on the ground that the defendants in this case were not parties thereto. The plaintiff then sought to prove by a witness, A. C. Davidson, that the said suit of *Straley & Johnston v. Perdue* was prosecuted at the instance and for the benefit of their vendees. This witness was offered after the defendants had rested their case, and it appears that the plaintiff reoffered as evidence the record in the case of *Straley & Johnston v. Perdue*, together with the mandate of this court in said cause, and, in connection therewith, offered to prove by said

witness, A. C. Davidson, that said suit of *Straley & Johnston v. Perdue* was instituted and prosecuted at the instance and with the approval of the Bluestone Coal Company, and for its benefit; and the court, on its own motion, declared that it was not its purpose to open this case after the long time engaged in it for the admission of evidence in chief, the plaintiff having the day before yesterday rested from his case, and declared himself through in chief; and, to the end that the case might be concluded in a reasonable time, the court declined to permit said evidence to be introduced, and the plaintiff excepted. The object of this testimony was to show that said *Straley & Johnston* were in privity with the defendants, and the first question we shall consider is whether the court acted properly in excluding the testimony of said witness on the ground that it came too late. Upon this question, Thompson on Trials (volume 1, p. 310, § 348) says: "So it is within the discretion of the trial court, both in civil and criminal trials, to reopen the case at the request of a party for the purpose of allowing him to introduce additional evidence. The court may allow a party to introduce further evidence after the testimony has closed on both sides after a demurrer to the evidence has been made, after the argument has commenced, and even after the argument has closed. The court may allow the prosecution in a criminal trial to reopen its case and introduce further evidence in chief even after the examination of witnesses for the defense has commenced, and after the state has closed, and the defendant has announced that he will introduce no evidence, though it has been elsewhere said that this discretion should be exercised with the utmost caution. This discretion will not be exercised where it would work a fraud on the opposite party, or where the withholding of the evidence was a manifest trick; and, if the introduction of the additional evidence takes the adverse party by surprise, he should be allowed time and opportunity, if desired, to meet it with further evidence on his side. It is scarcely necessary to add that it is not an abuse of discretion for the trial court to refuse to open a case to admit further defenses after the trial where the defendant, knowing of the existence of the defenses, neglected to assert them in his pleading in the first instance, and gives no satisfactory reason for the neglect. But where the plaintiff has inadvertently omitted to introduce a formal, though necessary, document until after the close of his evidence, it will be an abuse of discretion, for which the judgment will be reversed, to refuse his application to be allowed to introduce it then." See *Meacham v. Moore*, 59 Miss. 561. Now, if the testimony of A. C. Davidson was matter for rebuttal, it should have been allowed to go to the jury. By reference to the record (page 98), it will be seen that the record of this chancery suit of *Straley & Johnston v. Perdue* and the mandate of this court were offered in evidence;

and on page 134 of the record the court said, "It may go in." On page 135, the whole record in the case of *Straley & Johnston v. Perdue* was offered in evidence, and was objected to, and the court's opinion was reserved; and on page 186 of the record, at the close of the plaintiff's testimony in chief, the plaintiff offered separately and collectively so much of the printed record as had theretofore been offered in manuscript, in so far as it was contained in the printed record. It was objected to by the defendants, and the objection sustained. The defendants then introduced their testimony, during the introduction of which they offered in evidence documents and testimony tending to show that *Straley & Johnston* had conveyed the coal underlying the land in controversy to *Bartholomew*, trustee, before the suit of *Straley & Johnston* was brought against said *Perdue*; and, at the close of the testimony, the defendants, by their counsel, renewed their motion to strike out the record of the chancery suit of *Straley & Johnston v. Perdue*; but, before the court passed upon the motion, plaintiff, by counsel, gave notice that he desired to introduce further evidence to show the privity of the *Bluestone Coal Company*; and the defendant *Jones*, surviving partner, etc., with the plaintiffs in said chancery suit of *Straley & Johnston v. Perdue*, and to show that said chancery suit was prosecuted at the instance and with the approval and for the benefit of the *Bluestone Coal Company* and its lessees, *Freeman* and *Jones*, partners, under the name of the *Caswell Creek Coal & Coke Company*. Thereupon the court declared that it had given plaintiff five days in which to make out his case, and it was not the purpose of the court to open the case for further evidence in chief, and sustained said motion, and excluded said record of said chancery suit, and every part thereof, for the reason that the proceedings in said suit were *res inter alios acta*, and that the defendants in this suit could not be prejudiced thereby. The defendants then rested their case, and the plaintiff, by his counsel, at once reoffered the record in the case of *Straley & Johnston v. Perdue*, together with the mandate of this court, and, in connection therewith, offered to prove by the witness *A. C. Davidson* that said suit of *Straley & Johnston v. Perdue* was instituted and prosecuted at the instance and with the approval of the *Bluestone Coal Company*, and for its benefit; and the court refused to allow said testimony to be given to the jury, and the plaintiff by counsel excepted.

Now, while it is true that in the trial of a case at law much is left to the discretion of the trial judge as to the order and time that testimony is to be adduced, yet, in exercising this discretion, it must be a sound legal discretion, and must be so exercised, if possible, as not to do injustice to either party. When we consider that the record discloses the fact that this chancery record was at first allowed to go in, and then the printed record was of-

fered, and was excluded, just as the plaintiff was resting his case, and, when the defendants rested their case, they moved the court to strike out the record of the chancery suit, for the reasons above stated, a question of surprise to the plaintiff is suggested. I cannot regard the testimony which the plaintiff then offered to introduce by the witness *A. C. Davidson* as strictly in rebuttal, or that said testimony would have been unnecessary to establish the plaintiff's case but for the documents and testimony introduced by the defendants, and by the exclusion of said chancery record at the last moment, upon the grounds stated by the court. The object of the plaintiff in introducing the witness *A. C. Davidson*, as was stated at the time, was to prove that the said chancery suit of *Straley & Johnston v. Perdue* was instituted at the instance and for the benefit of the *Bluestone Coal Company*, the lessors of the *Caswell Creek Coal Company*. Now, the record shows that, after the plaintiff had rested, the defendant proceeded to offer testimony tending to show that *Straley & Johnston* had conveyed the land in controversy to *Bartholomew*, trustee, before said chancery suit of *Straley & Johnston v. Perdue* was instituted, and that, therefore, the defendants had no interest in said chancery suit, and were not bound by its decree. The decree of this court, however, held that the deed from *Perdue* to *Straley & Johnston* did not include said 19.39 acres, and, as a consequence, the deeds from *Straley & Johnston* to *Bartholomew*, trustee, etc., to the *Bluestone Coal Company*, did not convey to them said 19.39 acres. This ruling, however, would not be binding upon the defendants unless they or their lessors were privies to the suit; and while the evidence of the witness *A. C. Davidson* might be regarded as in rebuttal to the testimony of the defendants, which tended to show that the defendants had no interest in said chancery suit, and were not bound by the determination thereof, yet it is evidence that might have and perhaps ought to have been offered in chief by the plaintiff at the time said chancery record and mandate were offered. Upon this question of discretion by the court in controlling the order in which evidence shall be admitted, this court has held that "whether a party shall introduce further evidence after that of the adverse party has been heard is a matter within the discretion of the court, and its exercise will rarely, if ever, be the cause of reversal in an appellate court. Clearly, he is entitled to introduce evidence to rebut that of the other party." See *Johnson v. Burns*, 39 W. Va. 659, 2 S. E. 686; *Clarke v. Railroad Co.*, 39 W. Va. 734, 20 S. E. 696; *Rowyer v. Knapp*, 15 W. Va. 278; *Brooks v. Wilcox*, 11 Grat. 411. I am inclined to think that, under the circumstances, the exercise of a sound discretion would have allowed the testimony of *Davidson* to have gone to the jury, even though it be in chief; but as the case is to be remanded on other grounds, and upon a new trial a dif-

ferent course may be adopted, it is unnecessary to now determine the question.

As to the question raised by the fifth assignment of error as to the propriety of instruction No. 2 given at the instance of the defendant, in which the court instructed the jury that "the deed from George W. Perdue to H. W. Straley and David B. Johnston, dated the 5th day of February, 1884, and which is in evidence in this case, conveyed to said Straley & Johnston all the coal and minerals in and under the whole of the tract of land which was conveyed to said George W. Perdue by Henry Bell by deed, which is in evidence in this case, except the twenty-five acres reservation contained in the title bond of the said Perdue to said Straley & Johnston, which is in evidence in this case, and in the deed dated the 5th day of February, 1884, from said Perdue to said Straley & Johnston; and the jury cannot find for the plaintiff any damages on account of the entering, mining, and carrying away the coal, or any part thereof, from said 19.39 acres of land in controversy in this case,"—which instruction appears to have been given after all the evidence was before the jury, and directs the jury to pass on the effect of a deed, claiming that the same was in evidence before the jury when in fact it was not; the only place in which a certified copy of said deed is found being in said chancery record, which was excluded from the jury. This instruction we regard as erroneous, and it had a direct tendency to prejudice the plaintiff.

For these reasons, the judgment must be reversed, and the cause remanded, with costs to the plaintiff in error.

(40 W. Va. 420)

#### BATES v. SWIGER et al.

(Supreme Court of Appeals of West Virginia.  
April 6, 1895.)

**SPECIFIC PERFORMANCE — AS AGAINST INNOCENT PURCHASER — OUTSTANDING INCUMBRANCE — ESTOPPEL TO CLAIM TITLE—SUBROGATION.**

1. Where a vendor, by executory contract, has conveyed the legal title to a subsequent purchaser for value, without notice, there cannot be specific performance of the executory contract in favor of the first purchaser; but, if the second purchaser had notice, there can be, the conveyance to him being void as to the first purchaser, and he can be compelled to convey the land, without warranty, to the first purchaser. Proper decree in such case.

2. Where the land is subject to a life maintenance in favor of a third party, that is no impediment to a specific performance of a contract of sale with general warranty, if the purchaser will accept a conveyance with such warranty, and rely upon it for indemnity against such incumbrance.

3. A reservation or charge upon land, in a conveyance, for maintenance for life, is valid, though no amount be fixed.

4. One owning or having any interest in or charge upon land, knowing that another is about to purchase it, who declares to such other person that he has no interest in the land, and that the one proposing to sell has the absolute right to the land, cannot set up any ownership, interest, or charge, then existing, hostile to the right acquired by such purchaser.

5. Where one, by words or conduct, intentionally causes another to believe in the existence of a certain state of things, or such words or conduct are of such nature as he has reason to believe will cause him to so believe, and such other, not knowing to the contrary, acts thereon, the former will be estopped from averring or claiming under a different state of things, then existing and known to him, to the prejudice of the other party.

6. Subrogation, being merely the creature of equity, and not of contractual nature, will be administered only in harmony with its fixed rules, in furtherance of justice.

7. Subrogation is not given to one who officiously, as a stranger, pays a debt of another.

8. One guilty of fraud in the transaction on which he asks subrogation, as one who asks it must come before the court with clean hands, cannot have subrogation. Therefore, a second purchaser, who, with notice of the right of a first purchaser, pays off a lien on the land, cannot ask to be substituted to it.

(Syllabus by the Court.)

Appeal from circuit court, Doddridge county.

Bill by Squire Bates against C. A. Swiger and others for the specific performance of a contract for the sale of land. Decree for plaintiff, and defendants appeal. Affirmed.

J. V. Blair, for appellants. M. R. Crouse and M. F. Snider, for appellee.

BRANNON, J. Charlotte A. Swiger, by executory contract, sold to Squire Bates a tract of land. The consideration was \$900, of which he paid down \$20, and was to pay \$180 more in money to Charlotte A. Swiger, and pay off a deed of trust to McMillan, when the deed should be made to Bates, and the remainder was to be paid in three annual installments. This land had been conveyed to Charlotte A. Swiger by her father and mother, William L. Swiger and Elizabeth Swiger, by a deed reserving to them "their lifetime maintenance in said land." Some short time after the sale, Bates met Charlotte A. Swiger and her father and mother at their home, counted out the \$180 balance of cash to be paid under the contract, tendered it, and asked for his deed, which was refused; and they said they would pay the \$20 back, and got it, and proposed to refund it to Bates. Bates declined to receive it, saying it was the land he wanted, and insisted upon the performance of the contract; and, as Charlotte A. Swiger would not receive the \$180, he left it on the table, in their presence, and left the house. He had in the meantime paid a small part of the McMillan deed of trust debt, and had received from McMillan a writing addressed to W. L. Swiger, who, with his wife, had made the deed of trust to secure a note made by them to McMillan, saying that he (Bates) had arranged to settle and pay the debt, amounting to \$106.83, and that the deed of trust need not interfere with any trade between them. This writing was exhibited to the parties on the occasion when Bates offered the money and demanded a deed. Later on, the parties met again, when a deed was offered to Bates, and he objected to it for two reasons,—one, that its boundary included some land of a third

party, and because of indefiniteness of description; the second, because it reserved "unto said Elizabeth Swiger and Wm. L. Swiger their life estate, support, and maintenance in and on said land," whereas the contract between Charlotte A. Swiger and Bates called for a general warranty, making no provision for such reservation of a life estate. The reason given for refusal to make an absolute conveyance was that such reservation existed in favor of her father and mother, and they would not join in the deed. In a day or two afterwards, Charlotte A. Swiger sold this same land to H. L. Swiger; and she and her father and mother joined in a deed conveying it to him for the consideration of \$1,000, of which \$107 is recited as paid down, and the residue payable in deferred installments, reserving no life estate or maintenance. Then Bates brought a suit in the circuit court of Doddridge county to specifically enforce the contract between him and Charlotte A. Swiger; to set aside the conveyance to H. L. Swiger, as made with notice on his part of Bates' purchase, and was therefore fraudulent; and to declare that the life maintenance reserved in the conveyance to Charlotte A. Swiger in favor of William L. and Elizabeth Swiger was not valid, or longer valid, against Bates, because he (Bates) did not know of any such reservation in said deed, as he lived distant from the office in which it was recorded, and William L. Swiger and Elizabeth Swiger had represented and declared to him at the time when he entered into said contract that they had no interest in the land, but that Charlotte A. Swiger owned it all, absolutely, and that they had aided in and consented to her making the sale, and he relied on and believed those representations. The court entered a decree that, in its opinion, Charlotte A. Swiger could not make a deed in accordance with her contract, but that plaintiff was entitled to specific performance, so far as she was able to perform, and putting Bates to an election whether he would accept a conveyance of such title as she was able to make. At the next term the court entered a decree from which it appears that Bates refused to take only such deed as she could make, and elected to take a deed in fee, with covenant of general warranty, without any reservation or incumbrance, save a lien for unpaid purchase money; and the court thereupon went on to decree that the plaintiff have specific execution of the contract, and that William L. Swiger had forfeited and estopped himself from making any claim for life maintenance upon said land, but that Elizabeth Swiger had not done so, and reserving her life maintenance, without prejudice from the decree, and annulling, as fraudulent, the deed made by Charlotte A. Swiger, William L. Swiger, and Elizabeth Swiger to H. L. Swiger, and that Charlotte A. Swiger execute to Bates a deed, with general warranty, for the land, without reservation or incumbrance, save a lien for unpaid purchase money, and that Bates execute notes

therefor, and pay McMillan his debt. Charlotte A., H. L., Elizabeth, and William L. Swiger unite in an appeal from said decree. Squire Bates cross-assigns certain errors to his prejudice.

First, it is said, against the decree, that it is inconsistent with the first one. That is not material. A court ought to be allowed to change its mind before final decree. The first was a mere expression of opinion, but preparatory to further decree; it decreed nothing. An interlocutory decree may be set aside before the final decree. *Morgan v. Railroad Co.*, 39 W. Va. 19, 19 S. E. 588. But this was no decree. Now, take the case as to Charlotte A. Swiger. She made a plain contract entitling Bates to a clear conveyance, with general warranty; and the deed which she wished Bates to accept was not a compliance, because it reserved a life estate in favor of William L. and Elizabeth Swiger. Indeed, under the reservation in that deed, she created, as I think, a more serious and hurtful incumbrance to her vendee than that contained in the deed from her father and mother to her, as that gave them only maintenance, not a right to possession, whereas her deed to Bates called for a life estate in the land, calling for possession, but in any view an incumbrance detracting seriously and substantially from the value of Bates' estate in the land. The decree of specific execution, as against her (Charlotte A. Swiger), is one but as a matter of course under equity principles of specific performance, as expounded in *Abbott v. L'Homme dieu*, 10 W. Va. 677, unless there be impediment, either because of her conveyance to H. L. Swiger, or because there was a life maintenance charged on the land in favor of her father and mother, which bound her estate, and which might involve her in trouble from action for breach of warranty.

As to the impediment from her conveyance of the fee to H. L. Swiger: If he were a purchaser for value, without notice, no decree of specific performance could go against Charlotte A. Swiger, for she would have no land to convey, and would be utterly disabled from conveying, by reason of the valid estate in H. L. Swiger; and the decree would be abortive, and the plaintiff could get relief only by an action for damages on the violated contract. *Wat. Spec. Perf.* § 125; *Pom. Spec. Perf.* §§ 294, 461, 462. But H. L. Swiger was not a complete purchaser, not having paid purchase money; and, moreover, it is plain and clear from the evidence that when he purchased he knew, as he admits, of the sale to Bates. He says he was informed that Bates had refused to accept a deed,—the insufficient deed above referred to. He was bound to inquire of Bates as to his rights. Bates did nothing to mislead him. If he depended on misinformation, he assumed the risk and hazard. The truth is, his conduct is entirely reprehensible, as he wanted to buy the land himself,



and sought the merest pretext for doing so, in violation of Bates' rights; and no one reading the evidence can hesitate to say that the finding upon it by the circuit court judge, that his purchase was fraudulent and void, is correct.

Next, did the existence of the life-maintenance charge on the land in favor of her father and mother forbid a decree against her, compelling her into a general warranty, which might subject her to liability for its breach? Here an argument is made that this charge or reservation in the deed to Charlotte A. Swiger for life maintenance is too general, unliquidated, and indefinite, and is therefore no charge, or void; and this contention is based on *Brawley v. Catron*, 8 Leigh, 522. But I do not concur in this contention. That case does say that an agreement between vendor and vendee that the vendee support vendor during life, and two daughters until they married, constituted no lien; but there was no reservation or charge in the deed, and it was in the days of implied lien, and, if any lien, it was an implied one. And Judge Tucker said the doctrine of secret, implied liens had been carried too far already, to the ruin of innocent purchasers, and that it ought not to be extended to a case where the amount of the charge was indefinite, extending through several lives, and would justify such liens in favor of several generations, so that purchasers could not know the amount, even if they knew of the fact of the charge. But here is an express charge, on the face of the deed, and, while indefinite in amount, is ascertainable; and a purchaser could and would be bound to know of it, as it is in the chain of his title. A similar charge contained in a deed was supported in *Pownall v. Taylor*, 10 Leigh, 172. Still, though a valid charge, it was no bar to a decree of specific performance. It was not a total absence of estate in Charlotte Swiger, but only a charge for a small part of the duration of the fee,—a partial disability,—and might not ever be enforced. She, with knowledge of it, warranted against it, by her contract; and she cannot declaim against a liability under her self-imposed warranty, if the purchaser is willing to take it. It may be, he could ask performance, with compensation by abatement from purchase money; but certainly the vendor cannot complain that Bates elects to accept, and rest on his warranty. *Pom. Spec. Perf.* § 438; *Wat. Spec. Perf.* §§ 130, 203. And this impediment was still further diminished by the denial of any right in William L. Swiger to claim anything for his maintenance. The decree would forever bar him.

As to H. L. Swiger: I have said enough touching his case above.

As to William L. Swiger: The evidence is abundant to justify the decree declaring that he had no further right to maintenance under the deed from his wife and himself

to Charlotte A. Swiger. He induced Bates to make the contract with his daughter. He was present at the drafting of the contract (she being absent), participated in it, fixed terms, and when it was proposed to draw it in his name, as the seller, the other party and the scrivener supposing he owned the land, he said, "No"; that he had no interest in the land, but it was his daughter's,—and went along with Bates' son to Bates', where she was working, young Bates taking the contract for his father, to have her sign it, and with the \$20 cash, and she signed it. In every way he showed his assent. He never mentioned his interest or maintenance, but let his neighbor go on and buy, and pay money,—he silent as to his right. This silence alone estops him, as an estoppel in pais, called "equitable estoppel." 1 *Bigelow, Estop.* 544. But he affirmatively and expressly declared that he had no interest, but that his daughter was absolute owner. This, of course, would estop his claim. See doctrine of estoppel stated in *Mason v. Bridge Co.*, 28 W. Va., on page 649; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Railroad Co. v. Perdue* (this term) 21 S. E. 755. An estoppel in pais operates where a person has made an admission or done an act with intent to influence the conduct of another, or that he has reason to believe will influence his conduct, inconsistent with the evidence he proposes now, or with the claim or title he proposes to set up, where the other party has been influenced by and has acted upon it, and where he would be prejudiced by the allowance of the claim or title set up. *Pom. Eq. Jur.* § 804; *Cowles v. Bacon*, 56 Am. Dec. 371; *Drew v. Kimball*, 80 Am. Dec. 163; *Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713. William L. Swiger could not even stand by, silent as to his interest in the land, and see this contract made, and money paid under it to his daughter, and know that money would be paid to McMillan, and indeed take the active agency for his daughter in the sale, and then set up his claim. Where one has the legal title to land, acquiesces in its sale by a person under claim of title, and moreover advises and encourages the parties to carry out such sale, he will be estopped from asserting his title against the purchaser. *Bigelow, Estop.* 544; *Pom. Eq. Jur.* § 818; *Maple v. Kusart*, 91 Am. Dec. 214; *Titus v. Morse*, 63 Am. Dec. 665; *Stebbins v. Bruce*, 80 Va. 389. In *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878, it is held that one who has title to land, and stands silent by, and allows an innocent man to purchase from one claiming authority to sell, is estopped from claiming the land, against the purchaser, on the ground that the seller had no authority; and so far did the case carry this doctrine that it held that a court of equity would compel him to convey to the innocent purchaser. It cannot be said that Bates ought to have examined the record to see if the title was



clear, and not have relied on Swiger's declaration or silence; but, in view of those declarations,—even silence alone,—he need not go to the record. The declarations misled, and dispensed with inquiry; and mere silence, under the circumstances, will estop M. L. Swiger, regardless of any record examination. *Stone v. Tyree*, 30 W. Va. 704, 5 S. E. 878.

As to Elizabeth Swiger: The evidence of any conduct on her part to bar her further claim to life maintenance is not nearly so strong as that against her husband. She was not present at the execution of the contract, and did not, prior to its close, make declarations that she had no interest, and that her daughter had the absolute estate. She was not present, and silent, prior to the contract, when she should speak, unless we say it was at her house, after the contract was drawn up, and in the hands of Bates' son, to take it up to Charlotte to have it signed. She then and elsewhere expressed assent to the sale, but there is conflict of evidence as to what she there said between her and her husband and young Bates. Mere declarations of satisfaction with the sale afterwards will not create this estoppel. Besides, several Virginia cases hold that participation of a wife in the fraud of the husband will not impair her rights. *Taylor v. Moore*, 2 Rand. (Va.) 563; *Penn v. Whitehead*, 17 Grat., on page 512. William L. and Elizabeth Swiger say they never intended to let Bates have their rights. They did at the time, but changed their minds to get a better price. They estimated their life maintenance at much more than \$100, and, if they did not intend to let Bates have the land unincumbered, it is strange that in a day or so they sold their interest, with the fee, for only \$100 more, to a nephew, unless it was a shift to keep Bates from having the land, and retain it for themselves. But, to debar her, we must find conduct before the sale, in its negotiation, on her part, misleading, or ignoring her right, so as to make an equitable estoppel against her; and we cannot sustain the appellee's cross assignment, and reverse the circuit judge on a question of fact, on the evidence.

Then it is argued that, as Elizabeth Swiger's interest was left still in her, the deed from her and others to H. L. Swiger passed that interest and ought not to have been wholly set aside. Of course, as it conveyed, with general warranty, the land, she would be hindered from claiming maintenance had the deed stood, and it would be merged; but it did not pass the maintenance separately, as that is a merely personal right of hers. I do not think there is fault in the decree in wholly annulling the deed, as there would be under such cases as *Love v. Tinsley*, 32 W. Va. 25, 9 S. E. 44, in case of deeds fraudulent as to creditors, as in them, if the debt be paid, the vendee retains the land, as it was only subject to the incumbrance of debt; but, in case of convey-

ance to a purchaser with notice, the very title to the land must be passed to the first purchaser. My opinion is that in such a case as this,—a suit to enforce performance of an executory contract, where the vendor has passed title to a second purchaser, with notice,—the proper decree is to direct a conveyance by the vendor with such warranty as he stipulated, and from the second purchaser without warranty, in one or separate deeds. As the legal title passed, a conveyance from the second purchaser would be sufficient to give the first one such title; but you want the warranty of the first, and the estoppel created by it. Thus you follow up the legal title, certainly divesting the second purchaser of it, and vesting it in the first, and avoiding all question as to the whereabouts of the legal title in case of a decree directing a deed from the seller, and annulling the second deed as to the first purchaser. Where the second deed is wholly avoided, as in this case, it reverts the title in its grantor; and likely so, too, in the case of such partial annulment, when taken in connection with record. The decree will be modified so as not to prejudice any rights that may exist between the grantors and grantee in that deed.

A point made against the decree is that it requires Bates to pay McMillan his debt, whereas H. L. Swiger had already paid it, and Bates ought to have been required to pay it to H. L. Swiger. Though it was not an officious payment, as to Swiger's grantors, yet it was such as to Bates, and is no ground of action against him. *Crumlish's Adm'r v. Improvement Co.*, 38 W. Va. 390, 18 S. E. 456. A stranger cannot be subrogated to a lien. *McNeill v. Miller*, 29 W. Va. 480, 2 S. E. 335. But a still more serious bar lies in the way of H. L. Swiger to subrogation to the McMillan lien. Subrogation is purely the creature of a court of equity, is not a matter of contractual character, and is administered just as equity deems proper, consistently with its principles, to further justice. One who asks relief, by way of subrogation or otherwise, in a court of equity, must, under one of its most fixed rules, come with clean hands, guilty of no fraud. But H. L. Swiger, with eyes open to Bates' rights, sought to wrong him out of his prior right to the land; and this payment is one of the very acts done by him, in collusion with the other parties, to effectuate that purpose. His grantors wanted \$100 more for the property than they had agreed to take. Moved by this design, probably at the instigation of some third party, they had recourse to this sale to H. L. Swiger. If not this, it was a mere covert, sham sale, to keep Bates from getting the land under his purchase, and there is some show of this; and, if so, it is worse for H. L. Swiger, making him only an instrument for the accomplishment of the wrong. In either aspect it was a wrong, odious to a court of equity. Justice Bradley said in

*Railroad Co. v. Soutter*, 13 Wall., on page 523: "Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could recover for his repairs or improvements, or for incumbrances lifted by him? If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate, under such circumstances, he does in his own wrong. \* \* \* One of the maxims of the latter system [English equity] is, 'He that hath committed iniquity shall not have equity.' Subrogation will not be applied to relieve a vendee from the consequences of his own wrongful act, or of a wrongful act in which he had participated, or of the wrongful act of one under whom he claims." *Sheld. Subr. § 44*. The decree was one of specific performance of the contract, and followed it in decreeing payment to McMillan by Bates. What remedy H. L. Swiger may have, it is not proper to say. If, as Lord Coke says, he has no remedy, it is the case of the woodcock caught in his own springe. The plaintiff, it is said, had not paid the McMillan debt. He had arranged it, and McMillan looked no longer to the debtors, but took Bates and the land. All this he did before he asked a deed. No objection was made on that score. Bates showed himself prompt and eager to execute the contract, and the defendant Charlotte A. Swiger, a young girl, who had derived title from her parents to frustrate the enforcement of a liability feared by the father and mother, took every means suggested by her father, and probably by some one else, to defeat a plain and just right of Bates, whose conduct in the matter seems not open to any wrong or impropriety. The decree is affirmed, without prejudice to the rights of H. L. Swiger, as against Charlotte A. Swiger, William L. Swiger, or Elizabeth Swiger, growing out of their deed to him dated 1st day of November, 1892.

(40 W. Va. 564)

**McDODRILL et al. v. PARDEE & CURTIN LUMBER CO.**

(Supreme Court of Appeals of West Virginia.  
April 13, 1895.)

**TRESPASS—DESCRIPTION OF PREMISES—POSSESSION OF WARD'S PROPERTY — ACTION BY MINOR—EVIDENCE—DEED—WASTE BY COTENANT.**

1. In the action of trespass to realty, or an action on the case in lieu thereof under the statute, the place where the acts complained of were done is material and traversable, and the allegations thereof must in some way, either by the name of the land or close, by some or all of its abutments, by naming a particular locality, or in some other way, designate or describe such locus in quo with a reasonable degree of definiteness; otherwise the declaration will be bad on demurrer.

2. Not a guardian by nature, but only a guardian appointed, who has given bond as and when required by law, is entitled to the possession, care, and management of his ward's estate.

3. An infant who has no such guardian who has given bond may, for damage done to his real estate, sue by next friend.

4. Where a deed made under a decree by a commissioner or other authority is offered in evidence as a connecting link in the plaintiff's chain of title to land, it is necessary to introduce with it so much of the record of the suit in which such decree was made as will satisfactorily show that the person having the legal title to the land conveyed was a party to the suit, and as will identify the land conveyed with the land decreed.

5. As against a party who claims against the deed and is a stranger thereto, the recital of such facts therein, without more, is not evidence thereof, and the deed does not prove the transfer of the title to the land it purports to convey.

6. Cotenants, who commit waste, are liable to each other jointly or severally for the damages; but the amount of a recovery against a stranger or a grantee of a cotenant must be apportioned to correspond with his undivided interest in the land. A case where these principles are applied.

(Syllabus by the Court.)

Error to circuit court, Braxton county.

Action of trespass on the case by Charles McDodrill and another against the Pardee & Curtin Lumber Company. Plaintiffs had judgment, and defendant brings error. Reversed.

W. E. Haymond, for plaintiff in error.  
Dulin & Hall, for defendants in error.

HOLT, P. This was an action of trespass on the case, brought in the circuit court of Braxton county, by Charles McDodrill and Martha Couger, an infant, suing by McDodrill as her next friend, against the lumber company, a corporation under the laws of the state of West Virginia, for trespasses committed on a certain tract of land, by cutting down and carrying away various growing trees. There was a demurrer overruled; plea of not guilty; trial by a jury; a verdict for plaintiffs for \$500 damages; motion for a new trial, motion in arrest of judgment, both overruled; judgment for plaintiffs; and this writ of error awarded defendant,—with all these rulings, and others, excepted to there, and assigned as grounds of error here.

First it is said the court erred in overruling the demurrer entered to the declaration as a whole and to each of the four counts. The first two counts aver a trespass committed by defendant in entering upon the lands and premises of plaintiffs and cutting down and carrying away various trees there found growing, and converting and disposing thereof to its own use. The third count avers a cutting down and destroying the saplings and undergrowth, the denudation of the land of all its valuable timber, to the permanent and lasting injury of the same. The fourth and last count avers that plaintiffs are the owners of and invested with the ownership of the immediate remainder in fee in said tract of land, subject to a certain life estate, followed by the same averments of trespass, whereby plaintiffs have been injured and damaged in their estate in remainder in and to said land and premises. By section 8 of chapter 103 of the Code it is provided that "in any case in which an

action of trespass will lie there may be maintained an action of trespass on the case." By chapter 92, § 1, if a tenant of land commit any waste thereon, or after he has aliened it, while he remains in possession, unless by special permission of the owner so to do, he shall be liable to any party injured for damages. Section 2: If a tenant in common, joint tenant, or parcener commit waste, he shall be liable to his cotenants, jointly or severally, for damages. Section 3: If a guardian commit waste of the estate of his ward, he shall be liable to the ward, at the expiration of his guardianship, for the damages. Section 4: Any person entitled to damages in any such case may recover the same in an action on the case, and by section 14 of chapter 82 any minor entitled to sue may do so by his next friend.

The first point made on the demurrer is that the infant cannot sue for such trespass to his lands; it must be brought by the guardian; and for this is cited *Truss v. Old* (1828) 6 Rand. (Va.) 556. For a full discussion of the various kinds of guardians and of the common-law doctrine as modified by our statutes, see 1 Minor, Inst. c. 17, pp. 460, 472, et seq. It was held in that case that guardians in socage and testamentary guardians, although they have no beneficial interest, yet have a legal interest, accompanied with the possession of the ward's land during the guardianship. If, therefore, a person trespass on the lands of an infant, and cut and carry away his trees, without the license of the guardian, the ward cannot maintain an action of trespass therefor, but the guardian may, and he must account to the ward for the damage recovered. And section 7 of chapter 82 of the Code provides that "every guardian who shall be appointed as aforesaid and give bond as required shall have the custody of his ward and the possession, care and management of his estate, real and personal." If there be a father, he is guardian by nature; if the father be dead, then the mother succeeds as guardian by nature; and though, as such, charged with the custody of the child's person, and, it may be, with his education, they do not have, as such, the possession or care of his estate. See 1 Minor, Inst. p. 472. In such case the doctrine of *Truss v. Old*, 6 Rand. (Va.) 556, would not apply, for the reason and foundation of the rule do not exist. Nothing appears on the face of this declaration that the infant has any guardian at all; certainly nothing that she has a guardian who is entitled to the possession and care of her estate; and I know of no rule which requires or authorizes such presumption to be made in passing upon a demurrer to her declaration; and section 4 of chapter 92 of the Code (page 706) provides that "any person entitled to damages in such case [that is, a case of waste] may recover the same in an action on the case." Is this dec-

laration good in other respects on general demurrer? It seems to have been drawn in the ancient mode of declaring in trespass *quare clausum fregit*, with the expectation of making a new assignment. This mode had its origin in the practice, which had become general, to sue out only general *clausum fregit*, and the law being held that upon such general writs the plaintiff either could not at all, or could not to any conclusive effect, count of a close in certain, the mode of declaring generally, pleading the common-law bar,—that is, naming any place as the locus in quo, and the plea of *liberum tenementum*, and making a new assignment,—seems to have been universally adopted. See *Martin v. Kesterton* (1776) 2 W., Bl. 1089; 4 Rob. Prac. 584. See *Cooke v. Thornton* (1827) 6 Rand. (Va.) 8. But, as this practice was circuitous and full of delay, it has been plainly modified, if not done away with, in this state, by section 32 of chapter 125 of the Code. In such action it is necessary to allege the locus in quo, for such fact is plainly traversable; and being necessary to be alleged, it must be given to a reasonable degree of certainty. Here the allegation in the first three counts is that on the — day of —, 1890, at the county of Randolph, state of West Virginia, the said defendant, without the consent or approval of plaintiffs, wrongfully and unjustly entered upon the lands and premises of the plaintiffs, to wit, a tract of 344 acres, more or less, of land, situated on Elk run, in Randolph county, West Virginia, and wrongfully, etc., cut down, etc., 100 poplar trees, etc. It is not called the close of any one, or designated as in the occupation of any one, or given any name or designation, nor metes or bounds of any kind, in whole or in part. Any one or all of these modes of designation would have sufficed, and could have been easily used in this case, as appears in this record, as it appears to be the land conveyed to Lewis Couger, Peter Couger, and John Couger by Peter Conrad, by deed dated October 29, 1853, on which Jeremiah Couger then lived. It was known and called the "Jere Couger Place" or "Jere Couger Land," described as on Elk river, at the "mouth of the Valley fork." It was so described in plaintiff McDoddrill's various deeds. The reasons are obvious for requiring, in actions in which the locus in quo is of their essence, that it should be designated in the declaration by name, by some of the abutments, or by some other proper description. And I have not been able to find any modern case under any system of pleading anywhere, or any form given, or any book treating of the subject, which would seem to justify so scant and indefinite a description of the place of the alleged trespass as we find in this declaration. I do not regard the fourth and last count as sufficient in this respect, for the description of the locus in quo is the same; the only difference is that in the fourth count it is averred

that "one Jeremiah Couger was in possession of, and had an estate for and during his natural life in, a tract of land containing 344 acres, more or less, lying on Elk river, in Randolph county, West Va., and the plaintiffs were and are now the owners of and vested with the immediate remainder in fee in said land." Here possession is only used to describe his estate, viz. that he was seised and possessed of the freehold for life, not that he resided on the land, as a description of the land itself. From the nature of such cases the locus in quo—the place—is material and traversable; therefore it cannot be omitted, but must be alleged with reasonable certainty of description. Code, c. 125, §§ 32, 34. The rule of pleading is that the declaration must allege what is required to be proved—that is, the facts constituting the cause of action, with such other allegations as are required for the right understanding of such material allegations—with such precision, certainty, and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea, that the jury may be able to give a complete verdict upon the issue, and the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises. See 1 Chit. Pl. 258.

It needs no bill of exceptions to make the overruling of the demurrer a ground of motion for new trial, for that fact already appears by the record; but as to other matters complained of as error, and as grounds of such motion, they must be made part of the record by bill of exceptions signed by the judge. At this stage of the case the point is made by the counsel for the defendants in error (plaintiffs below) that the bills of exception are not in such form, and the evidence is not so certified, as to make them parts of the record. This is not made good by an examination of the record, for it is not necessary that there should be a separate bill of exceptions taken and signed to each ruling or opinion of the court; such exceptions, though they may be numerous, may be incorporated into one bill of exceptions. *Snyder v. Railway Co.*, 11 W. Va. 14, 32. In this instance, four bills of exception, each complete within itself, are numbered and set forth seriatim, conjointly, in one bill, which is signed as the signature of each, and made part of the record. The court evidently anticipated something of this sort, and, following the analogy of a joint and several bond, made each one of the four bills several, and each one a part of every other. Then follows: "The court certifies the following evidence introduced upon the trial of the above cause." Then follows the evidence, and closes as follows: "And there was no other evidence introduced on said trial (except there was evidence tending to corroborate the plaintiff's evidence as to possession), and the same is certified and made part of the record in this cause,"—signed by the

judge presiding, which certificate is referred to in the bill of exceptions, and the order book notes the taking thereof, and making the same a part of the record. I do not see what else could be required to be done to make them parts of the record. See *Wickes v. Railroad Co.*, 14 W. Va. 157.

From the certificate of evidence the following facts appear: The tract of land on which the alleged trespasses were committed calls to contain 344 acres, is situate in Randolph county, on Elk river, at the mouth of the Valley fork. Peter Conrad, by deed dated 29th day of October, 1853, conveyed the same to Lewis Couger, Peter Couger, and John Couger in fee, subject to a life estate in their father, Jeremiah Couger, who was then living on it, and still lives on it. This deed recites that it is the same land which was conveyed to Peter Conrad by David Goff, commissioner, by deed dated 3d November, 1836, and duly recorded. Lewis Couger died unmarried, and without children, about 1861–65, leaving his father, Jeremiah Couger, his heir at law. About the year 1867 or 1868 plaintiff Charles McDoddrill, as he claims, brought suit against Lewis Couger's administrator and his heir, namely, his father, Jeremiah Couger, to enforce payment of a bond of \$100 against Lewis Couger's estate. Such proceedings were had that the circuit court of Randolph county, by decree entered on the 22d day of August, 1868, directed a sale of the reversionary interest of Lewis Couger in the tract of land in the bill and proceedings mentioned, and appointed Joseph A. Thompson a special commissioner to make such sale. On the 24th day of August, 1869, he made sale thereof to plaintiff McDoddrill for the sum of \$231, and reported the sale to court; and the court, by decree entered on the 9th day of November, 1871, confirmed the sale and appointed Thompson commissioner to convey the same to the purchaser upon payment of the balance of the purchase money. This being paid by McDoddrill, Thompson, as commissioner, by deed dated October 1, 1872, reciting these facts and decrees, conveyed the same to McDoddrill, which deed was duly admitted to record on the same day. Plaintiffs also proved by W. H. Wilson, clerk of the circuit court of Randolph county, and, as such, keeper of its records, that he had made careful and diligent search on three different occasions for the bill and papers in said cause in his office, and was unable to find them, but he had never seen the bill or papers at any time. The original decree entered on the first hearing is not introduced. The court permitted the deed from Commissioner Thompson and these three copies of decrees to be read in evidence on behalf of plaintiffs against the objection of defendant. This is defendant's ground of error No. 2.

Where a deed made under a decree by a commissioner or other authority is offered in evidence as a connecting link of the

party's claim of title to land it is necessary to introduce with it so much of the record of the suit in which such decree was made as will satisfactorily show that the persons having the legal title to the land conveyed were parties to the suit, and as will identify the land. *Waggoner v. Wolfe*, 28 W. Va. 820. In that case, as in this, it was proved by the clerk that the file of papers was lost. Here the recitals in the commissioner's deed made in pursuance of the decree state that the chancery suit was pending in the circuit court of Randolph county, in which the said Charles McDodril was plaintiff and John M. Phares, administrator of Lewis Couger, Jr., deceased, and Jeremiah Couger and Joseph E. McDodril were defendants. The oral evidence shows that the said Jeremiah Couger was the father and only heir at law of Lewis Couger, who died intestate, unmarried, and childless, seised and possessed in fee simple of an undivided third of the tract of land in question, subject to the life estate of his father, the said Jeremiah. The deed of Commissioner Thompson and the decrees were at that stage provisionally admissible in evidence as color of title, and were therefore competent evidence. Whether the legal effect of the deed was to transfer the legal title presents a different question. Plaintiffs also showed that some years ago Peter Couger, one of three grantees of this land by the deed of Peter Conrad, departed this life, leaving as children and his heirs at law the infant plaintiff Martha Couger, and also the following: George W. Couger, who conveyed his interest to plaintiff McDodril by deed dated the 28th day of January, 1891; Debby J., wife of James M. Jackson, who conveyed to McDodril their interest by deed dated the 15th day of March, 1890; Minerva A., wife of Joseph Daft, who conveyed to McDodril their interest by deed dated 13th day of May, 1889. So that plaintiff McDodril had all the interest of Peter Couger except that of his infant coplaintiff. Plaintiffs also introduced in evidence a deed of special warranty to himself from John Couger, dated the 17th day of March, 1890, for all his right, title, interest, claim, and demand in this tract of land, he being one of the three grantees from Peter Conrad. But John Couger had, by deed dated on the 19th day of January, 1889, duly acknowledged and admitted to record in the clerk's office of the county court of Randolph county, sold to George W. Curtin, a member of the defendant corporation, for the sum of \$40 in hand paid, 32 of the trees in controversy, and his father, Jeremiah Couger, the life tenant, and in one view the owner in fee of an undivided third, then in actual possession, by deed dated the 2d day of February, 1889, duly acknowledged and admitted to record on the 13th day of May, 1889, for the sum of \$56.25 sold to said Curtin 45 standing trees, the remainder of the subject of controversy. No time was fixed in either contract within which the trees

were to be cut and taken away; therefore they had a reasonable time. *Hanly v. Waterson*, 39 W. Va. 214, 19 S. E. 536. But full rights of way over the land were given, and the trees were afterwards cut and taken away by defendant and sawed, making 113,-864 feet board measure. These trees, as they stood on the ground, were shown by plaintiff's evidence to be worth from \$5 per 1,000, board measure, up to \$15 per tree; by defendant's evidence, to be worth from \$1.25 to \$1.50 per standing tree. Jeremiah Couger, the life tenant, was at the time in possession of the land under the Peter Conrad deed, and had been in actual possession under such claim continuously for at least 37 years, and since the death of his son, Lewis, as owner in fee of one-third of it. There was no evidence that the land had ever been granted by the commonwealth or state to any one.

The ground of error No. 3 is that the court overruled defendant's motion to exclude all the evidence of plaintiffs on the ground that no grant from the commonwealth was shown, no color of title ripened into a perfect one by adversary possession, no right of recovery on any ground shown on behalf of plaintiffs. We have already seen that the deed of Commissioner Thompson was admissible at that point in the case provisionally,—was admissible as giving color of title to his claim of ownership, and showing the nature, the boundaries, and extent of such claim. Whether it was sufficient to show a divesting of the heir of and the investing of the purchaser with the legal title will be considered under another head. In such refusal of the court there was no error, for the following reasons: (1) Plaintiffs and defendant derive title to the trees from a common source. In such case the plaintiff need not trace his title back beyond such common fountain, from which both claims of ownership emanate. *Bolling v. Teel*, 76 Va. 493; *Newell*, Eject. p. 485. (2) It is not a suit to try adverse titles to the land, but an action on the case by the remainder-man for waste committed, to the permanent injury of his interest in the freehold; the tenant for life being in actual possession. (3) Even as against the state, under our statute, the Couger title has been perfected by length of continuous actual possession under the Peter Conrad deed; for, by section 20 of chapter 35 of the Code, "every statute of limitation, unless otherwise expressly provided, shall apply to the state." And the estate of the life tenant, of which he is seised by such actual possession, and the estate in fee simple in remainder, constitute but one freehold in law; and therefore such possession of the life tenant, so far as it perfects his own title, inures in the same way to the benefit of those entitled in remainder. (4) And what plaintiffs sought for could only have been given, under the circumstances, by instruc-

tion given to the jury, or withdrawing the deed of the commissioner, and not by taking the case from them entirely, for there was no controversy that plaintiff McDoddrill was the owner by legal title of some undivided part of the land. And now, as already intimated, it becomes necessary to regard the life tenant, Jeremiah Couger, as invested, under the statute of descents, with the legal title to one-third of the remainder in fee, as the heir at law of his son, Lewis Couger, who died intestate, unmarried, and childless, about the time of the war, in 1862, and as one of the cotenants, for such, in the record as it stands, he appears to be. As to the bill and file of papers in the chancery cause entitled, at the head of the decree, "Charles McDoddrill, Complainant, v. Lewis Couger's Adm'rs, Defts. In the circuit court of Randolph county," the clerk of that court testifies that he has searched for it, and cannot find it; that on the 12th day of August, 1893, he had been clerk nine years, and had never at any time seen the bill or file of papers. The first decree is not produced. The one entered on the 22d day of August, 1868, begins; "This cause came on again to be heard upon the papers formerly read." Neither one of the three shows by recital or in any way that Jeremiah Couger was a party to the suit, or had anything to do with it; and the administrator does not represent the real estate. The defendant claims under the grant of timber made by Jeremiah Couger to George W. Curtin, so that the effect of the commissioner's deed to transfer the legal title from Jeremiah Couger, as the heir at law of Lewis Couger, deceased, is directly involved and put in issue in this suit. The deed of Commissioner Thompson does recite that Jeremiah Couger was a party defendant in the suit, but such recital in the deed, by itself, is clearly insufficient to show that Jeremiah Couger was a party to the suit, as against him and those claiming under him, where the transfer of the legal title is directly brought in question; and both, being strangers to the deed, are not bound by its recitals. To hold otherwise would be proving in a circle. He was a party to the suit; therefore he is privy to the deed. Being privy to the deed, its recitals are competent evidence against him and his grantee. The recitals being competent evidence, they state that Jeremiah Couger was a party to the suit; therefore the effect of the commissioner's deed was to divest Jeremiah Couger of the legal title. See *Wiley v. Givens*, 6 Grat. 277; *Walton v. Hale*, 9 Grat. 194; *Bower v. McCormick*, 23 Grat. 310, 327.

It is a well-established principle that in adversary proceedings in a court of equity for the sale of land nothing but the title which is vested in the parties to the proceeding can be sold; and a deed made under a decree in such proceedings carries with it only the title of the parties to the suit.

*Adams v. Alkire*, 20 W. Va. 480; *Waggoner v. Wolfe*, 28 W. Va. 820. See *Hall v. Hall*, 12 W. Va. 1. And where the fact whether one was a party to such suit is brought into question directly, and not simply on some collateral proceeding, a recital in the deed made by the commissioner, professing to convey the land in question, is in and of itself not sufficient evidence that the court directing the deed to be made had jurisdiction of the person. In this state the administrator does not represent the land; the heir at law must be before the court. The remarkable fact about this case is that the decrees introduced recite that the administrator of Lewis Couger is a party, but nowhere is there any mention of Jeremiah Couger, the heir at law, being a party. We would naturally look for it in the decree entered on the first hearing of the cause. The nonproduction of a copy of that decree justifies the inference that it would do the plaintiffs' title no good. Our records show that proceedings have been had in this state to sell by decree the real assets with no one before the court but the administrator, and such decrees have been held to be mere nullities as against the heir. Whatever be the cause, the nonproduction of a copy of the first decree cannot but attract observation. For a summary of the general principles governing jurisdictional inquiries, see *Freem. Judgm. § 124*; *Freem. Jud. Sales, § 8*; *Newell, Eject. § 87 et seq.*, p. 489. At this stage of the case, after the evidence was all in, and the court was called on to instruct the jury, this deed of Commissioner Thompson should have been withdrawn by the court as evidence, or at least the jury should have been expressly instructed as to its legal effect,—that is, that it did not operate as a transfer of the legal title; especially as the counsel for defendant had asked that it should be stricken out as evidence, or not be considered by the jury. That this was error to the prejudice of the defendant below (plaintiff here) plainly appears by what follows, for such exclusion ought also to have had the effect to limit to that extent the amount of plaintiffs' recovery; and because it showed that Jeremiah Couger, who now appeared to be one of the co-owners of the reversionary interest, had not been joined as a plaintiff; and the court instructed the jury, on motion of defendant, that unless all the co-owners were so joined there could be no recovery in such an action as this. These instructions given for defendant are as follows: (1) "The court instructs the jury that the burden is on the plaintiffs to establish their right by satisfactory proof, and, unless the plaintiffs have established their title to the satisfaction of the jury, the verdict should be for defendant." (2) "The court further instructs the jury that, unless all the co-owners of the reversionary interest join as plaintiffs, there can be no recovery in such action as this."

Of course, these instructions would have been properly modified had the court been led to take the above view of the legal effect of the commissioner's deed.

Defendant's fourth assignment of error is based on the giving by the court on motion of plaintiffs, and against the objection of defendant, the following four instructions: "No. 1: The court instructs the jury that the deed from Peter Conrad to Lewis Couger, Peter Couger, and John Couger did not confer upon Jeremiah Couger the right to cut and remove from the land therein mentioned the marketable timber thereon, or to sell and dispose of the same for the purpose of removal from said land; and that the contract between Jeremiah Couger and George W. Curtin did not confer upon the said Curtin, or any one claiming under him, the right to cut and remove from said land any of the marketable timber thereon. No. 2: The court instructs the jury that one tenant in common or joint tenant has no authority, without the consent of his cotenants, to commit waste on the lands owned by them, by cutting and removing therefrom the marketable timber thereon, or to authorize another so to do. No. 3: The court instructs the jury that a person holding a life estate in land has no right or authority to cut or remove therefrom the valuable and marketable timber thereon, nor can he confer such authority upon a stranger without the consent of the persons owning the immediate remainder in fee; and the persons owning the immediate remainder in fee are not authorized to cut and remove from said land said timber before the life estate is terminated, without the consent of the person owning the life estate. No. 4: If the jury believe from the evidence that the defendant cut and removed and converted to its own use any of the marketable timber on the land in the declaration mentioned, and that at that time the plaintiffs were the owners in fee of the said land, subject to the life estate therein of Jeremiah Couger, then the defendant was not authorized, by the contract read in evidence between Jeremiah Couger and George W. Curtin and John Couger and George W. Curtin, to cut and remove the said timber without the consent of the plaintiffs, and, if the same was done without consent, the plaintiffs are entitled to recover from the defendants such damages as they have sustained by reason of such cutting and removal of timber; and in ascertaining such damages the jury have the right to take into consideration not only the value of said timber, but the permanent injury occasioned to the said land by reason of the cutting and removal thereof." These instructions, as we see, cover the point that the evidence tended to raise of waste on the part of a life tenant or his grantee as against the remainder-men who were cotenants in fee, and of waste committed by such remainder-men, being cotenants, as between each other; but not the case of a life tenant of the whole and a co-owner of an undivided third

of the immediate remainder in fee. If the learned judge who tried the case below had been able to give the point involving the legal effect of the deed of Commissioner Thompson more mature consideration, he would have been led to modify these instructions also so as to meet that aspect of the case. He treated standing timber trees as part of the realty,—this, as a general rule, is well settled (*Schulenberg v. Harriman*, 21 Wall. 64),—and correctly instructed the jury that the life tenant had no right to cut and remove such timber without the consent of those in remainder. The tenant for life has the common right of all tenants to cut wood for fuel to burn in the house, for the making and repairing of all instruments of husbandry and of fences, but not to sell the timber, although the proceeds be applied to repairs. See 2 Minor, Inst. pp. 100, 101; Lomax, Dig. p. 60; Williams, Real Prop. (Am. Notes, p. 148; 17th Internat. Ed.) p. 127. Still the land in question was for the most part in woods. It was certainly intended that the life tenant might clear, for the purpose of farming, to any extent he saw fit, provided he left wood and timber enough for the permanent use of the farm. See *Jackson v. Brownson*, 7 Johns. 227. The deed conveying the land has this in conclusion: "And it is understood strictly that Jeremiah Couger is to have the use and control of said land during his natural life, and then to go to the aforesaid Lewis, Peter, and John Couger." In this state the law of waste must be so viewed as to accommodate it to circumstances of a new and unsettled country. *Findlay v. Smith* (1818) 6 Munf. 134. See *Macaulay v. Land Co.* (1843) 2 Rob. (Va.) 507, 527. If the life estate were ended, each and every cotenant would have the right to take possession peaceably, and have the reasonable enjoyment thereof in some of the ordinary methods of reaping profits from property of like character under like circumstances. *Freem. Coten.* § 251; *Hawley v. Clowes*, 2 Johns. Ch. 122. Thus, if timber standing on the land is of proper size and condition for advantageous sale, either of the cotenants, it is said, may lawfully proceed to cut and sell it; for in so doing he makes no unusual use of the real estate of which he is a tenant in fee. *Freem. Coten.* § 251. *Baker v. Wheeler* (1832) 8 Wend. 505, 24 Am. Dec. 66, and note, was an action of trover, where it is held, inter alia, that license by one tenant in common to a third person to cut timber on the common land is good, and gives such person title to the trees cut. The note is quite a full discussion of the measure of damages in such cases. *Bradley v. Boynton* (1843) 22 Me. 291; *Alford v. Bradeen* (1865) 1 Nev. 230; *Hihn v. Peck* (1861) 18 Cal. 641, on injunction affirmed in *Carpentier v. Webster*, July 3, 1868, not reported. As to quicksilver mine, see *McCord v. Mining Co.* (1883) 64 Cal. 135, where there is a full discussion of the general subject. One tenant in common cannot maintain an action on the

case in the nature of waste against another tenant in common in possession of the whole, having a demise of the moiety from the first, for cutting down trees of a proper age and growth for being cut. *Martyn v. Knowllys* (1790) 8 Term R. 145; 1 Taunt. 241. The mere act of selling the standing timber was not waste. They were sales and grants by deed of some interest in the realty, and, being duly recorded in the proper county, had the effect of notice to all subsequent purchasers; so that such purchaser took it subject to such rights, whatever they may be. The subsequent cutting of the timber constituted the waste, if any, which involves different questions; and, in any event, the plaintiffs would be entitled to recover only their proportionate part of the damages, measured by the quantity of their interest in the timber cut and carried away. See *Freem. Coten.* § 356; *Carpentier v. Small*, 35 Cal. 348; *Cain v. Wright* (1858) 5 Jones (N. C.) 282, 72 Am. Dec. 551. In fact, I think this is included in the meaning of our statute on the subject of waste between cotenants (section 2 of chapter 92 of the Code). The jury evidently included in their verdict damages for all and the whole of the trees cut, in the interest of Jeremiah Couger and of John Couger, who had sold the trees to defendants.

The propriety of limiting such recovery of the cotenant to an amount in damages proportionate to his interest in the land may receive some further indirect confirmation from section 14 of chapter 100 of the Code, which, among other things, provides that an action of account may be maintained by one joint tenant, or tenant in common, or his personal representative, against the other, for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common. "And if the property admits of use and occupation by several, and less than his just and proportionate share of the common property to the occupying cotenant, who in no way hinders or excludes the others, he is not accountable to his cotenants for the profits of that portion of the property owned by him within the meaning of this statute." *Dodson v. Hays*, 29 W. Va. 577, 2 S. E. 415. But here the estate for life was not ended, and an undivided third interest in the immediate remainder in fee had, by our statute of descent, come to the father, the tenant for life. I take for granted that by operation of the law of merger an undivided third of the life tenant's freehold was thereby enlarged to a fee; but that such union of such part of his particular estate with such part of the immediate remainder in fee came to him by descent did not operate in any way to defeat, impair, or otherwise affect his own particular estate or the remainder. If it had the effect to merge the life tenant's whole legal estate, then it would be to be held for the use of the life tenant for life. See section 13, chapter 71, of the Code; *Scott v. Scott* (1808) 18 Grat.

150, 160; *Wiscot's Case* (1599) 2 Coke, 61. *Crump v. Norwood*, 7 Taunt. 362, goes to sustain the first view, and it would not affect the creditors of Lewis Couger, deceased, otherwise than as provided by section 5 of chapter 86 of the Code, making the heir liable to those entitled as creditors for the value thereof, with interest; and we see that he did by deed sell to defendant part of the standing timber trees here in controversy, which might have some bearing upon the case as to the remedy, and as to what would have been his liability, and what is the liability of his vendee growing out of his relation as life tenant to the owners of the remainder in fee, as governed by the doctrine of waste.

The fifth ground assigned is overruling defendant's motion to set aside the verdict and grant a new trial for the errors already assigned, specifying them, and also as contrary to law and the evidence. This was followed by a motion in arrest of judgment, made and overruled at the same time. "Arrests of judgment arise from intrinsic causes appearing on the face of the record, \* \* \* as where the verdict materially differs from the pleadings and issue thereon, \* \* \* or if the case laid in the declaration is not sufficient to found an action upon"; and this has already been considered in discussing the demurrer. "And it is an invariable rule that whatever matter of law is alleged in arrest of judgment must be such matter as would, upon demurrer, have been sufficient to overturn the action or plea." 3 Bl. Comm. 394. The verdict for the plaintiffs is general on the plea of not guilty. There is no special finding that differs from the pleadings and issue; so that in this case there was no ground for motion in arrest of judgment that was not covered by the motion for a new trial, and also by the demurrer. This fifth ground of error need not be further discussed, for we have already seen that the demurrer to the declaration should have been sustained, not because it appears upon its face that one of the plaintiffs is an infant, therefore cannot sue,—for, as to the first three counts, we cannot presume that she has a guardian who has been appointed and given bond as required by law before he is entitled to the possession of his ward's estate, and as to the fourth and last count we are inclined to think that she can bring an action on the case for damages to her estate in remainder,—but because the locus in quo, the place where the act was done, is a material and traversable allegation, and should, therefore, be alleged with some reasonable degree of certainty and definiteness of designation. We have also seen that, as the evidence stood at its close, it was error to leave the deed of Special Commissioner Thompson to plaintiff C. McDoddrill in evidence before the jury at all, or at least without having instructed them that it did not have the effect of transferring the legal title, and also without having adapted the other instructions given to such a state of facts. Therefore the judgment



complained of must be reversed, and, proceeding to give such judgment as the circuit court ought to have given, the verdict is set aside, and the cause remanded for a new trial.

(44 S. C. 557)

JACOBS v. GILREATH et al.

(Supreme Court of South Carolina. May 16, 1895.)

**DISMISSAL OF APPEAL—REINSTATEMENT.**

When an appeal is dismissed by the clerk for failure to file the return within the prescribed time, and it satisfactorily appeared that the failure was owing to the loss of one of the papers, for which appellant was in no way responsible, additional time will be allowed him to file a new case.

Appeal from common pleas circuit court of Greenville county.

Motion by Mattie Gilreath and another to reinstate an appeal from a judgment in favor of R. H. Jacobs. Granted.

W. H. Irvine and B. M. Shuman, for appellants. James I. Earle, for respondent.

**PER CURIAM.** This is a motion to reinstate an appeal which has been dismissed by the clerk of this court under Rule 1, for failure to file the return within the prescribed time. The clerk was right on the showing made before him, and we do not understand that this was questioned; but this motion is now made to reinstate the appeal so dismissed, on the ground that the failure to file the return on proper time, under the agreement between counsel, resulted from the loss of one of the papers—master's copy of the testimony—which by such agreement were to constitute a part of the "agreed case." We think appellant was not in default. He expected, and had a right to expect, that he would find this paper in the clerk's office. The respondent contends that the statement as to loss made by the clerk is not competent, because not sworn to by the clerk, but only by Mr. Irvine, to whom such statement was made; but we think Mr. Irvine's affidavit is competent to show that application was made by him to the proper custodian, and that he failed to get the paper on such application. Our conclusion is that the agreement was carried out because of appellant's failure to procure a copy of the testimony from the proper officer when demanded. Under these circumstances, we are willing to let appellant supply this missing part of the record if he can do so. Therefore we will permit appellant, within 20 days from date, to serve a "new case"; the practice prescribed by the rules as to service, amendments, and settlement being observed. If, however, respondent is willing to have the appeal heard on the "case" as now prepared and printed, we will accord to him that privilege, and let the case go to the foot of the docket of this circuit.

Respondent having declined to agree to a hearing on the papers as now prepared, the court signed the following order:

It is ordered that the appellant be, and she is hereby, allowed to reinstate her appeal, provided that, within 20 days from date thereof, she shall file, with the clerk of this court, the return required by the rules of this court, and that she shall within the same period of time prepare and serve respondent's attorney with a copy of her proposed "case" and exceptions for hearing in this court, just as if no agreement had been heretofore entered into, and that respondent may, within the prescribed time, prepare and serve any amendments, which, if accepted, shall be incorporated in the "case," but, if not accepted, then the "case" shall be settled in accordance with the rules and practice of this court, and the case may be docketed for a hearing at the next term of this court.

(44 S. C. 81)

NEW ENGLAND MORTGAGE SECURITY CO. v. BAXLEY et al.

(Supreme Court of South Carolina. April 25, 1895.)

Petition for rehearing. Denied.

For former opinion, see 21 S. E. 444.

McIVER, C. J. On hearing the application of the respondent Martha A. Baxley for a rehearing of this case, and for a stay of the remittitur herein, and on consideration thereof, it is ordered that the remittitur herein be, and is hereby, stayed, and shall not be sent down until the further order of this court.

(May 14, 1895.)

**PER CURIAM.** After a careful consideration of this petition, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence there is no ground for a rehearing. It is therefore ordered that the petition be dismissed, and the stay of the remittitur heretofore granted be revoked.

(43 S. C. 318)

MILLHOUSE et al. v. SALLY et al.

(Supreme Court of South Carolina. April 17, 1895.)

**APPEAL—REMITTITUR.**

There is no ground to recall a remittitur sent by the clerk of the supreme court to the clerk of the circuit court on April 1st when the opinion was filed March 21st.

Motion to recall remittitur. Denied.

For former opinion, see 21 S. E. 268.

McIVER, C. J. This is a motion made by appellants for an order recalling the remittitur, so that they may be enabled to present a petition for a rehearing of the cause by this court. The opinion was filed on March 21st

in the office of the clerk of this court. On Monday, April 1st, the clerk sent down the remittitur to the clerk of the circuit court. On Tuesday, April 2d, application was made to the Chief Justice for an order staying the remittitur, and such an order was signed, the Chief Justice being under the impression that the opinion had been filed on March 22d, but stating to counsel at the time that it might be that the order was too late. Telegraphic notice of this order was received by the clerk on the same day, but this was one day after the remittitur had been actually sent down. It is thus manifest that the clerk committed no error in sending down the remittitur on Monday, April 1st, the opinion having been filed on March 21st. There is no ground, therefore, for granting this motion to recall the remittitur. But, by reason of the earnestness of counsel and the importance of the case, we have carefully looked into the papers, and fully considered the grounds upon which the petition for rehearing is based, and we are satisfied that nothing is stated in the petition to warrant us in granting the petition even if it were properly before us. We, therefore, are satisfied that no harm has resulted to appellants by reason of the delay in obtaining order to stay remittitur. The motion must be refused.

(43 S. C. 538)

**BICKLEY v. COMMERCIAL BANK OF COLUMBIA.**

(Supreme Court of South Carolina. April 15, 1895.)

**ACTION AGAINST BANK — CERTIFICATE OF DEPOSIT — SIGNATURE BY PRESIDENT — PAROL EVIDENCE — ADMISSIBILITY TO SHOW PRINCIPAL — AUTHORITY OF PRESIDENT.**

1. On an issue as to the liability of a bank on a certificate of deposit signed by a former president as "manager," without naming the bank, evidence that a certain person was requested to solicit deposits was admissible, the directors having authorized the president to receive deposits and pay interest thereon.

2. In an action against a bank on a certificate of deposit signed by one I. as "manager," on the ground that I. acted for the bank, of which he was president at the time, wherein defendant claims that I. acted as the manager of a different principal, and that plaintiff so understood when he accepted the certificate, parol testimony is competent to show for what principal I. signed the certificate. 17 S. E. 977, distinguished. McIver, C. J., dissenting.

3. It is within the court's discretion to permit the reading of answers to cross-interrogatories showing what the witness swore to in another cause in regard to the same matters.

4. Remarks of counsel will not be reviewed on appeal, if no objections thereto were made on the trial.

5. Where it was necessary to prove, not only that the president of a bank had authority to act for the bank in executing an instrument, but that he also made fraudulent representations in respect thereto, a charge that the instrument was prima facie not the contract of the bank, unless the jury were satisfied that its president had the right to act for the bank, did not tend to lead the jury to believe that it was unnecessary to prove fraud on the part of the president.

6. In an action to charge a bank with a certificate of deposit signed by one I., it was not error to modify a request to charge that evidence that the money was deposited by I. to his credit in defendant bank as manager of another concern would not sustain the action, unless I., as president, was held out by defendant as clothed by it with authority to receive deposits, and the deposit was made with defendant bank, by adding thereto that if I. had no connection with defendant bank, and fraudulently got the money from plaintiff and deposited it in defendant bank, defendant would be liable, not in law, but in equity.

7. Where a bank authorizes the establishment of a savings department paying interest to depositors, and no particular official is charged with the management thereof, if the president holds himself out to others as in control thereof, and such others deposit their money with him as in charge of such savings department, the bank is liable therefor.

8. A request to charge on the meaning to be given answers to interrogatories calls for a charge on facts, which cannot be given.

Appeal from common pleas circuit court of Richland county; T. B. Fraser, Judge.

Action by J. D. Bickley against Commercial Bank of Columbia on a certificate of deposit. Judgment for plaintiff. Defendant appeals. Affirmed.

Lyles & Muller, for appellant. J. S. Verner and Abney & Thomas, for respondent.

POPE, J. This action has been before this court on appeal once before. The decision may be found in 39 S. C. 281, 17 S. E. 977; and by that decision a new trial was ordered. The complaint in the case was in three paragraphs, whereof the first alleged the corporate character of the defendant; the second alleged that on the 21st day of October, 1890, the plaintiff deposited with the defendant, and the defendant received from the plaintiff on deposit, the sum of \$800, which the defendant agreed to pay to the plaintiff's order one year after said date, with interest thereon at the rate of 6 per cent. per annum, payable semiannually from said date; and the third alleged that said sum of \$800, and the interest thereon, was now due by the defendant to the plaintiff, that demand had been made therefor, but the defendant refuses to pay the same or any part thereof. When the case reached the circuit court, a motion was made by the plaintiff to amend his complaint. This motion having been granted, the plaintiff served his amended complaint, wherein he retained the first two paragraphs of the original complaint, but, having omitted the third paragraph, alleged as follows: "(3) That, before and at the time said sum of money was deposited in said defendant bank by this plaintiff, one C. J. Iredell was the president of said bank, and the agent thereof, to receive deposits and issue interest bearing certificates therefor, and, as such, advertised that said bank would receive deposits and issue interest bearing certificates as evidence of such deposits. (4) That the plaintiff, with knowledge of said advertise-

ment, went to said bank's place of business on the 21st day of October, 1890, in the city of Columbia, S. C., for the purpose of depositing said sum of money, and made special inquiries of said Iredell with reference to said bank receiving deposits, and the rate of interest it allowed thereon, and the said Iredell represented to the plaintiff that he was authorized by said bank to receive deposits for it, and give interest thereon at the rate of 6 per cent. per annum, and induced the plaintiff to deposit his money in said bank. (5) That the plaintiff, relying upon the representations of said Iredell and believing that he was depositing his money in said bank, and that Iredell had the authority, as he represented, to receive the same, and relying upon the credit of said bank solely, and upon its ability to repay him, delivered the said sum of money to Iredell, who deposited it in said bank, and gave this plaintiff a certificate, of which the following is a copy: 'Columbia, S. C., October 21, 1890. I hereby certify that James D. Bickley deposited with C. J. Iredell, manager, eight hundred dollars, payable to his order, properly indorsed. It is agreed that said sum of money shall remain on deposit for one year from the date thereof; that interest on this amount shall be at the rate of six per cent. per annum, payable semiannually. C. J. Iredell, Manager.' (6) That after the plaintiff had parted with his money, and the same had been deposited in said bank by said Iredell, the president and agent of said bank as aforesaid, the said Iredell fraudulently induced the plaintiff to receive said certificate as the certificate and obligation of said bank, and was in proper form, and as good as a printed certificate of said bank; that it was valid and binding upon the bank, and it was responsible for it, and would pay the same; the plaintiff, relying upon such representation, and believing it to be true that the said paper was the certificate of the defendant, and was in proper form and valid, took the same. (7) That before the beginning of this action, and after said deposit was due and payable, the plaintiff presented said certificate to said defendant, in Columbia, S. C., for payment, and the same was refused by the then president, W. G. Childs, who was the successor of said Iredell, upon the ground that said certificate was not the obligation of said bank, and that said bank was not responsible for it. (8) That said deposit was at the beginning of this action, and is now, in the possession of the defendant bank as the property and deposit of this plaintiff, and the plaintiff alleges that, if the said certificate is not the obligation of said deposit bank, then this plaintiff was induced, by the false and fraudulent representations of said Iredell, the president and agent of said bank, as hereinbefore alleged, to deposit the said sum of money with the said bank, and to receive the said certificate as the evidence

thereof; and the said bank, having now in its possession the said deposit so fraudulently received, is liable to the plaintiff therefor, and there is now due the plaintiff thereon the sum of \$800, with interest from the 21st day of October, 1890, at the rate of six per cent. per annum, payable semiannually." And the plaintiff prayed for judgment for \$800 and interest and costs.

To this amended complaint the defendant bank interposed its answer, wherein, after admitting its corporate capacity at the times alleged, and that C. J. Iredell was its president at such time, denied each and every other allegation. Thereafter, at the spring term, 1894, of the court of common pleas for Richland county, the action came on for trial before his honor, Judge Fraser, and a jury. After the plaintiff closed his testimony, the defendant moved for a nonsuit, which was refused. Defendant then introduced testimony, to which the plaintiff replied. Before the judge delivered his charge, certain requests to charge were made by defendant. Some of these requests the circuit judge refused to charge, and some were charged in a modified form. The jury returned a verdict for the plaintiff, and, after judgment was duly entered thereon, the defendant appealed from the same, and in his ground of appeal he assails certain rulings of the circuit judge as to the competency of some testimony; also his refusal to grant the motion for nonsuit; also his action on requests to charge; and, finally, that he erred in failing to grant the motion for a new trial.

We will consider the grounds of appeal in their natural order.

As to the alleged errors of the circuit judge in admitting certain testimony:

(a) "Because the witness T. J. Gibson was allowed to testify against the objection of the defendant that he has been requested to solicit deposits for the defendant bank." Now, the defendant admitted in its answer that Mr. Iredell was its president at the period of time when the plaintiff alleged he made the deposit in question. The production of its by-laws showed that the directors of the defendant bank had authorized the president to receive deposits and pay interest thereon. The duty of the president of any corporation is to enforce the directions of its board of directors, if they are legal. Hence, if the president of the bank saw proper to employ means such as those of a soliciting agent for deposits to obtain such an advantage, and if it would throw any light upon the question as to whether the bank sought to obtain deposits for which interest was to be paid, it seems to us that the testimony of Mr. Gibson was, in that view, competent. We therefore overrule this exception.

(b) Exceptions from b to h, inclusive (2 to 7, inclusive), raise this question, whether it is competent by parol testimony to show that the contract sued on was the contract

of the defendant bank. An exact copy of this alleged certificate of deposit is set out in the complaint already incorporated in this opinion, and therefore need not be reproduced just now. An inspection of that instrument will disclose the fact that the defendant's name nowhere appears there, but that it is in its body, and the signature to the certificate is that of "C. J. Iredell, Manager." In the former decision of this court in this case the court held: "The cases cited to show that a receipt may be explained by parol evidence have no application, as the paper in question, an ordinary certificate of deposit, has none of the elements of a receipt, but, on the contrary, is more like a promissory note; for it is certainly an obligation to pay a specified sum of money at a time stated, with interest at a specified rate. In *Miller v. Austen*, 13 How. 218, a paper practically identical in form with this was held to be a note, upon which the indorser was held liable, as in case of an ordinary note. So that, as a beginning to this investigation, the character of this certificate is fixed. It will be remembered that by the pleading of the plaintiff it is contended that this certificate of the deposit is that of the defendant, but the defendant denies this proposition; thus an issue of fact is squarely presented. The plaintiff admits that the certificate is not signed by the president or cashier of the defendant bank as such officers, and also that there is no reference to the defendant bank in the body of the certificate or the signature thereto. He contends, however, that his money was paid to C. J. Iredell, who was then president of the bank, in the building devoted to the business of the bank, where its officers had their offices and their desks, where money was deposited in said bank; and that this money, after being paid over to C. J. Iredell, was by him at once paid into the bank; and that the certificate in question was written out by C. J. Iredell after he had paid over the money into the bank; and that, when the plaintiff was handed the certificate so prepared by the said Iredell, he complained to him that it was not in the usual printed form of certificates of deposit, and to this remonstrance of the plaintiff the said Iredell replied that such printed forms were out, but that the bank was responsible for the deposit, and would pay it; that he contracted with Iredell, as president of the defendant bank, touching said deposit, and that the certificate issued to him by said Iredell as president of the bank, and though signed by "C. J. Iredell, Manager," it is the certificate of the bank, and that he should be allowed to show such state of facts. It will be noticed that Iredell does not pretend that it is an obligation personal to himself. He styles the transaction as one with himself as "manager." For awhile in the history of this state—we apprehend it must have been owing to the strictness observed in the

courts of law as opposed to that of equity—when the principal was disclosed in the obligation signed by the agent a recovery could not be had against the principal thereon. *Fash v. Ross*, 2 Hill (S. C.) 294, and some cases followed in its wake. However, in the case of *Robertson v. Pope*, 1 Rich. Law, 503, it was settled that, when the principal was disclosed in the obligation made by his agent, the principal was in law responsible on the contract. In *Tarver v. Garlington*, 27 S. C. 107, 2 S. E. 846, the note sued on in that case was as follows: "\$460. On the first day of November next I promise to pay Samuel J. Taver or order four hundred and sixty dollars, for value received, with interest from date at the rate of seven per cent. per annum. Witness my hand and seal this March 22, 1894. S. D. Garlington, Agent." Action was commenced by Tarver against Mrs. Garlington and George F. Young, alleging that the said note was made by them through S. D. Garlington as their agent. The former did not answer, but George F. Young appeared in the action, and demurred, on the ground that the plaintiffs' complaint failed to state a sufficient cause of action. Under the rules for the construction of pleadings, said Young thereby admitted the truth of the facts as alleged in the complaint. The circuit judge sustained the demurrer, but this court, on appeal, reversed such judgment, holding that Young, having admitted that S. D. Garlington had made the contract as his agent, would be held bound by the same rule of law that governs these cases where the agent in the contract itself discloses who his principal is; and in the opinion of the court it is intended that there may be exceptions to the rule that, when the contract as written fails to disclose who is the principal, no recovery can be had against such principal thereon. In the case of *Barkley v. Tarrant*, 20 S. C. 574, this court deemed the name of the payee in a sealed note, which sealed note failed to disclose the name of any payee, to be proved by parol testimony. In the case of *Rapley v. Klugh*, 40 S. C. 134, 18 S. E. 630, this court allowed the terms the "R. H. Wardlaw homestead" and "and others" in a deed to be proved by parol testimony. In the case of *Willis v. Hammond* (S. C.) 19 S. E. 310, this court held that when a written contract fails to express the consideration, or uses terms requiring explanation to be understood and applied, or is only a part of a general whole, it is competent to supply the missing facts by evidence of all the precedent oral arguments of the parties. Now, in the case at bar, if you depend upon the contract—certificate of deposit,—which states that the plaintiff deposited \$800 with "C. J. Iredell, Manager," and is signed by "C. J. Iredell, Manager," how can you ever learn of whom or what he (Iredell) is "Manager"? It is true, sometimes it is held that the word "Agent," or any other word imply-

ing agency, when added by the maker of a note, is treated as surplussage, and the contract is held to be that of the person signing his name to the obligation. But we apprehend that such a conclusion in a court of justice is always based upon the fact that no agency exists. Here the issue is squarely made by the plaintiff that Iredell acted in the transaction for the defendant bank, while the defendant seeks to establish that Iredell acted in the transaction as the manager of a different principal than the bank, and that the plaintiff so understood at the time he accepted the certificate of deposit now in question. We are obliged to hold that parol testimony is competent in such a case to show for what principal Mr. Iredell signed such certificate as "Manager"; and that this question of fact is one as to agency, and must be passed upon by the jury. But the defendant insists that this question has been decided adversely to the plaintiff by this court in its former decision in this case. It was for the purpose of showing how differently the pleadings now before the court were from those in the first hearing that we reproduce the allegations of the amended complaint. Besides, the chief justice, who rendered judgment in the first hearing in this court of this case, was exceedingly careful to preserve the rights of the parties. At page 281, 39 S. C., and page 977, 17 S. E., he said: "It is very possible that, if the parol testimony in question had been offered to show of what or for whom C. J. Iredell was manager, it would have been competent (inasmuch as the terms of the paper did not disclose the fact), under the cases of *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326; *Baldwin v. Bank*, 1 Wall. 234; *Ligon v. Irvine*, 1 Rich. Law, 502; *Dupont v. Ferry Co.*, 9 Rich. Law, 255. But here the evidence was offered for no such purpose. On the contrary, it was offered for the purpose of showing that the contract upon which the plaintiff sued was with an entirely different person from the one named in the paper delivered to the plaintiff as evidence of said contract; the paper showing that the contract was made with C. J. Iredell, manager, while the parol testimony objected to was intended to show that it was made with the chartered bank through its president, and that, too, without the slightest evidence tending to show that the president had any authority whatever to make such a contract, or had ever in any instance signed his name as manager of the chartered bank, or had in any way ever been designated as such." (Italics ours.) The testimony offered showed that in several instances the president received the money to be deposited in the defendant bank, and gave certificates therefor bearing 6 per cent. interest thereon, payable semiannually, and that the defendant bank paid such certificates. The by-laws of the bank showed that Mr. Iredell, as presi-

dent, was authorized to receive deposits on interest. The testimony of Mrs. Bickley and Mrs. Jumper tended to show that Mr. Iredell, as president of the defendant bank, held out to them his agency for the bank in their transactions with the bank touching this deposit of \$800. These exceptions must be overruled.

The next division of the appeal comprehends the two questions relating to the denial of the motion for nonsuit.

1. The appellant suggests, as the certificate of deposit negatives the idea of a contract between the plaintiff and defendant, and there being no proof of misrepresentation or fraud on the part of the defendant bank or any one for whom it was responsible in that respect, therefore the motion should have been granted. The rule is fixed that, if there exists any competent testimony responsive to the issues in a cause, the action must be submitted to the jury, for it is no part of a judge's duty to decide upon the sufficiency of the testimony. When, therefore, it appears, as there appears in this cause, that the question of agency or no agency of the defendant in the certificate of deposit signed by "C. J. Iredell, Manager," is squarely presented by testimony thereon submitted by the plaintiff, the motion for nonsuit ought not to be granted.

2. Again, the appellant suggests that the presiding judge, in refusing the nonsuit, was controlled by the idea that the term "manager" was synonymous with "agent," and that this was error. The law wisely seeks substance, and not form. It matters little how one, who is acting in a business matter for another who is his principal, characterizes such agency. The question is, in what capacity did he act? The technical name for such agent may be "president," "cashier," "teller," "manager," "agent," etc.; but if, in the discharge of an authorized act for his principal, the person who acts for such principal mistakes or misstates his technical name as to his capacity to act for his principal, such mistakes or misstatements will not be allowed to prejudice the rights of third persons against the principal. This is the principle of law we understand the circuit judge had in his mind when he used the language complained of. From this standpoint, the circuit judge did not err.

3. We may dispose of exception 10 in this connection, for it seems that, while the testimony of defendant's witness Mr. C. J. Iredell was being taken by commission, the plaintiff, in his cross-interrogatories 3, 5, 7, and 9, embodied page after page of questions of counsel and answers of this witness in another action pending in court; and now the appellant claims "that it was not competent in such manner to incorporate the evidence of the witness in another cause into this cause." It does not seem to us that we should lay down as law a rule which may tend to cripple a party who may wish, on a

cross-examination, to show what the witness has sworn in another cause on the same matters, to test, it may be, his credibility. The circuit judge is wisely vested with considerable discretion in the examination of witnesses, but, inasmuch as he did not view the matter complained of as the appellant does, we are not inclined to hold that the circuit judge was in error in this matter. This exception is overruled.

4. The eleventh exception complains that the plaintiff's counsel were allowed to comment upon the said cross-interrogatories Nos. 3, 5, 7, and 9, as the testimony of the witness C. J. Iredell, after, in his replies thereto, he had not admitted or denied the same. Now, in the "case," we find not the faintest allusion to any objection by defendant's counsel to any matter embraced in the argument of plaintiff's counsel. The "case" states: "At the conclusion of the argument, the presiding judge delivered the following charge." Surely, at this day, it is not necessary to say that this court will refuse to consider on appeal a matter to which the attention of the circuit judge was never called, or upon which he made no ruling one way or the other. This exception is overruled.

The third division of the grounds of appeal may be said to consist of that exception relating to the refusal of the circuit judge at the close of argument to dismiss the complaint. The exception is in these words: "(12) Because, after the close of the testimony, in the argument of counsel, his honor, the presiding judge, refused the motion of defendant to dismiss the complaint, because the evidence had established the fact that there was no cause of action on the part of the plaintiff against the defendant." In his argument the defendant treats this twelfth ground of appeal as a motion for a nonsuit. It is usually the case, in jury trials, that a motion for nonsuit follows immediately after the close of plaintiff's testimony. The appellant lays stress upon the character of the certificate of deposit,—the fact, as he urges, that by its very terms it negatives any contract between plaintiff and defendant,—as his ground for this motion for nonsuit. Having already considered this matter in disposing of the eighth ground of appeal, we will content ourselves with the observation that we are still satisfied with the views there expressed. We overrule this exception.

The last division of appellant's exceptions will embrace those relating to the alleged errors of the circuit judge in disposing of the defendant's request to charge. The thirteenth exception is as follows: "Because his honor, the presiding judge, refused plaintiff's seventh request to charge, to wit: 'That the instrument sued on is conclusive evidence that the contract was not made with defendant bank, unless it is proven to the satisfaction of the jury that the plaintiff

was induced to take it by the fraudulent representations of C. J. Iredell,'—but modified the same by adding thereto: 'Well, that which is *prima facie* is always conclusive, unless you remove it. Therefore it is conclusive evidence it was made with C. J. Iredell, and not with the bank, unless you are satisfied that Iredell had the right to act for the bank. With these explanations, that proposition of law is correct,'—defendant urging as error that the said modification was calculated to lead the jury to believe that it was not necessary for the plaintiff to prove that there was fraud or misrepresentation on the part of the witness C. J. Iredell, but, upon simply proving that he had authority to act for the bank, they might find for the plaintiff." After reflection, we are not able to agree with the appellant that the modification of the request to charge, as made by the circuit judge, would, or might, cause the jury to believe that it was not necessary for plaintiff to prove that there was fraud or misrepresentation on the part of the witness C. J. Iredell, but that, if the plaintiff proved that Iredell had authority to act for the bank, it would justify the jury in rendering a verdict for the plaintiff. A judge, like any one else, in law must be judged to have meant what he actually said, or what is naturally and directly deducible from what he did say. What he did say was that *prima facie* the certificate of deposit in this case was to be held as that of Charles J. Iredell as an individual until such *prima facie* view of it was removed by testimony here offered that Charles J. Iredell acted for the bank (defendant) in making the certificate of deposit. There is no duty in a judge to charge upon abstract propositions of law; he must mean them to fit the facts in testimony. This testimony did not stop at simply stating that Mr. Iredell was authorized by the bank as its president to receive deposits, but that he, as such president and under such authority, did receive deposits, not only for the plaintiff, but from other depositors in said bank. The circuit judge nowhere restricted the jury to an inquiry as to whether the bank had merely authorized its president, Mr. Iredell, to receive deposits. Let the exception be overruled.

The fourteenth exception was: "Because his honor modified plaintiff's seventh request to charge, by indicating his opinion that it did not have much to do with the case." There is nothing to indicate that the judge ever uttered one word that could be tortured into an opinion that the seventh request did not have much to do with the case. This exception is overruled.

The fifteenth exception is: "Because his honor refused defendant's tenth request to charge: 'That this being an action at law, founded upon contract, it cannot be sustained by proof that the money in question was deposited by Iredell to his credit as manager of the partnership bank,—that is, by the old

bank,—even by breach of trust, unless the jury believe that Iredell had, or was held out by the bank, the defendant in this case, to have, authority to receive deposits, and that the deposit was actually made with the defendant bank,—but modified the same by adding thereto: 'That is the law as modified: If Iredell had no connection with the bank whatever, and fraudulently got this money from the plaintiff in this case, and deposited it in the bank, this bank would not be liable in an action at law; this would be an action on the equity side of the court,'—thus indicating that, in his opinion, the fact that Iredell was president of the defendant bank would establish a different rule, and would sustain the present action, even though the deposit was not actually made with it." There is room just here for some nice distinctions, but we do not know that we would be justified in entering upon any field save that selected by the appellant or indicated by the substance of this exception. To business, then: The appellant sought by his request to charge to have the circuit judge announce as the law governing this case that here, being a contract in the shape of a certificate of deposit, an action cannot be sustained thereon upon proof that the money was deposited by Iredell to his credit in defendant bank, as manager of the old partnership bank, unless the further facts are believed to exist, namely, that Iredell as president was held out by the defendant as clothed by it with authority to receive deposits, and that the deposit by plaintiff was actually made in this bank. Now, the judge sustained the request, except he stated that if Iredell had no connection with the bank whatever, and fraudulently got this money from the plaintiff, and deposited this money in this bank, the bank would not be liable in law, but would be in equity. Again, we cannot say that the modification as made by the circuit judge, when construed carefully, would naturally lead to the conclusion that the judge thought the fact that Iredell was president of the bank would establish a different rule, and would sustain the present action, even though the deposit was not made with it. It is quite true that if Mr. Iredell had not been president of this bank when he deposited, as alleged, the money of the plaintiff to his (Iredell's) credit as manager in said bank, and there was no privity between the plaintiff and the defendant, the plaintiff could not, at law, have sued the bank for that money, for the bank would have owed him no duty enforceable at law touching a deposit entered by another person as his own. A resort to equity would have been necessary to show a duty of the defendant to the plaintiff, arising from some breach of duty on the part of the depositor. Now, all the judge did was to preserve the distinction in the law. No ill effects could follow to the defendant therefrom. The exception must therefore be overruled.

The next exception (the sixteenth) is as follows: "Because his honor refused defendant's twelfth request to charge: 'That neither of the resolutions of the board of directors, introduced in evidence, authorized Iredell, as president, to receive deposits, except in the manner prescribed for the management of the bank,'—but modified the same by saying: 'What I have to say is this: The supreme court has ruled on it, and I will have to follow it, whatever my views may be; but if the president was authorized by that resolution to establish a savings department, and borrow money at four per cent., then, if the resolution did not go any further to say by whom it was done, if the president represented himself to outsiders that he had authority to borrow at six per cent., I think the bank would be liable. The question, then, would be, not between outsiders and the bank, but between the bank and its president, whether he was transcending the authority which he had. If they gave him authority to borrow money,' or receive deposits and pay interest, that is enough to justify outsiders, without further notice. Therefore I cannot charge that exception as modified,'—thereby indicating that the question was to be determined solely by the representations made by the president, Iredell, as to his authority to borrow money." We do not think that the deduction of the appellant that thereby the circuit judge indicated that the question was to be determined solely by the representations made by the president, Iredell, as to his authority to borrow money, is well founded. Certainly the circuit judge nowhere says any such thing. On the contrary, in the supposed case, if the bank authorized the establishment of a savings department, with interest for depositors, and no particular person as a bank official was charged by the bank with this work, then, if the president held himself out to others as clothed with the power, and they took him at his word and deposited their money with the bank, the bank would be liable therefor to such depositors. This is good law. Let the exception be overruled.

The next exception is the seventeenth, which is as follows: "(17) Because his honor refused defendant's thirteenth request to charge 'that the answer of the witness C. J. Iredell to the eleventh direct interrogatory, that the money was placed on deposit on the name of J. D. Bickley, and he took the certificate, is shown by the context and his answer to the thirteenth interrogatory to have referred to a deposit in the Depositors' Co-operative Association, not to a deposit in the defendant bank.'" The judge was clearly right in refusing to make any such charge, for he would have charged upon the facts if he had undertaken to do so; and this he was inhibited by the constitution from doing.

The last exception is the eighteenth: "Be-

cause his honor, the presiding judge, refused defendant's motion for a new trial of said cause, based upon the alleged errors of his honor in the admission of testimony, and upon the failure of the plaintiff to introduce any testimony to show that, by the use of the term 'manager,' Iredell was authorized or intended to bind the bank." As will be seen, this involves two propositions. The first, relating, as it does, to alleged errors in the circuit judge in the admission of testimony, we have already seen is untenable. The second refers to the failure of the plaintiff to introduce any testimony that the use of the term "manager" by Iredell was authorized or intended to bind the bank. No doubt the presiding judge conceived that the defendant had been accorded a fair trial; that a jury of the vicinage had found the issue against it; and that the same idea can be conveyed both by direct and by indirect means; in other words, to enlarge the last somewhat, a man may directly and positively appoint A. his agent, and give public notice thereof. The same man may, without any direct and positive appointment of A. as his agent, just as effectually in law make such appointment by indirect means, such as allowing A. to assert that he is such agent, allowing him while claiming to be such agent to occupy the principal's place of business, and conduct while there the principal's business,—all of which is fully ratified by said principal. The circuit judge did not err here.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, O. J. (dissenting). It seems to me that the material questions raised by this appeal have been decided by the conclusions reached under the former appeal in this case, reported in 39 S. C. 281, 17 S. E. 977, adversely to the result reached in the opinion prepared by Mr. Justice POPE under the present appeal, and therefore I cannot concur in such result. Time will not permit any extended discussion of the several points presented by this appeal, and hence I must content myself with simply indicating, very briefly, some of my reasons for dissenting.

Under the former appeal it was held that it was not competent to introduce parol testimony to show that the paper offered in evidence,—the certificate of deposit,—constituting the evidence of the contract which constituted the basis of plaintiff's action, was really intended to bind the defendant bank. In the former opinion the following language is used: "It is quite clear that the terms of this paper not only do not imply, but expressly repel, the idea that the chartered bank was in any way bound thereby, or in any way referred to therein. On the contrary, the paper, in express terms, refers to and purports to bind a totally different person; for, in law, Iredell, as manager of the partnership bank, or as manager of the Depos-

itors' Co-operative Association, and as president of the chartered bank, are entirely distinct and different persons. So that, *even if it should be conceded that Iredell, as president of the chartered bank, had the power to bind the bank by such a paper as this* [italics mine] (a concession which I am not now prepared to make), there is nothing whatever, either in the body of the paper or in its signature, to which alone we can look, which shows that he attempted or intended to exercise such a power." Then follows a quotation from Greenleaf on Evidence, which seems to me very appropriate to the present inquiry, but which need not be repeated here, as it is set forth in the former opinion. It is true that it was said in the former opinion that it was "very possible that, if the parol testimony in question had been offered to show of what or for whom C. J. Iredell was manager," it would have been competent, and, although that view was expressed as possible only, yet I am free to confess that I, there, was very much inclined to adopt that view; but I must add that subsequent investigation and reflection has tended to shake my confidence in such view, as there is nothing whatever on the face of the paper even to suggest that the defendant bank may have had some connection with it,—not even the appearance of the name of such bank written or printed on the margin. Inasmuch, however, as there was no evidence whatever in the case tending to show that Iredell ever, in a single instance, signed his name as "manager" of the defendant bank, or was ever known or regarded as such, while, on the contrary, there was evidence that he was so known and regarded in conducting the affairs of the partnership bank, and was in the habit of signing certificates of deposit made with the partnership bank, as well as with the Depositors' Co-operative Association, "C. J. Iredell, Manager," the question whether it was competent to offer parol evidence to show for whom or of what Iredell was manager becomes an immaterial inquiry, as there is no evidence which could give rise to such an inquiry. Indeed, the indisputed fact appearing in the testimony that while the defendant bank, when it first went into operation, used some of the blank certificates of deposit prepared for the partnership bank, with the word "Manager" printed at the bottom, but with that word erased or written over with the word "President," conclusively shows that Iredell, when acting for the defendant bank, did not style himself "Manager," but "President."

It is contended, however, that the case presents itself in an entirely different aspect from that which it wore at the first trial, by reason of the amendment of the complaint made since the former decision of the court, whereby fraud is distinctly charged, in that the plaintiff was induced to accept the paper—the certificate of deposit—in its present form by the fraudulent misrepresentations of Ire-



dell. Conceding, for the purpose of this inquiry, that these additional allegations in the amended complaint are true, then it seems to me that the plaintiff states a case for the reformation of the instrument evidencing the contract for the breach of which he brings his action, so as to express the real intent and terms of such contract, and such a case is within the exclusive jurisdiction of the court of equity. It is true that it is often said, in general terms, that, in cases of fraud, courts of law and equity have concurrent jurisdiction. While that may be conceded as a general proposition, yet it is not universally true. In 2 Pom. Eq. Jur. § 872, that distinguished author classifies the cases in which a court of law may take jurisdiction and those which appropriately belong to a court of equity, among which latter he places cases for the reformation of a written instrument so as to make it express the real intention of the parties; and in 1 Pom. Eq. Jur. §§ 171, 172, 188, it is said a case for the reformation of a written instrument is within the exclusive jurisdiction of the court of equity. This is obvious, for the reason that a court of law has no machinery by which the end desired can be attained. It is true that, since the reformed procedure instituted by the Code, a plaintiff may unite in the same complaint equitable and legal causes of action, when otherwise permissible, and therefore, in the same complaint, a plaintiff may ask for a reformation of a written contract as well as for damages sustained by reason of a breach of such contract; yet it is equally true that, in such a case, the equitable cause of action must be tried by the tribunal appropriate to that end, and the legal cause of action by its appropriate tribunal. *Adickes v. Lowry*, 12 S. C. 97, recognized and followed in numerous other cases. So that it seems to me that the plaintiff could not recover against the defendant any damages for the breach of the contract set out in the complaint as the basis of his action until he had just obtained a decree of the court of equity for the reformation of such contract, so as to make it express the real intentions of the parties at the time it was entered into. The fact that the defendant may not have made any request to have the equitable and legal issues tried separately by the tribunals appropriate to each cannot affect the question, for it is a matter of jurisdiction, and if, as we have seen, the court of equity has exclusive jurisdiction of the question of reformation of the terms of the written contract, then any attempt of a court of law to render judgment upon such an issue, even by the consent of defendant implied from want of objection, would amount to nothing, because of the lack of jurisdiction. For the reasons above indicated, without going into any of the other questions presented by this appeal I think the judgment of the circuit court should be reversed, and the case remanded to that court for a new trial.

(94 Ga. 706)

## MARTIN v. KENDRICK et al.

(Supreme Court of Georgia. Aug. 6, 1894.)

## NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

The evidence warranted the verdict. The newly-discovered evidence, if true, would only tend to discredit the plaintiff's witnesses, and would throw no direct light of its own upon the controversy. The court did not err in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Action by L. Kendrick and another against J. B. Martin. Judgment for plaintiffs, and defendant brings error. Affirmed.

The following is the official report:

Kendrick & Jones sued Martin in trover to recover certain cross-ties, and obtained a verdict for \$97.21. Defendant moved for a new trial, and, his motion being overruled, excepted. The motion contained the grounds that the verdict was contrary to law, evidence, etc.; and that a new trial should be granted because of newly-discovered testimony. In support of the last ground, movant produced the affidavit of J. O. Mullinix, to the following effect: He learned from Martin, several years ago, that some posts on one side of the railroad near his house, which had been sawed out of cross-ties by Martin, belonged to W. C. Adamson and C. P. Gordon, and, wishing the posts, applied, to the best of his recollection, to Adamson to buy them, stating that he had been informed by Martin that they belonged to him and Gordon; and Adamson replied that they did not want to sell them, that they needed or wanted to use them themselves. Also, the affidavit of J. K. P. Gray, that, a few years since, he applied to Martin, who was then running a sawmill, to get some posts; he did not have any, and referred him to Gordon and Adamson, as having some on the railroad near his house, which he had sawed for them out of some cross-ties; that he saw Adamson, and proposed to buy the posts, after his saying they belonged to him and Gordon, and Adamson agreed to sell him the posts, and figured on the price, and deponent found they would cost him about five cents apiece, and did not buy. Also, the affidavit of J. L. Lyle, that a few years ago he was at Martin's sawmill, and, while there, Gordon came to the mill with a wagon, and Martin asked him if he had come for his posts, saying he had not yet sawed them, to which Gordon replied that he had not come for the posts but for some lumber, and would come after the posts another time. Also, the affidavits of Martin and his counsel that they were ignorant of the facts stated in these affidavits until after the trial, and that Mullinix, Lyle, and Gray were of good character and worthy of belief. Martin made affidavit, also, that he used due diligence to discover evidence and prepare for trial. By way of counter showing, plaintiffs used the affidavit of Gordon that Mullinix never applied to him

to purchase any posts, and deponent never had any conversation with him either alone or with Adamson; that Lyle is mistaken, because the time Lyle claims deponent went to Martin's mill after lumber was before Martin sawed the ties, before the levy upon the ties, and long before Martin ever had any connection with the ties. Also, the affidavit of Adamson, that Mullinix and Gray are mistaken as to the conversation referred to; that several persons came to him after the difference arose with Martin, to talk about the posts, but, regarding them as sent by Martin to make evidence, he was always guarded in his conversation; that he told Martin, Gordon, and others that, if the posts could be sold for the value of the ties, the money would settle the matter, and may have told Gray and Mullinix the same thing, and Gray may have figured on the matter, but deponent never claimed the posts and offered to sell them, nor did he ever do or say anything to ratify Martin's taking possession of the ties; that, before the ties were taken by Martin, deponent tried to sell them, and talked to people about getting them hauled to town or some other station, and honest men may at this distance of time mix up ties and posts in their memory; and that Gray, Mullinix, and Lyle were friendly and near neighbors of Martin. Upon the trial, Gordon testified as a witness for plaintiffs: He was attorney for Kendrick, who had a claim against Kilgore, who had been getting ties near the railroad, not far from the defendant, and this claim was adjusted by taking some of the ties which were scattered about over the woods. Defendant shortly after came to him to get him to saw ties into posts, but witness never agreed to it. Witness did not know the amount or number of the ties, but defendant afterwards told him he had sawed up about the number set out in the summons (the suit was begun in a justice's court), and they were worth the amount set out in the summons. He never ratified the act of defendant in sawing the ties. All this occurred in 1886 or 1887, or about the time alleged in the summons. Witness never tried to get Ruff to haul the posts to Carrollton, as testified by Ruff. He had no use for the posts, and was surprised when defendant told him he had sawed the ties into posts, and put them on the railroad near his (defendant's) house. A compromise of a claim case placed title in the ties jointly in the plaintiffs. They were piled on the railroad at a crossing, and "we" tried to sell them. They were good first-class ties; but the railroad company would not buy them because they were in litigation. The only hauling witness ever mentioned to any one was with a view to hauling them to another point, in order to sell them. Martin talked to him and Adamson about sawing them into posts, but no terms were mentioned. Adamson said he had no use for posts. "We" did not agree, nor did witness agree with Martin. As soon as witness heard that Martin had sawed the ties, he went to see him,

and demanded the money for them. He said he had sold \$20 worth of them, and claimed that Adamson authorized him to saw them. Witness told Martin if he could get Adamson to agree to it, and could get the posts hauled, at a reasonable price, he was willing to take some of them. Martin then told him he could get Ruff to take them for "me" for little or nothing, but, when he saw Ruff, he would not agree to haul them, and witness afterwards told Martin he could not take them, and, besides, Adamson would have nothing to do with them. Martin never claimed to have made any trade with witness at that time, but said he was sorry the trade was not made with him. If it had been, there would have been no trouble about it. Witness never told Ruff the posts were "my" posts. Adamson also testified for plaintiff, his testimony being similar to that of Gordon. He also testified that defendant talked to him and Gordon about the ties, and wanted to saw them into posts, but they did not contract with defendant to do so; that defendant afterwards told him that he had gathered up the ties, hauled them to his sawmill, sawed them into posts, and put his and Gordon's part of them on the railroad, near defendant's house; that witness was surprised at this, as he had not contracted with defendant to saw them into posts, but had declined defendant's proposition; and that defendant told him afterwards that he had sawed the ties into posts, all but 50, which he sold for \$20 cash. Defendant testified: Hearing that these ties, which Kilgore had left scattered about in the woods, belonged to Gordon and Adamson, he went to them, or rather they came to him, and wanted him to gather up the ties and saw them into posts suitable for fencing posts; that he contracted with them to saw the ties into posts, gathered up the ties, carried them to his sawmill, sawed them into posts, as he had agreed to do, and carried Gordon's and Adamson's portion of the posts, and put them on the railroad, where they had been ever since; that they were refused ties, not suitable as cross-ties, and this was why they wanted them sawed into posts; that he certainly would not have hauled them off and converted them into posts if Gordon and Adamson had not got him to do it. He admitted he got \$20 for 50 of the ties, admitted the number of the ties sued for, and that he placed them on the road a mile from where trains stopped. Ruff testified that Gordon told him the posts near Martin's were his, and asked witness what he would haul them to Carrollton for on his pole car, and he told Gordon he could not do it; and that, to the best of his recollection, Gordon told him he got Martin to saw the posts, and deliver them on the railroad near Martin's.

G. W. Austin, for plaintiffs in error. Oscar Reese, W. F. Brown, W. C. Adamson, and C. P. Gordon, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 644)

**CULVER v. MULLALLY.**

(Supreme Court of Georgia. July 23, 1894.)

**WRIT OF ERROR—NECESSARY PARTIES—FORECLOSURE OF CHATTEL MORTGAGE—ADDITIONAL PARTIES PLAINTIFF.**

1. Where a sole plaintiff in the court below has a coplaintiff forced upon him by an illegal amendment made at the instance of the opposite party, such coplaintiff is not a necessary party to a writ of error brought by the original plaintiff to review the judgment, more especially if the coplaintiff disclaimed at the trial all ownership and interest in the subject-matter of the litigation, and asserted no interest whatever relatively to either party. If he would be a proper party to the writ of error, he could by amendment be made a coparty plaintiff in error.

2. In a statutory proceeding by affidavit of illegality in resistance to an execution founded on the foreclosure of a mortgage upon personalty, the mortgagor has no right, pending the cause, to have a third person made a coparty plaintiff with the mortgagee upon the alleged ground that he was a joint owner of the mortgage, and equally entitled to collect from the mortgagor, and had collected certain specified partial payments on the mortgage debt. The pleading act of 1887, which provides for making additional parties, has no application to such a proceeding.

(Syllabus by the Court.)

Error from superior court, Hancock county; J. J. Hunt, Judge.

Action by E. B. Culver and another against W. T. Mullally on a chattel mortgage. Judgment for defendant, and plaintiff Culver brings error. Reversed.

The following is the official report:

A mortgage on personal property in favor of Culver against Mullally was foreclosed May 3, 1893, for \$500 principal, \$19.65 interest to that date, and \$50 attorney's fees. Mullally interposed an affidavit of illegality, alleging that \$378 had been paid to Lamar on the mortgage, and tendering the balance to the sheriff. On the same day that this affidavit was filed (June 6, 1893), the sheriff acknowledged receipt of \$122 from Mullally upon the *f. fa.* At the trial Mullally was allowed to amend his affidavit of illegality by adding: "Said T. R. Lamar being then and there joint owner of said mortgage with said E. B. Culver, the same being in his desk in his office, and he equally with the said E. B. Culver entitled to collect from this deponent, said mortgage having been written by and negotiated with said T. R. Lamar; and, while the note was made payable to E. B. Culver, it was expressly understood that payments were to be made direct to said Lamar; and deponent prays said T. R. Lamar may be made a party plaintiff to this cause, and stand to and abide the results." The jury found in favor of the defendant, and a motion for a new trial was overruled, upon condition that defendant, within 10 days, pay to the sheriff for the use of plaintiff \$25.94, and \$14.79 attorney's fees, and all costs. To the refusal of a new trial on the grounds taken in the motion, and to the ruling allowing defendant to amend his affidavit of illegality, and in said amendment to make Lamar a party plaintiff over objections of Culver, Culver excepted.

The grounds of the motion for a new trial were that the verdict was contrary to law and evidence; and that the court erred in allowing defendant, over objection of plaintiff, to amend his affidavit of illegality by making Lamar a party plaintiff without Lamar's consent; and erred in giving to the jury certain instructions, which are not material to the report. In the supreme court a motion to dismiss the writ of error was made, because Lamar was not a party to the bill of exceptions.

T. L. Reese and Jordan & Burwell, for plaintiff in error. R. H. Lewis and F. M. Hunt, for defendant in error.

**PER CURIAM.** Judgment reversed

(94 Ga. 665)

**KING et al. v. JOHNSON.**

(Supreme Court of Georgia. July 30, 1894.)

**LIABILITY OF ADMINISTRATOR—PAYMENT OF WIDOW'S SUPPORT — ASSETS IN HANDS OF WIDOW — RETURN OF APPRAISERS — CONCLUSIVENESS — PLEADING.**

1. A widow who, by reason of her having been administratrix upon her husband's estate, had in her hands, or was chargeable with, funds or property of the estate sufficient to pay the allowance subsequently made to her of a year's support for herself and children, and who is still chargeable therewith, has no right to enforce by execution payment of the allowance out of the assets of the estate in the hands of her successor in the administration.

2. The return of the appraisers, though it has become final as to the amount to which the widow and children are entitled for their year's support, is no evidence against the administrator to charge him with assets, inasmuch as the statute makes no provision for objecting to the return on the ground of deficient assets. The return by the sheriff of *nulla bona* upon the execution in favor of the widow against the administrator is of itself no evidence of a devastavit.

3. In an action on the bond of an administrator, brought by the widow, for failure to pay her year's support, the administrator cannot, by plea or answer, call the plaintiff to account as a removed administratrix, who preceded him in the trust, though he may show that she had assets belonging to the estate, out of which the year's support should have been paid by her, instead of sending an execution against him.

4. As against a general demurrer or mere motion, a plea containing a good defense to the action is not vitiated by setting up other matters, and praying for relief which cannot be granted.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by A. J. Johnson, ordinary, suing for the use of Mrs. Weber and others, against J. King, administrator, and others. Judgment for plaintiff, and defendants bring error. Reversed.

The following is the official report:

Johnson, ordinary of Floyd county, suing for the use of Mrs. Weber, widow of Joseph Weber, and her five minor children, children of Joseph Weber, brought his action against J. King, as administrator of Joseph Weber, and individually, and S. S. King, as security on the administrator's bond, for \$1,050 prin-

cial, besides interest and attorney's fees. When the case came on for trial a motion was made by plaintiff's counsel to strike the plea and amended plea of defendants, which motion was sustained. To this judgment defendants excepted, alleging that the court erred in holding and deciding (1) that no valid defense was set up in the plea and amended plea; (2) that the judgment of the court of ordinary was conclusive against the administrator and his surety; (3) that the judgment against the administrator was conclusive against his surety; (4) that the order and judgment of the court of ordinary, setting apart to the widow a year's support out of her husband's estate, was an adjudication and settlement of all claims of the estate against her, growing out of her conduct as administratrix; (5) the administrator de bonis non could not in this suit call the former administratrix to an account of her actings and doings, nor collect from her money due from her to the estate, and apply the same to the payment of the year's support, nor any part thereof; (6) that the widow need not account for money in her hands as former administratrix, before collecting the amount set apart to her for a year's support; (7) that the widow, with an amount of the money and effects of the estate in her hands, as former administratrix, more than sufficient to discharge the judgment for a year's support, was legally entitled to hold said money and effects unaccounted for, and also collect by execution, out of the estate, the additional amount set apart to her for a year's support. The petition alleged: In 1891, J. King was appointed administrator of Joseph Weber, and on July 6, 1891, gave the bond attached, and qualified as administrator. Having so qualified and given bond, he took possession of property of the estate, consisting of personalty and realty, a schedule of which is attached, amounting to \$6,584. After leave to sell, regularly obtained, from the court of ordinary of Floyd county, King, as administrator, sold and converted to his own use all the property set out in said schedule, receiving the amounts therefor shown in another schedule attached, and, having received said sums, converted them to his own use, by pretending to apply them to pretended claims against the estate of junior rank in distribution to petitioner's claim, hereinafter set out. On June 12, 1891, Mrs. Weber, for herself, as widow, and for the five minor children, applied to said court of ordinary for the setting apart of a 12-month support, a copy of which petition is attached. Appraisers were appointed, service made on King, as administrator, the appraisers made return in conformity to their appointment, setting aside \$1,050 in cash; and, after citation duly run, the ordinary, on July 17, 1891, admitted the return to record, and made it the judgment of the court of ordinary. Copies of the various papers, orders, etc., above referred to, are attached. Notwithstanding

said return and judgment, J. King refused to pay such sum, whereupon execution was issued against him, as administrator, upon which there has been a return of nulla bona, as will appear by exhibit attached. King, administrator, made no defense, and filed no objection to the petition of Mrs. Weber, and therefore the entry of the sheriff of nulla bona binds him individually. King, as administrator, having received funds of the estate more than sufficient to pay said claim in full, but,—having refused to pay it,—instead, appropriated the fund to pretended claims due to himself individually, none of which were equal in dignity to the claim for 12 months' support, is liable individually for all of the sum so set aside. Individually, and as administrator, he has acted in bad faith, and been stubbornly litigious, and has caused petitioner unnecessary trouble and expense in the collection of the claim for 12 months' support, and is therefore liable for attorney's fees.

The pleas alleged: Joseph Weber died September 4, 1890, intestate, leaving a valuable stock of goods in Rome, Ga., accounts, notes, etc., and certain realty in Floyd county. Immediately after his death his widow took possession of his property, of every kind; on September 5, 1890, was appointed temporary administratrix, and November 3, 1890, permanent administratrix, upon the estate. The property received by her was appraised at \$8,287.10. She took dower out of the estate, as will appear by exhibits attached. She took charge of and conducted the business of the deceased, the same being a merchant tailoring establishment in Rome, with a large stock of goods. Without authority, she employed hands, incurred debts, paid out money, received from the sales of the stock, and conducted the business in a reckless, extravagant, and illegal manner, until April 13, 1891, when she was removed from her trust because her bond was insufficient, and she was mismanaging the affairs of the estate,—complaint having been made to that effect. When she took charge of the estate, it was amply solvent, but by her extravagance and mismanagement it was rendered insolvent. She made no return as administratrix until June 4, 1891. On May 11, 1891, J. King was appointed temporary administrator de bonis non upon the estate, and on July 6, 1891, permanent administrator de bonis non, and as such has frequently called upon her for an account of her actings as administratrix; but she neglects and refuses to make any settlement, or come to an account with him, or to pay him any of the money of the estate in her hands. She had in her hands at the time of her removal \$1,200 in money belonging to the estate. In addition thereto, she and her children had lived upon, and been supported out of, the estate, from the time of Weber's death up to the time of her removal, and she had neglected and failed to give any account of the

same; and upon that account she is justly indebted to the estate \$1,000, or other large sum. She is further indebted to the estate a similar sum for money collected by her, and paid out contrary to law, and without the ordinary's consent, in the management and running of the business of Weber after the expiration of the current year of his death. In the return rendered by her, she has taken credit for  $2\frac{1}{2}$  per cent. upon all sums paid out, and  $2\frac{1}{2}$  upon all received, and in addition for \$640 extra compensation, and \$50 attorney's fee. Defendants deny her right to the extra compensation and attorney's fee, and, because of her mismanagement, deny her right to any commissions. Neither as administrator nor individually is J. King indebted to her in any sum. She has in her hands, and has received from the estate, sums largely in excess of the amount set apart to her and children as a year's support, and nothing further is due her on account of said support. She is largely indebted to the estate, and defendants filed this answer in the nature of a cross petition against her, and prayed that she come to a full and fair account of her actions as administratrix; that she be charged with all the money and property of the estate consumed by her and her children for their maintenance, from Weber's death until her discharge; that she account for and pay over to the administrator all money of the estate collected by her and paid out in running the business after December 31, 1890, and for the money paid out by her at any time for the hire of labor in the conduct of the business without the approval of the ordinary; that she account for and pay over to him, as administrator, the extra compensation and attorney's fees mentioned, and all sums received by her as commissions, and \$138.60 balance admitted to be in her hands at the time of her return; that the judgment and execution in her favor for a year's support be decreed satisfied and canceled, and defendant, as administrator, have judgment against her for any balance that may be found due from her to the estate. By the amendments, defendant alleged that Mrs. Weber, as administratrix, collected of the effects of Weber \$4,763.20 in money, and has in her hands, unaccounted for, \$2,828.07, and refuses to pay over the same to the administrator, or to account for it. Defendants prayed that she be decreed to pay it into court, and that so much of the same as might be necessary be applied to the payment of her year's support; and they alleged that, by reason of the premises, she had received full payment of the judgment in her favor for a year's support.

Reece & Denny and Fouché & Fouché, for plaintiffs in error. Nat. Harris and H. M. Wright, for defendant in error.

PER CURIAM. Judgment reversed.

v.21a.E.no.12—57

(94 Ga. 640)

# HOLDER v. AMERICAN INVESTMENT & LOAN CO.

(Supreme Court of Georgia. July 23, 1894.)

LEVY ON LAND — DESCRIPTION IN ENTRY AND SHERIFF'S DEED — UNCERTAINTY — CONVEYANCE UNDER POWER — DEVISE — LATENT AMBIGUITY.

1. The evidence showing that the land in Vineville district, which the constable intended to seize by virtue of a tax fi. fa., was a lot consisting of two acres adjoining several adjacent owners, one of whom was Ross, alias Hollingsworth, a description in the entry of levy, and in the conveyance subsequently made by the sheriff, was too vague and uncertain, the whole description being as follows: "One acre of land, more or less, in the Vineville district, adjoining the property of W. T. Hollingsworth and Ben Ross." — and the land of Ross, alias Hollingsworth, being so situated as to make the description equally as applicable to various other acres as it would be to the premises which the officer intended to seize.

2. Where the owner in fee of one undivided half of certain premises is the executrix of the deceased owner of the other half, and besides being tenant for life, under his will, relatively to that half, is empowered by the will to sell in fee, as executrix, for reinvestment, a conveyance made by her of the whole premises in fee to a purchaser, which makes no mention of her executorship, and does not refer to the will, or to any power derived therefrom, but purports to be a conveyance made in her own right, as sole owner, passes no title to the purchaser, as against the rights of remaindermen under the will. Such conveyance is effective to pass her own undivided interest, together with her life estate, but no more.

3. A devise by a surviving tenant in common, her deceased husband having been her cotenant, in which she gives her half interest in a tract of land, describing it as the tract on which she now lives, "said half interest having been conveyed to me by deed made jointly to myself and my deceased husband . . . by E. H. Bloodworth, the other half interest in said lands having been conveyed to my said husband," imports on its face a gift of all the interest which she derived from Bloodworth by the deed referred to, including her half of the entire tract, as described in that deed. In this respect there is no ambiguity on the face of the devise, and a latent ambiguity, raised by extrinsic evidence showing that previously to the execution of the will the testatrix had sold and conveyed a small portion of the tract to another person, would be no reason for not applying in favor of a bona fide purchaser, who purchased without notice of such sale and conveyance, the statutes giving priority to a junior recorded deed over a senior unrecorded deed; and that statute applies where the senior deed was made by the testatrix, and the junior by her devisee.

4. There was no error affecting the substantial merits of the controversy, and, under the facts, no legal result was possible, except the one which was reached by directing a verdict in favor of the plaintiff below.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. C. Smith, Judge.

Action by the American Investment & Loan Company of Macon, Ga., against H. S. Holder. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

The issue in this case was between the American Investment & Loan Company of Macon, Ga., and H. S. Holder, as to the title to two acres of land. The jury found for plaintiff, the investment and loan company, that the title to the two acres in question

was perfect in plaintiff, and that the deeds and muniments of title offered in evidence to support defendant's title were void, and that the same be canceled. The following, among other things, appeared for plaintiff: In June, 1874, E. H. Bloodworth conveyed to Sarah E. and G. C. S. Johnson a tract of land, being 125 acres, more or less, in Bibb county, part of the Macon reserve, on the west side of the Ocmulgee river, and also 75 acres, another portion of the same reserve. By his last will, dated February 28, 1877, G. C. S. Johnson directed that his executrix (his wife, Sarah E. Johnson) should pay his debts, and for this purpose might sell any part or all of his estate, real and personal, if, in her discretion, it should become necessary or expedient. He made a number of bequests to children previously provided for, and bequeathed to his wife, for life, the residue of his estate, directing "that she have full and entire control of the same for and during her natural life, with power to sell any part of or the whole of the same, and to reinvest the proceeds in other like property." He further directed that at the death of his wife the property given to her for life be equally divided between his daughters, Minnie and Callie, and his step-daughter, Hattie Tinsley, and that, in the event either of them die without a natural heir, her share should be equally divided between the survivors. Sarah E. Johnson, by will dated February 12, 1883, devised to her three children, T. D. Tinsley, Hattie Tinsley, and Minnie Johnson, her half interest in the tract of land deeded to her and her husband by Bloodworth. She appointed Lofton executor. On March 3, 1884, a tax *fi. fa.* for taxes due for 1883 by Mrs. Johnson was levied on the land, described in the sheriff's deed made under the levy as "all that lot of land situated, lying, and being in the Howard district of said county, known in said district as the 'Place of Mrs. Sarah Johnson,' containing 175 acres, more or less, agreeably to original survey." The sheriff's deed, made April 1, 1884, conveyed the land to the board of county commissioners of Bibb county. On February 19, 1885, the board of county commissioners, by quitclaim, conveyed the land bought by them as the property of Mrs. Johnson to H. S. Holder. On April 28, 1888, Holder conveyed to Lofton, executor of Mrs. Johnson, the land, described in the deed as 175 acres more or less of land in the Howard district in said county, and known as the "Mrs. S. E. Johnson Place." It was recited in this deed that Lofton, for the benefit of the estate of Mrs. S. E. Johnson and G. C. S. Johnson, had refunded the taxes, with interest and cost; that one half interest in the land had been the property of G. C. S. Johnson, and the other half, of the estate of Mrs. S. E. Johnson, as would appear by the dispositions made thereof in the wills of Johnson and Mrs. Johnson; and that the purpose of this deed

was to restore the title of the land to the condition existing at the time of the tax sale, and subject to the wills of Johnson and Mrs. Johnson. On October 14, 1890, Lofton, as executor of the will of Mrs. Johnson, made his deed to J. J. Cobb, S. J. Toole, George W. Duncan, and T. W. Ellis. This deed recited the deed last above mentioned, and, further, that the legatees under the will of Mrs. Johnson having sold and conveyed all their interest in the lands belonging to Mrs. Johnson to said Cobb, Toole, Duncan, and Ellis, this deed was made to signify the executor's assent to the vesting of the legacies under the will of Mrs. Johnson, and for conveying any interest that may have come to Lofton as executor. The land was described as "in the Vineville district, known as 'Parts of Lot One and Two of the Macon Reserve, West of the Ocmulgee River, and Part of Lot 351, in 13th District,' all in Bibb county, said state, \* \* \* being the same property conveyed by E. H. Bloodworth to Sarah E. and G. C. S. Johnson on June 16, 1874, \* \* \* and supposed to contain 150 acres, more or less, except one acre sold to the Central Railroad, one acre to Ousley et al., about four acres to Frank, and about three and a half acres to Mrs. Riley." At various dates in 1890, Callie P. Johnson, Hattie E. Lancaster (formerly Tinsley), Thomas D. Tinsley, and Minnie M. Johnson conveyed to Cobb and others their interest in the lands, as devised by the wills of Johnson and Mrs. Johnson; and through Cobb et al., by various conveyances, the title came down to the plaintiff. For defendant, it appeared in evidence, among other things, that on January 14, 1879, Mrs. Johnson conveyed to Irwin Haslin two acres of the land deeded by Bloodworth to her and her husband. This deed was recorded in September, 1892. On July 1, 1892, Irwin Haslin deeded the two acres to H. S. Holder.

The motion for new trial was upon the general grounds that the verdict was contrary to law, evidence, etc. Also because the court erred in ruling out the following evidence offered by defendant: Witness T. E. Merritt was asked, "Did you have any conversation with Mrs. S. E. Johnson in reference to these lands in dispute?" An objection on the ground of irrelevancy was sustained. Defendant proposed to prove by this witness that he had conversation with Mrs. Johnson while she was in possession of the unsold portion of the Johnson tract and while she admitted having sold these two acres to Haslin. The error alleged is that declarations in disparagement of the alleged title in Mrs. Johnson as to the two acres in dispute, were admissible, especially when made to a third party, in no way interested in the question at issue. Error in ruling out the testimony of T. D. Tinsley to the same effect as the above, and as follows: "Had your mother sold any land before this time? A. Yes, sir; she sold some, and exchanged

some; she exchanged part of the extreme eastern portion to Mrs. Riley, and she sold four acres— (Objection; sustained.)" The error alleged is that this evidence would have shown a material reduction in the acreage of the Johnson tract, and that, therefore, the plaintiff's deeds could not cover that tract, as originally conveyed, and, further, that it would have established an acquaintance in the various sales of Mrs. Johnson by all those who were entitled to question their legality. Error in refusing to allow defendant to show by Tinsley that the two acres in dispute were never bargained or conveyed by him as one of the heirs of Mrs. Johnson, the error alleged being—First, that the deeds offered by plaintiff were ambiguous upon their face, and therefore parol evidence was admissible to show that they did not convey the premises in dispute; second, that, if they covered the disputed land, it was only by implication, and parol evidence would be admissible to rebut that implication, as a latent ambiguity, especially in view of the fact that the oral testimony of plaintiff's president admitted that a tract adjoining the disputed premises, and forming one of its boundaries, was not covered by their purchase. The deed from Tinsley and others described the land as "all that tract or parcels of land lying and being in the Vineville district, known as 'Parts of Lot One and Two of the Macon Reserve, West of the Ocmulgee River, and a Part of Lot 351, in the 13th District,' all in Bibb county, said state, and bounded on the east by the Macon & Western (now the Atlanta Division of the Central Railroad) Railroad, on the south by lands of Huff, trustee, on the west by lands of the estate of Peter Solomon and Henry J. Berkner, and on the north by lands of Walter K. Holt, being the same property conveyed by E. H. Bloodworth to Sarah E. and G. C. S. Johnson, June 16, 1874, and recorded in Book X, page 77, and supposed to contain 150 acres, more or less, except one acre sold to the Central Railroad, one acre to Ousley et al., about four acres to Frank, and about three and one-half acres to Mrs. Riley." Error in ruling out the testimony of T. C. Green, going to show that the general reputation of the neighborhood was that the land in dispute was the land of the defendant. The error alleged is that plaintiff witness Sims, president of plaintiff, having denied any knowledge of Holder's claim, it was entirely competent to show the general knowledge in the neighborhood of that claim. Error in ruling out sheriff's deed, with its attached fl. fa. and accompanying levy; the grounds of objection by plaintiff being excessive levy and insufficient description. The attached fl. fa. issued against Irwin Hamlin for two dollars, state and county tax for 1884. The levy was on "one acre of land, more or less, in the Vineville district, adjoining the property of W. T. Hol-

lingsworth and Ben Ross, levied on as the property of the defendant, Irwin Haslin, to satisfy the within fl. fa. and cost. February 25, 1885." The sheriff's deed was dated May 25, 1885; recited the foregoing levy in terms, and the offer of the lot on the day of sale,—first one-fourth, then one-half, then three-fourths, and then the entire lot being offered. No bids being received, except on the entire lot, the same was knocked off to H. S. Holder for \$9.30. The deed then purported to convey to Holder all that lot of land in the Vineville district of said county known in said district, \* \* \* containing one acre, more or less, agreeably to the original survey. Recorded May 13, 1886. The error alleged is that having shown the identity of Haslin and Haston, and the identity of the land sold with that conveyed to Haslin, by various witnesses, and by the real defendant in execution, it was competent evidence to go to the jury in explanation, at least, of Holder's possession. Further, that, it being a recorded deed, it could not be withheld from the jury, unless attacked for forgery or for fraud, but should have gone in, subject to the court's instruction. Further, that the right to attack a tax deed is a personal one, and plaintiff has not shown itself to be in privity with the defendant whose property was sold. The constable who made the levy of this tax fl. fa. testified, among other things, that he was bothered to find Haslin, because he went by two names—"Haslin" and "Haston"; and Berkner testified that Haslin was called by three or four different names,— "Haslin" and "Haston." Error in directing a verdict in favor of plaintiff—First, because the evidence for plaintiff was not plain and undisputed in its favor; second, this was not such a case as required defendant to make out a special defense, the burden being upon plaintiff to show its right to the disputed premises; third, defendant contended there was evidence of his being in possession, and that was a fact which the jury alone could pass upon; fourth, defendant contended that the deeds of plaintiff are ambiguous, and did not cover the premises in dispute. There was evidence to support that theory, and this also was a question for the jury to pass upon; and this would be true whether Mrs. Johnson had the right to convey to Haslin, or not.

Freeman & Griswold, for plaintiff in error.  
H. V. Washington and Anderson & Anderson, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 642)

BELL et al. v. GUNN et al.  
(Supreme Court of Georgia. July 23, 1894.)

INTERPLEADER PROCEEDING—PARTIES.

1. Where a debtor filed a petition of interpleader against his creditor and several of the

creditors of the latter, who claimed specific liens upon the property of the plaintiff as security for their demands, and paid into court a fund to stand in lieu of the property, and it was sought to conduct the proceeding so as to substitute that fund, for all purposes with reference to the alleged liens, for the property itself, the creditor of the plaintiff was a necessary party; and the case was not ready to proceed, and he finally disposed of as to any of the parties thereto, until he was served with process, or had acknowledged service, or duly waived it, by appearance or otherwise. Until this occurred, the court could not, without his consent, pay out the fund, or any of it, either upon the liens claimed on the plaintiff's property, or upon a prior general judgment against the unserved defendant.

2. While the court was right in not recognizing the right or power claimed by the attorneys for one of the lien holders, without other evidence of its existence than the statement in their places of these attorneys, to represent the absent defendant (their client's debtor) in acknowledging or waiving service of the original process, or of the interpleading petition filed by themselves in behalf of their client, the court did err in awarding a portion of the fund to a judgment creditor of the absent defendant without having him properly served with process in the main action, at least.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Petition by P. A. and Mrs. M. A. Rossiter against one Gunn, J. T. Bell & Son, and others, requiring defendants to interplead. On the decree rendered, J. T. Bell & Son bring error. Reversed.

The following is the official report:

In Bibb superior court there came on to be tried the case of P. A. and Mrs. M. A. Rossiter v. Martin, McCook, Cherry, Gunn (agent), Bell & Son, Eden & Co., Hanse, and Higley; the same being upon a petition requiring defendants to interplead with each other, and show their respective claims and liens upon the fund admitted to be due Higley, as contractor, for building a house for Mrs. Rossiter. There had previously been passed a consent order requiring all the defendants to interplead and set up their respective claims to the fund ordered paid into court, the order reciting that the respective liens should attach to the fund in lieu of the property; and in pursuance thereof the money was paid to the clerk, all the defendants being enjoined from proceeding further against plaintiff. Bell & Son filed their claim, setting up that they were entitled to a lien for lumber and material furnished to Higley for use in erecting the house; that, in accordance with the statute, they had filed their lien against the property, which was of record, and all of which was done within three months after the completion of the work for which the material was furnished; that they gave notice to plaintiffs, stating the amount due them (Bell & Son), before plaintiffs had settled with Higley; that they had fully completed their contract for furnishing the material to Higley; and that they had taken no personal security for their claim. They prayed for judgment against Higley, alleged that their claim was the highest and best

lien on the fund, and prayed that it be awarded to them in satisfaction of their account, as far as the fund would go. The amount of their claim was \$338.95; and the amount of the fund, \$315.45. Eden & Co., by their interpleader, set up a similar lien, and made similar prayers. Neither of these liens had been foreclosed. Mrs. Gunn claimed under an execution against Higley, upon which a garnishment had been served upon Rossiter. The claim of Martin was similar. The claim of McCook was of a laborer's lien, which had not been foreclosed. What the claim of Hanse was, does not appear from the record, and no pleading by Hanse is specified as material to be transmitted to this court, although the bill of exceptions states that Hanse filed an interpleader. The nature of the claim of Hanse is not stated in the bill of exceptions. Cherry does not appear to have pleaded at all, and was not awarded anything. The claims of Martin and McCook were allowed by consent of all parties.

Upon the call of the case, Gunn, agent, moved that the fund be ordered paid upon his claim, first paying the cost of court. Presumably, Gunn was agent for Mrs. Gunn. The interpleader is in her name, and the execution in favor of Gunn, agent, without stating for whom he was agent. She alleged that she held the judgment on which the execution was issued. This motion was made upon the ground that Higley was not a party to the case before the court, as the original papers showed no service upon him. Whereupon, M. D. Jones stated to the court, in his place: That, when the petition was filed, Higley came to Jones & Dasher, of which firm Jones was a member, to secure their services as his attorneys. That they told him they represented Bell & Son, Hanse, and Eden, all of whom were claiming liens against Mrs. Rossiter, on account of work done and material furnished for Higley upon the house. That Higley fully and clearly understood that Jones & Dasher represented these parties, and stated that he desired their services, notwithstanding the fact that they represented other parties; that he had no fight to make against Bell & Son, Hanse, and Eden, but desired to see their claims paid. That under these circumstances he employed Jones & Dasher as his attorneys in the case, and they have since represented him. That, when the consent order requiring the defendants to interplead was taken, Jones & Dasher then and there appeared for Higley, and disputed with plaintiffs' attorneys as to the amount to be paid into court, finally agreeing to the sum which was actually paid in. That, in taking the said consent order, Jones & Dasher represented Higley, and it was only through oversight that their names were not signed to the consent decree as his attorneys, but in point of fact they had represented him, and appeared for him, and agreed to the consent order as his attorneys. Jones & Dasher also



offered to acknowledge service for Higley upon the interventions filed by Bell & Son, Eden, and Hanse, and did acknowledge service for said parties in open court. They also filed in court, as Higley's attorneys, a statement of the above facts, and therein, for him, waived service, notice, etc. The court granted the motion of Gunn, agent, and, by written judgment, ordered the fund to be paid to Hanse, McCook, Martin, and Gunn, agent, after paying cost and attorney's fees. This judgment having been taken, Jones & Dasher proceeded to give in evidence upon the claims of Bell & Son and Eden & Co. against Higley; and, the evidence having been submitted, the court refused to permit Bell & Son or Eden & Co. to set up or foreclose their lien against the fund in court, or the premises of Mrs. Rossiter, but directed a verdict in their favor against Higley.

Bell & Son excepted, and make the following allegations of error: (1) The judgment of the judge presiding should not have been granted, without first submitting the matters contained therein to the verdict of a jury; said judgment covering, as it does, certain facts at issue in the case, and not being purely questions of law, to be decided by the court. (2) Because it appears from the records in said case that the judge segregated or divided the case, deciding part of it by a written judgment, and allowing other portions of the case to proceed to a verdict by the jury; and movant says that the court should either have decided the whole case, or allowed the jury to decide the same. (3) Because the judgment of the court was rendered on the idea that N. D. Higley was not a party to said litigation, and yet the court proceeded to render a judgment appropriating money belonging to said defendant N. D. Higley, which movant says was error, unless Higley was a proper party to such litigation. (4) Because the court, in rendering its judgment, did so on the idea that N. D. Higley was not a proper party to the case, and yet said court treated said Higley as a party to the same by allowing a portion of said case to proceed to a verdict and judgment against said Higley. (5) Because the court erred in holding and deciding that N. D. Higley was not a party to said litigation, for the reason that said Higley had always been present and represented by counsel throughout said litigation, and had consented to, ratified, and acquiesced in all the orders, judgments, and proceedings had in said case. (6) Because the court erred in not holding and deciding that N. D. Higley was a proper party to said litigation, and particularly as to the claim of T. J. Bell & Son, because, through his counsel, in open court, said N. D. Higley acknowledged service in writing of said claim, making all necessary waivers, and from the further fact that N. D. Higley was all the time a proper party to said litigation, being present by his counsel, adopting and ratifying all proceedings

therein, even without such formal written acknowledgment of service. But movant says that when said Higley, by his counsel, did propose to place the question beyond doubt as to whether he was a party to said case, by a written acknowledgment in open court, he had the right to do so, and certainly, after such acknowledgment, he was a legal and proper party to said case. (7) The court erred in rendering said judgment, and in not decreeing said money to T. J. Bell & Son and the other lien men, for the reason that they held material men's lien for supplies used in constructing plaintiff's house, and which claim of lien was of higher dignity than the other claims in said case, to which the court awarded the money. Movant says that, this case being a question of interpleader between various creditors and lien claimants of N. D. Higley to a fund placed in court by petitioner in lieu of the property, the court should have rendered judgment according to the legal priority of the respective claims before the court, as the same stood at the filing of the original petition in this case, and should have preserved the liens of each of the defendants in said case as they stood when the petition was filed, and should have awarded the money accordingly. And when the defendant creditors were brought into court on the petition of the debtor of their debtor, and all such defendants, by the petition and by consent, agreed to interplead as to the fund paid into court, no lien claimant was required to reduce his claim of lien to judgment by any outside or independent proceeding, but could set the same up by interpleader, and was entitled to have his priority of lien preserved, and the money awarded accordingly.

Jas. H. Blount, Jr., A. Dasher, and M. D. Jones, for plaintiffs in error. Hardeman, Davis & Turner, Ryals & Stone, Freeman & Griswold, and Dessau & Hodges, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 649)

#### NANCE v. WINSHIP MACH. CO.

(Supreme Court of Georgia. July 23, 1894.)

**GUARANTOR OF NOTE — DISCHARGE — FAILURE TO BRING SUIT — COLLATERAL SECURITY — RELEASE BY FAILURE TO FILE PAPERS — PLEA OF SETTLEMENT — SUFFICIENCY.**

1. In Georgia, a general guarantor, for value, who guarantees payment of a promissory note at maturity, is not discharged by mere failure of the creditor to bring suit, or to proceed against the maker of the note, although the maker becomes insolvent, or some obstacle, such as sale and removal of personality, arises to the effective enforcement of a collateral security held by the creditor; the creditor himself taking no part in producing the insolvency, or in creating the obstacle, and the guarantor having given no notice to sue, or to proceed otherwise. And the guarantor is subject to suit, although no suit has been brought against the maker.

2. Such a guarantor is not discharged by rea-

son of the creditor's bringing an action of trover against a third person to recover property which the maker of the note had sold to that person; this property being the consideration for which the note was given, and the title to which the creditor retained as security for payment. Had the creditor succeeded in this action, the result would have been beneficial to the guarantor, as well as to himself. The suit was consistent with the contract of conditional sale, and with the contract to pay embraced in the note, inasmuch as such actions are, in this state, one mode of enforcing payment in cases of conditional sales.

3. A plea of settlement, without setting out either the terms of the settlement, or its agreed result as to release, discharge, satisfaction, or extinguishment of the liability sought to be enforced by the action, sets forth no defense.

4. A guarantor who binds himself for the payment of a promissory note given for the price of personal property sold by the payee to the maker of the note, with a reservation of title, is discharged by failure of the payee to have the contract of conditional sale, which was in writing, duly recorded; the maker of the note having subsequently, and while the instrument was unrecorded, sold the property to a bona fide purchaser for value, whereby it became lost to the payee, and incidentally to the guarantor, as security for the debt.

(Syllabus by the Court.)

Error from superior court, Hart county; Hamilton McWhorter, Judge.

Action by the Winship Machine Company against J. L. Nance. Judgment for plaintiff, and defendant brings error. Reversed in part, and affirmed in part.

Following is the official report:

The Winship Machine Company sued Nance as guarantor on three promissory notes dated September 7, 1885, and due, respectively, on December 20, 1885, October 20, 1886, and December 20, 1886. The declaration alleges that Smith the maker of the notes, is insolvent, and a nonresident of the state. Each of the notes stipulates that the title to a gin, feeder, condenser, and press, for which it is given, shall remain in the Winship Machine Company until this note is paid in full. On each is the following, signed by defendant: "For value received, we guaranty the payment of this note, and waive protest and notice of protest." The defendant's special pleas were stricken, on motion, and he excepted. These pleas are, in brief, as follows: "(1) Plaintiff stood by, and allowed Smith to sell out and dispose of all his property, and leave the country, whereby the risk of defendant was increased. (2) To protect their lien, it was necessary to have the notes recorded as a mortgage; and it was plaintiff's duty towards defendant to do this, which plaintiff failed to do, which failure exposed defendant to greater liability, and increased his risk. (3) In consequence of plaintiff's failure to have the notes recorded, plaintiff's lien on the property was lost, the same was sold to a bona fide purchaser, and could not be held bound for the payment of said debt, whereby defendant was injured, and was discharged from any and all legal liability to pay the notes. (4)

There is no legal plaintiff maintaining said suit. (5) On or about the — day of December, 1885, defendant and plaintiff had a full and final settlement of all matters and things between them, which settlement included defendant's liability on said notes sued on. After said settlement, defendant, relying on it, took no steps to protect himself out of Smith, as he might otherwise have done, and had no intimation from plaintiffs that they still claimed that he was still bound on the notes, until this suit was filed. Plaintiffs, by their own action, elected to rescind the trade under which the machinery was sold, and the notes taken, by bringing an action of trover in Madison superior court against T. J. Hunt, who was at the time in possession of the machinery, and on the trial a verdict was rendered against plaintiffs; and defendant says the election of plaintiffs to bring said trover suit was an election of legal remedies by plaintiffs, which bound them to that remedy alone, and released defendant from any liability on the notes; and, further, that bringing said trover suit amounted, in law, to a rescission of the contract, whereby he was released from all liability on the notes." (5) Substantially a combination of the second and third pleas. "(6) Defendant is released from any and all liability on the notes, for that plaintiffs retained the title to the machinery therein described, and, by their negligence and delay in prosecuting suit on the notes against the maker, the machinery was lost as security, the same having been sufficient to have paid said debt. Smith was solvent, and amply able to pay the notes when they matured, and, by the exercise of reasonable diligence on the part of plaintiffs, the money could have been made; but, by negligent delay to prosecute suit for several years after the notes matured, Smith was allowed to sell out all of his property, and leave the country. Plaintiff's suit against defendant is improperly brought, for the reason that he has never sued or exhausted the maker, and has no right of action against this defendant till then. Plaintiff did not notify this defendant, or call on him to settle the notes, within a reasonable time after default of payment on the part of the maker. For all of which reasons, defendant says he is not liable. (7) The suit in trover before mentioned, and the suit on the notes, are not, and were not, concurrent remedies, but were conflicting and distinct; and the election of plaintiff to bring trover was such an election as debars him from bringing a subsequent suit."

P. P. Proffitt and A. G. McCurry, for plaintiff in error. W. S. Hodges and I. C. Van Duzer, for defendant in error.

PER CURIAM. Judgment reversed in part, and in part affirmed.

(34 Ga. 654)

**BAGWELL v. TOWN OF LAWRENCEVILLE.**

(Supreme Court of Georgia. July 30, 1894.)

**AMENDATORY ACT — SUFFICIENCY OF TITLE — MUNICIPAL POWERS — PROHIBITION OF ILLEGAL LIQUOR SALES.**

1. The phrase, "An act to amend the several acts incorporating the town of Lawrenceville," is sufficiently descriptive of the law to be amended, the amending act not undertaking to expressly repeal or modify any of the provisions contained in the acts incorporating the town of Lawrenceville, but only adding affirmative legislation, which might have been constitutionally enacted without making any reference whatever to existing laws touching that town, the sole repealing clause in the act being the usual general clause repealing all conflicting laws and parts of laws. The descriptive phrase being set out in the title of the act, it was unnecessary to repeat it in the body of the same.

2. A statutory power conferred upon a municipal corporation "to protect the health, property and person of the citizens of the town and to preserve peace and good order therein," and "to make and pass all needful orders, by-laws, ordinances, resolutions, rules and regulations, not contrary to the constitution and laws of this state, and to prescribe, impose and enact reasonable fines and penalties," etc., is comprehensive enough and specific enough to enable the corporation to pass and enforce an ordinance prohibiting any person from keeping a "blind tiger," or keeping for sale, barter, or exchange any vinous, spirituous, or malt liquors, within the corporate limits of the town, there being no law of the state which prohibits or makes penal the acts to which the ordinance applies, and it not appearing that the county in which the town is situate is one in which liquors could lawfully be sold, with or without license. It is legitimately within the scope of general police powers to inhibit the keeping of intoxicating liquors for illegal sale, or the keeping of places for conducting such sales.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; N. L. Hutchins, Judge.

One Bagwell was convicted of violation of an ordinance, and, upon the overruling by the superior court of his certiorari, he brings error. Affirmed.

The following is the official report:

Bagwell, on June 3, 1893, was tried and convicted in the mayor's court of Lawrenceville for violation of an ordinance of that town known as the "Blind-Tiger Ordinance." He took the case by certiorari to the superior court, where his certiorari was overruled, and to this he excepted. In the petition for certiorari he admitted that there was sufficient evidence to authorize the judgment of conviction, but insisted that the conviction was illegal for the following reasons: Because the ordinance in question never has been adopted by the present board or council. The court trying petitioner admitted that a new council was elected in January, 1893, for the ensuing year, and since his election said ordinance has not been adopted or published; neither was the ordinance in question, which was adopted in October, 1892, by the old council, ratified, approved, or made the ordinance by the new and present council. Second. Because the court erred in allowing the ordinance to

be used as evidence, over the objection of petitioner, who insisted that said ordinance was void and of no legal effect because the town council had no authority to pass it. The charter under which said council was created and exists confers upon the municipal authorities no power to enact such legislation, and it is therefore void. See Acts Gen. Assem. 1882-83, p. 356, approved September 17, 1883. Third. Because the said act, known as the "Act to amend the act incorporating Lawrenceville," etc., and entitled "An act to amend the several acts incorporating the town of Lawrenceville, to create the offices of mayor and councilmen and to declare and define the powers and duties of the same, and for other purposes," being the charter under which the said town is now acting, violates the constitution of the state, and is therefore void and of no legal effect, and any law or ordinance enacted by authorities elected and qualified thereunder is therefore void. Said act is unconstitutional, and therefore void, because it contains matter different from what is expressed in the title thereof, and because the said act sought and seeks to amend all the prior acts in reference to the town of Lawrenceville, by mere reference to the titles, in fact without any reference to the titles even, and without distinctly describing the said several acts sought to be amended, and without giving the alterations to be made. Fourth. Because the court, over the objection of defendant's counsel, allowed the witness John Mills to testify as to defendant's violation of said ordinance prior to the date charged in the warrant and affidavit therefor, under which he was arrested, to wit, May 30, 1893, defendant insisting that the rule applicable in state cases, to wit, allowing the state to fix the time of the commission of the alleged offense at any period or date within the statute of limitations, did and does not apply to cases made against violation of the laws of municipal authorities. From the answer to the petition for certiorari the following appears, among other things: The ordinance in question, after being ordained by the council at a meeting thereof held on October 18, 1892, was regularly published by the marshal of the town. It was admitted by the mayor that the ordinance had never been formally adopted by the council of 1893, which admission was coupled with the fact that the same had never been repealed or revoked. The warrant charged defendant with having violated the ordinance on May 30, 1893, and there was evidence that about that time a witness got corn whisky from defendant for which he was to pay; that he had got liquor from him in May, 1893, and paid him for it; and had seen others drinking at defendant's place of business, and paying him for it, but could not say what it was they were drinking. The same witness testified that since October, 1892, he had several times procur-

ed liquor from defendant at his place of business, and paid him for it, and that defendant's place of business was in Lawrenceville. The ordinance was as follows: "If any person shall keep a 'blind tiger,' or keep for sale, barter or exchange any wine, brandy, rum, gin, whisky or other spirituous or malt liquors or any mixtures of such liquors, within the corporate limits of the town of Lawrenceville (except domestic wine or wine for sacramental purposes), such person and the occupant of the house or other place of business for the time being, shall severally be deemed offenders, and upon conviction thereof shall be punished as prescribed in ordinance No. 11, of the by-laws of the town of Lawrenceville."

C. H. Brand, for plaintiff in error. Sam J. Winn, for defendant in error.

PER CURIAM. Judgment affirmed.

(24 Ga. 706)

**RICHMOND & D. R. CO. v. HERRINGTON.**

(Supreme Court of Georgia. July 30, 1894.)

**REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.**

The motion for a new trial presenting no questions which can be dealt with by the supreme court, except those arising upon the general grounds that the verdict was contrary to law and the evidence, and the evidence being sufficient to warrant the verdict, no reason appears for setting it aside after its approval by the trial court.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; N. L. Hutchins, Judge.

Action by Frances H. Herrington against the Richmond & Danville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Mrs. Herrington sued the railroad company, alleging in brief: On the afternoon of February 7, 1891, she boarded a train of defendant for the purpose of going to Duluth, a station on defendant's road. She had with her a little grandchild, six years old, a little hand trunk, a bucket, and a basket. The conductor took up her ticket. Before arriving at Duluth, and while conversing with some passengers on the train, the conductor came to where she was sitting, and called out, "Here is the place you get off," or words to that effect, directing his remarks to her, and at the same time picking up her trunk. Presuming that he would not deceive her, and that he knew what he was doing, relying upon his statement, she immediately got up from her seat, and, taking her grandchild by the hand, followed the conductor to the door and on the platform. When she arrived on the platform, she did not think she was at Duluth, as the appearance of the place was unfamiliar to her, and she told the conductor that it did not look like the place she usual-

ly got off, but, it being dark, she could not be positive whether her doubts were correct or not. The conductor replied that they had on three extra coaches that night, and that was why she did not get off at the usual place, and then grabbed her in a rough manner, and told her to get off quick. Relying on his statement and orders, she undertook to get off; and with him holding her under and by the arm, in a rough manner, he put her off the train, at a rough place, whereby she was bruised and injured. She charges that this was an unlawful ejection from the train; that she did not voluntarily leave the train, but undertook to leave and was put off under and by the orders of the conductor. The point where she was ejected from the train was nearly four miles below Duluth, to which point she had paid her fare. When she learned how far she was from Duluth, having been told by a passenger who alighted at the same place, she was greatly vexed and annoyed. With the things she had with her and her little grandchild, it being dark, and the ground wet and slippery from long and continued bad weather, she began her journey, hardly knowing what to do or where to go. The person who alighted from the train, seeing her perilous condition, and moved by her fear and distress and the cries of the little girl, kindly went up the road part of the way with her, and, informing her of the names of the nearest neighbors, and about what distance ahead, he left her alone, in the dark, on the highway, unprotected, and almost frightened out of her senses. On her way up the railroad track, she was suddenly confronted by a long freight train, which came thundering down the track and near her before she was aware of it, and which almost scared her and her little grandchild to death, as she was at such a place she could not well and safely leave the track without hurt to herself. She was on a high embankment, and below on each side was a pond of water, of the depth of which she knew nothing, and, to save herself from death and great bodily injury, she grabbed the little child, crouched down on the ground, and with the child clinging to her clothes, and she to the end of the cross-tie, the train passed by, leaving her almost exhausted from fear and the dangerous position in which she was thus placed. With great trouble and suffering, mental and physical, she finished her journey, arriving at one Russell's almost prostrate from her trip. She could not and did not sleep a "wink" during the night. Next day he carried her home, about 5½ miles from his residence. Her joints, ankles, knees, and hips were injured and affected by the trip so much that she has been suffering from them since. Frequently at night, even now, she cannot sleep on account of the pain in her ankles and limbs, caused by the illegal expulsion and its direct and unavoidable consequences.

She is nearly 55 years old, and the wear on her nervous system from the trip has been great, causing her much suffering. Her feelings were wounded and greatly outraged by the illegal expulsion and careless and reckless ejection. She was in no way to blame. She obtained a verdict for \$500, and, defendant's motion for new trial being overruled, it excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and the ground that the verdict was excessive. Also, that the court erred in not granting defendant's motion for a continuance of the case, on account of the nonreturn of its interrogatories sued out for the female witnesses Mrs. Rebecca Smith and Mrs. Julia Knox, who resided in Chattooga county, Ga. What showing was made as to these interrogatories does not appear. Error in allowing plaintiff's counsel, over the objection of defendant's counsel, to read the answer of the witness C. Bush to the fourteenth direct interrogatory as to what plaintiff said after the train had left, the same being too remote, and not part of the *res gestae*. It was not stated in this ground what objection was made to this testimony when offered, nor does any statement appear in the evidence of Bush, as contained in the record, as to what plaintiff said after the train had left. The evidence for plaintiff was substantially in accordance with the allegations of her declarations, except that the conductor did not handle her roughly when she alighted from the train. She testified, among other things, that the conductor was a weakly little fellow, who could not hold her up, and she had to jump, and, in jumping, hurt the bottom of her feet, and it pains her yet, and she still has pains "plum up to her hips"; that it was some distance from the last step to the ground, and as she got off, and when her feet struck the ground, her right foot was hurt; that she struck the ground heavily, and, as her left foot hit it, she felt a pain in it, which caused her from that minute to suffer from it, and she has never yet recovered from it; that it pained her to walk, and from the effects of the injury received in alighting from the train her ankle became swollen that night, and is swollen yet; that she did not sleep any that night on account of it, and has never seen a well day since on account of it; that it has prevented her from doing her usual domestic duty unless with pain and suffering; that she never was so affected before, having been stout and healthy, but since has been unable to work any in the field, when prior to that time she had always gone to the field when necessary, and made a regular hand; that she has used up bottle after bottle of liniment, oil, etc., but has never been able to cure her leg, and it is now swollen up to her hips; that she walked down the railroad towards Duluth about a

mile and a quarter, and came to a house where she was allowed to spend the night; that she cannot walk much now to amount to anything, and before could walk from Duluth to Lawrenceville, without any trouble; that, when she got off the train, the conductor was too weak to hold her up, and she just squashed him to the ground, and went aliding down by his side on down the embankment, and struck her foot against some object, hurting it; that she got off the train on the right-hand side, at the point in question, Beaver Dam Crossing, and passengers got off on the right-hand side at Duluth; that the conductor had a lantern, and the porter also had one; that she knows where the guano houses are at Duluth, they being south or west of the depot, towards Atlanta, and on the left-hand side coming from Atlanta; that passengers alight on the right-hand side at Duluth and about two or three hundred feet from the guano houses; that she got hurt when the old freight train came along, in getting out of the way of it; and that the conductor was a new man, whom she never saw on this train (the accommodation) before or since. She showed her ankle to the jury, saying that it was swollen, caused from the injuries sustained in being put off the train. He husband testified, among other things, that, when she got home the next day, she complained a good deal of her foot, ankle, and limbs, and has complained a good deal since; that she has not been able to work in the field since; may have picked a little cotton; that she has used a great deal of medicine and liniment for her injured leg; and that her leg has been and is now swollen. For the defendant, the conductor, flagman, porter, and a passenger testified. Their testimony was to the following effect, in brief: The conductor knew the road well, but his regular run was on a through train, and he was running extra that evening for another conductor. Plaintiff was a passenger on his train that evening, and had a ticket to Duluth. Just after the train left Norcross, she tapped him on the arm, and told him not to forget her. When the engineer signaled for Beaver Dam Crossing, the conductor, having a passenger for that crossing, rang the engineer to stop, and, when the train arrived at the crossing, went up to the passenger for Beaver Dam, who was sitting just across the aisle from plaintiff, and said to him, "Here is your place." Plaintiff rose to go out, and the conductor said to her, "Do you want to get off here?" She replied that she did, and he took her trunk and basket, and went out of the car. He assisted her and her little grandchild to alight in as polite a manner as possible. After getting on the ground, she said, "This don't look like my place." He told her, "Yes;" it was; that he had on an extra coach that evening, and had not stopped directly on the crossing. He pointed out the crossing to her, and

asked her if she would mind standing still till the train moved away, when she could get on the crossing, about 15 or 20 feet off up the road. She said, "No," and he handed her trunk to the passenger who got off with her, got back on the train, and the train left. He never dreamed that a mistake had been made, or that she was dissatisfied, until about three weeks afterwards, when he heard that she was complaining about it. She did not fall or stumble in getting off the car, but alighted all right. The porter called out "Beaver Dam Crossing" in a loud voice twice, and the conductor called it once before the train stopped, and once after it had stopped at the crossing, loud enough to have been heard all over the car. The ground is not rough at Beaver Dam Crossing where she got off. There is no platform there for the accommodation of passengers. It is not a public crossing, and no passenger trains stop there except the accommodation.

J. B. Estes, for plaintiff in error. C. H. Brand, for defendant in error.

PER CURIAM. Judgment affirmed.

(40 W. Va. 464)

# TOWN OF DAVIS v. DAVIS.

(Supreme Court of Appeals of West Virginia.  
April 6, 1895.)

NUISANCE—WHAT CONSTITUTES—ABATEMENT BY  
TOWN COUNCIL—PROCEDURE—ORDER TO SHOW  
CAUSE—REVIEW BY COURT.

1. Under Code, c. 47, § 28, giving the council of a town power to abate a nuisance, but not prescribing the methods of procedure, upon a petition signed by 50 residents, supported by two affidavits fully describing the alleged nuisance, a merry-go-round, and praying that the owner might be summoned before the town council, a summons signed by the mayor only in the nature of an order to show cause, and reciting the facts set out in the petition, was issued. *Held*, that the procedure and summons were sufficient.

2. A summons in the nature of an order to show cause, issued by a town council to a person charged with keeping a nuisance, not being a writ or process, within the meaning of Const. art. 2, § 8, need not run in the name of the state.

3. Code, c. 50, § 58, providing for continuances in actions before a justice, does not apply to proceedings before the mayor under chapter 47, § 39, making it the special duty of the mayor to preserve the peace and good order of the town.

4. Code, c. 47, § 28, giving the council power to abate anything which, in the opinion of a majority of the whole council, shall be a nuisance, does not require the recorder, or more than a majority of the council, to be present at the hearing of a petition to abate a nuisance.

5. Where the law gives the council of a town ample power to abate nuisances, and the council gives the person charged with maintaining the nuisance opportunity to be heard, it is unnecessary to resort to a court of equity for relief.

6. A proceeding by a town council against a person for maintaining a nuisance is judicial in its character, and the decision is subject to review.

7. Where a person accused of maintaining a nuisance feels aggrieved by the decision of a town council, his remedy, if the statute gives no appeal, and no question is made that the statute is unconstitutional, or that the town authorities did not have jurisdiction of the subject-matter, is by certiorari, and not by prohibition.

8. Const. art. 8, § 3, giving the supreme court of appeals appellate jurisdiction in cases of certiorari, and not the clause fixing the court's jurisdiction by the value of the matter in controversy, determines the court's jurisdiction when error is brought on the ground that the circuit court refused defendant a writ of certiorari on a conviction by a town council for maintaining a nuisance.

9. A merry-go-round, run by a steam engine, the whistle of which blew every few minutes, accompanied by a band, and attended by a large, noisy, and bolsterous crowd till after 10 at night, disturbing some of the people living near by it, is such a nuisance as a town council has power to abate, after proper investigation, under Code, c. 47, § 28. Affirmed by a divided court.

Error to circuit court, Tucker county.

Proceeding by the town of Davis against S. T. Davis to abate a nuisance. On certiorari to the circuit court, the judgment of the town council was affirmed, and said Davis brings error. Affirmed.

A. M. Cunningham, for plaintiff in error.  
C. W. Dalley and C. O. Strieby, for defendant in error.

HOLT, P. This was a proceeding on the part of the incorporated town of Davis against S. T. Davis, to have declared to be and abated, as a nuisance, a steam riding gallery, commonly called a "merry-go-round," operated by defendant Davis in the town, on lot No. 73. Such proceedings were had that the town council, by judgment rendered on the 10th day of August, 1894, declared the same to be a nuisance, and ordered it to be abated,—to be stopped, we infer. On the 17th day of August, S. T. Davis presented to the circuit judge, in vacation, his petition for a writ of certiorari, but on mature consideration it was refused, and to such refusal this writ of error was granted. Defendant Davis appeared at the time and place mentioned in the process before the members of the town council, and moved to quash and dismiss the summons, as unauthorized by law, and as otherwise faulty and defective.

1. Was such motion improperly overruled? Section 28 of chapter 47 (see Code 1891, p. 426), which defines the powers and duties of the council, and among them the power to prevent injury and annoyance to the public or to individuals, and to abate, or cause to be abated, anything which, in the opinion of a majority of the whole council, shall be a nuisance, does not prescribe the forms and methods of procedure. Therefore they are allowed a wide discretion, within the limit of reasonable fairness. In this case there was a petition and information, signed by 50 residents of the town, supported by two supplementary affidavits, suggesting the location of the riding gallery, the name of defendant as the owner operating it, and praying that he might be summoned to show cause why the same should not be declared to be a nuisance and abated, being complained of as both a public and private nuisance. Upon this the summons in the nature of a scire facias, or rule to show cause, was issued. It gives the defendant notice of the injury and annoyance suggested and com-

plained of, commanding the officer to summon him to appear at a certain time and place "to show cause, if any he can, why the steam riding gallery, commonly known as the 'merry-go-round,' owned by him, and operated on lot No. 73, as shown by the map of the town of Davis, between the hours of 8 and 10 p. m. each day, since the 3d day of August, 1894, until this date, shall not be declared a nuisance, and abated as such. [Dated and signed by the mayor.]" I know of no law requiring it to be signed by the members of the council. In view of the purpose the summons and forms of procedure are intended to accomplish and subserve, I can call to mind no more short, simple, and efficient form than this, to give the party written notice of the thing complained of, the relief asked, and of the time, place, and tribunal when and where he is to appear and show cause why the same should not be granted. As to the authority for it, it finds justification in the forms of the various writs of *scire facias* and rules to show cause which have been in use for the like purpose time out of mind. They were used before the ordinary distinctive forms of common-law actions came into existence, and they still survive as efficient and simple methods of notice and procedure in daily use.

2. But it is said that it is a writ, and void because it does not run in the name of the state, as required by section 8 of article 2 of the constitution. See Code 1891, p. 21. I do not regard it as a writ or process of any tribunal acting as a court, but simply a notice, in the name and on the behalf of the town of Davis, that defendant should appear before the council at the time and place designated, and show cause, if any he could, why they should not, in the exercise of their police power, abate his riding gallery, as a nuisance, — a method deemed expeditious enough to meet the exigencies of this particular case, and certainly proper in itself, and fair to the defendant; for it not only gave him an opportunity to show cause, but to remove or stop it himself if he saw fit. The defendant demanded, as matter of right, a continuance of the cause for seven days, as allowed by section 58 of chapter 50 of the Code in an ordinary civil action before a justice. This was refused, but the further hearing was deferred for 24 hours. Such refusal was not error, for three reasons: First. It was not a cause, within the meaning of that section. Nor was the mayor acting as a justice of the peace to try a case between parties, but as the chief executive officer of the town, according to section 39 of chapter 47 of the Code, which makes it his especial duty to see that the peace and good order of the town are preserved, and that persons and property therein are protected. Therefore, when 50 residents lodged with him their sworn information and complaint of a nuisance, and asked its abatement, and that defendant might be cited before the council to show cause, if any he had, against it, the mayor caused such citation to

be issued and served, in the name and on the behalf of the municipality, for a hearing of the matter before the common council, having first fixed the time and place. Second. If, within the meaning of the section, defendant made no affidavit, and in such case the statute requires it. Third. And when the examination took place, on the next day, defendant appeared with, and examined on his own behalf, some 25 witnesses.

3. Again it is said there was error because the council heard the case when the recorder was absent. Section 27 of chapter 47 says, "The mayor and recorder shall vote as members of the council." But section 24 of chapter 47 says, "A majority of the council shall be necessary to form a quorum for the transaction of business." And the inference is that no greater number is required, unless the law in the given case specially makes the presence of the whole, or such greater number, necessary. I can find no such law. The section relied upon for this contention is section 28, which says the council shall have power to abate, or cause to be abated, anything which, in the opinion of a majority of the whole council, shall be a nuisance. This does not mean that more than a quorum must in such case be present, but that a majority of the whole, including those absent as well as those present, must concur in such opinion. Here five out of the whole seven concurred in the opinion to abate.

4. The defendant urges that the remedy by injunction should have been resorted to. In most cases, — in many cases, rather, — it is hard to conceive of a judicial remedy more full and complete, more flexible in adaptability to the peculiar exigencies and ever-varying requirements of the cases, or, what may be more to the point, more simply efficient and speedy; so much so that it has become a common judicial remedy in a common criminal nuisance, where abatement is necessary, and in a large class of cases has well-nigh superseded actions at law, except, perhaps, where *mandamus* is added to what we would call common-law suits, as an ancillary remedy, or mode of carrying a specific judgment into effect. But I take it for granted that some sort of a nuisance, great or small, — and many of a petty character, — arises almost every day in cities and towns. It would be intolerable to have to apply to a circuit court, in such cases; and it would seem not to be necessary under this statute, in most cases, where the party is properly heard before he is condemned, though it is easy to imagine grave and perplexing questions where such resort to the ordinary courts would be prudent and discreet, and especially safe, on the part of the common council. Long experience, the great practical test of general fitness and convenience in such matters, has shown that self-governing municipalities must have large power over such affairs, for the prevention of injury and annoyance to individuals, and the public from things dangerous, offensive, or



unwholesome; in other words, to see that each one has the full enjoyment of his rights of life, liberty, and property, and therefore that each one shall so use such rights of his own as not to invade or injure those of another. This is the main purpose of their creation, and the chief function in their existence; so that their fair and honest efforts in that behalf should be liberally construed, and steadily upheld. But, on the other hand, it would be intolerable for such local municipal authorities of a town to meet in private, and declare a particular thing to be a nuisance, without giving the party an opportunity to be heard and show cause against it. See *Yates v. Milwaukee*, 10 Wall. 498. Hence what seems to me to be the fair and prudent course was pursued by the mayor and council of the town of Davis in this instance.

Now the question arises, and has been discussed, what is the nature of such proceeding? It is plainly judicial in its character. I hardly see how it can be regarded otherwise. It is true that it is in the exercise of the general police power delegated by the legislature. But is the judicial ascertainment of a fact in a proceeding in the concrete case against a particular person and thing, after due notice given, in order to ascertain the character or status of the thing as a nuisance, followed by execution of the judgment, any the less a judicial proceeding, in the particular instance, because it is done under the delegated general police power? It is merely a concrete case of the administration of justice, like all other cases judicial. This defendant complains of this seizure of his property as unreasonable, the condemnation of it as a public nuisance as unlawful. Can it be that such seizure and condemnation are final and conclusive? It has been held not to be conclusive, and that the party proceeded against can test the validity of the action of the council by certiorari, if not by distinct action against the town for damages. See *Cole v. Kegler*, 64 Iowa, 59, 19 N. W. 843. Neither do I agree with counsel for appellee that his remedy was by prohibition, and not by certiorari, for here no question is made that the statute in question is not constitutional, and that the town authorities did not have jurisdiction of the subject-matter; so that if they failed to follow the law, in applying it to the facts of the case, the remedy is by certiorari, and not by writ of prohibition. *Mayor, etc., of Montezuma v. Minor* (1883) 70 Ga. 191. The statute gives no appeal in such cases, and, being the creature of statute law, it does not lie, except where it is given by express terms. The rule with regard to a certiorari is the very reverse. It always lies, unless expressly taken away, and it requires very strong words to do so. The reason of this is that it is an extremely beneficial writ, being the medium through which the court of queen's bench exercises its corrective jurisdiction over the summary proceedings of inferior courts. 2 Smith, Lead. Cas. (9th Ed., p. 998, note to

*Crepps v. Durden*. And, so far from this common-law writ being taken away in the state, the constitution, in express terms, gives the circuit court supervision and control over all proceedings before justices and other inferior tribunals by certiorari (see Const. art. 8, § 12); and by section 2 of chapter 110 of the Code (Ed. 1891, p. 761) the common-law jurisdiction of the writ is declared, and in every case, matter, or proceeding before a council of a city, town, or village it is expressly provided that, subject to certain exceptions mentioned, the record or proceeding may, after a judgment or final order therein, be removed by a writ of certiorari to the proper circuit court, and such writ may be awarded by the judge in vacation as well as by the court. For mode of procedure, see section 4, etc., of chapter 110. It is true that the question of what is a nuisance in a given case is a very perplexing one, and one that the tribunals are constantly called upon to decide; but so far from that being a reason why it should be left to the sole and unappealable decision of the council, with unlimited power to say what is a reasonable exercise of such power, it must for that reason be liable to frequent and grievous abuse, in the illegal and unnecessary injury of private property and invasion of private right, and must strengthen, rather than weaken, the claim of the party affected that he should have the right to subject the proceeding to the scrutiny of the ordinary courts. I think, therefore, that the circuit court had jurisdiction of the case. As we have already seen, this was a summary conviction of defendant for the creation of a nuisance, which has been affirmed in the circuit court on certiorari. In such a case the clause which determines the jurisdiction of this court by the value of the matter in controversy does not apply, and appellate jurisdiction is expressly given in cases of certiorari by section 3 of article 8 of the constitution. See Code (Ed. 1891) p. 38. And even if it were a civil case, and one in which the jurisdiction is to be determined by the value of the thing declared to be a nuisance, it would not be going far to assume, as a matter of general principles, that a steam engine and riding apparatus, etc., were of greater value than \$100.

The circuit judge to whom the record—made up of the evidence given and proceedings had before the council—was presented, together with a petition praying that a writ of certiorari might be awarded, heard the application upon the merits, and refused to award the writ. The question now reached is, was such refusal right? Reviewing the proceeding of the council upon the merits, and determining all questions arising on the law and the evidence, as certified, and rendering such judgment upon the whole matter as law and justice require, should the order of the town council have been affirmed, if the certiorari had been allowed? Many of the questions raised by



the plaintiff in error have already been discussed and considered. Was the riding gallery a nuisance at that particular place and time? Is the only one that remains. That depends upon the place, the time, the circumstances, the manner in which it was operated, and the effects it produced. Did the noise and crowd, and other effects of this riding gallery, invade any public or private right? Did it materially interfere with and impair the ordinary physical comfort of any one of normal sensibility and ordinary mode of living, in his home or place of business? The place has much to do with it. It seems to have been on a vacant lot in a populous part of the town, with at least four dwellings near by. The time is important. It was operated up to 10, and half after 10, in the night, tending to prevent and disturb sleep, and had been kept up continuously for six days. The attending circumstances are important. It drew to the place a large and noisy and boisterous crowd. The nature of the thing itself is important. It was run by a steam engine. The whistle blew every few minutes. The music played, the gallery ran around, the crowd hallooed, etc., until 10 o'clock at night. That it was a mere idle amusement, perfectly legitimate in a proper place or at a proper time, is not wholly unimportant. That which calls together a disorderly crowd in a public place was held to be a public nuisance in *King v. Moore*, 3 Barn. & Ald. 184. The making of loud music, with instruments or otherwise, in the nighttime, to the disturbance of a neighborhood, was held to be a public nuisance in *Rex v. Higginson*, 2 Burrows, 1233; *Com. v. Oaks*, 113 Mass. 8; *Com. v. Smith*, 6 Cush. 80. Those who participated did not regard it as a nuisance. Some of the witnesses attended. Some permitted their children to attend. They thought it a harmless amusement for the children. It did them good, rather than harm, and the proprietor was careful, polite, and kept good order. This, I take for granted, is true, at a proper time and in a proper place. Other witnesses lived at a distance. They, of course, were not annoyed, and they thought it was not a nuisance to those who lived near by. Four witnesses who lived close by say that it was a nuisance, disturbed and annoyed them at their homes, and prevented or interrupted their sleep. One witness, who lives on the same street, five lots below, says it was a considerable annoyance, and, to some extent, kept him awake. Quite a number of witnesses who live or do business near by were not annoyed by it, and do not regard it as a nuisance. From all this, and from the general character of such machines in operation, with their usual accompaniments, it is not hard for one to form a pretty accurate opinion on the question involved; that is, that when kept up day and night, for days together, in such a place, it was a decided nuisance to some people, of ordinary sensi-

bility, who lived or had their place of sleeping adjoining or close to the vacant lot No. 73, while to those who lived at a distance, those who participated, and some of those who lived close to the place, it was not a nuisance,—did not annoy them to any material extent. Such questions cannot be decided by a mere count of those two classes, or by taking a vote of the town. Whether a thing is or is not a nuisance does not depend upon the notions of people living in a designated locality. "No man has a right to take from another the enjoyment of what are regarded by the community as the reasonable and essential comforts of life because the notions of some individuals, or of the people of a given locality, may not correctly estimate the standard of such comforts." *Owen v. Phillips* (1881) 73 Ind. 284, 295. See *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241; *Powell v. Furniture Co.*, 34 W. Va. 804, 12 S. E. 1085.

In reaching this conclusion as to the results produced by the act complained of, I lay great stress upon the finding of the council,—men whose duty it was to ascertain them, and who had a right to observe and inspect for themselves, as well as to hear testimony. The law lays down no fixed method of procedure, and we may well believe that they resorted to means found to be so useful in like cases; that is, they went upon the ground, and viewed the place in question, and heard and observed for themselves the facts relating to the controversy. See section 30, c. 116, Code. With this view of the law and the facts of the case, the judgment complained of must be affirmed.

DENT, J. (dissenting). Section 28, c. 47, of the Code, under which these proceedings were instituted, contains two clauses referring to what, under the law in its broadest signification, are classed as nuisances, as follows: to wit: (1) "To prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome." (2) "To abate or cause to be abated anything which in the opinion of the majority of the whole council shall be a nuisance." The first refers to and includes all such things which, though lawful in themselves, may be conducted, used, or neglected in such manner and to such an extent as will cause them to become an injury or annoyance to the public or individuals, by reason of their becoming dangerous, offensive, or unwholesome, while the second refers to such things as are a nuisance per se, in the opinion of the council; that is, their sound and reasonable discretion. To hold otherwise is to render the first clause nugatory and meaningless, as the word "nuisance," construed in its broadest sense, would cover everything that injures or annoys the public or individuals by reason of its being dangerous, offensive, or unwholesome, while in its strictest sense it includes only such things

as are an injury or annoyance to all persons who come within the sphere of their operations, though in a greater degree to some than others. For instance, a cesspool throwing off putrid odors or gases; a harsh and grating sound, continuously repeated; the unnecessary obstruction of a public thoroughfare; a dangerous and unprotected excavation or opening of any kind,—are all injurious or noisome to every one who may come within their sphere, and hence are nuisances per se. But those things which are a source of pleasure and enjoyment to some, while they are a positive annoyance to others, such as singing, dancing, a hand organ, amusements, processions, and occupations of all kinds, including a merry-go-round, cats, dogs, and children, are not nuisances per se, but the world would be a dreary place to many without them. All such things can be indulged in and used in such manner as to make them a nuisance to certain individuals, and yet they may be a continual source of happiness and necessity to a large majority of the people who come within their sphere. The council, in determining what is a nuisance per se, and therefore to be abated, must use their sound discretion; hence the use of the words, "in the opinion of a majority of the whole council." But they cannot hold and abate as nuisance, under the second clause, that which is not, in a greater or less degree, injurious and annoying to all alike who come within its sphere. To give them the power to abate everything which, in the opinion of a majority, was annoying to any individual, would be unjust, unreasonable, destructive of private rights, and contrary to fundamental law. A merry-go-round is not a nuisance per se, and does not come under the second clause, and is therefore not a subject of abatement by the majority of a town council, and the judgment should have been reversed, and the proceedings quashed. The authority to abate, given to a town council, should not be construed as a license to do what they please with their neighbor's property, but only to protect the interests of the public. In this case no such interests were at stake, but it was simply a question of whether a few individuals, because of annoyance, real or imaginary, had the right to cause the abatement or destruction of that which afforded pleasure, amusement, exercise, and experience to a much larger number. It may be said that a merry-go-round comes under the first clause. Such is the case. But this prosecution is under the second clause, and the first does not authorize the harsh measure of abatement, but is simply a measure of regulation or prevention. A merry-go-round may be conducted in such manner as not to be offensive to any one, and yet it may be made a source of annoyance to all. In such cases it becomes the duty of the council to prevent its management in such way as to make it an offensive annoyance

to a person of ordinary sensibilities; that is, ordinary people, who love their own and their neighbor's children, find a sufficient recompense for all annoyance in their happy enjoyment of innocent pastimes and sports, and observe the golden rule, "As ye would that men should do unto you, do ye even so unto them." As is said in the case of *Westcott v. Middleton*, 43 N. J. Eq. 483, 11 Atl. 490: "Before the court can condemn a trade or calling, it must appear that it cannot be carried on without working an injury or hurt to another; and, as I have said, that injury or hurt must be such as would affect all reasonable persons alike, similarly situated. The law does not contemplate rules for the protection of every individual wish, desire, taste. It is not within the judicial scheme to make things pleasant or agreeable for all the citizens of the state." Such a scheme could not be devised by human ingenuity, for it is always too hot or too cold, too wet or too dry, too light or too dark, for some people. Always complaining, never satisfied, morbid, phlegmatic, continually annoyed, fault-finding, looking for slights, easily offended, hysterical, captious, haters of children and their enjoyments, a misery to themselves and a heaviness to their friends, is their history; and for such the law affords no remedy, as it cannot administer to a mind and heart diseased. On the judgment of such it is never safe to condemn a lawful calling as an offensive annoyance. The conduct of this merry-go-round was a legitimate business,—just as much so as the selling of ribbons or flowers for hats, cigars or pipes, or sweetmeats or candies, and as useful or beneficial. The council, before regulating it, should have found out wherein it was offensive, and then have compelled the manager to submit to necessary rules to reduce its offensive characteristics as much as possible, and, if necessary, to lop off some of the offensive contingents. To testify that a thing is a nuisance must testify to the annoying characteristics. R. W. Eastman testified "that he goes to bed early, and gets up early; that he sleeps best in the first part of the night; that the noise of the merry-go-round interrupted him from sleeping; that his wife had the headache one night, and it annoyed her from sleeping; that the crowd around the merry-go-round hallooed and made a noise, and that the music annoyed him." To go to bed before 9.50 p. m. on a sultry summer night is out of the ordinary rule, in towns the size of Davis, and this was the hour the amusement stopped. Neither does ordinary music annoy the ordinary man, especially when in bed, nor should the joyous shouts of children at play. So far as his wife was concerned, she certainly was guilty of contributory negligence in having the headache; and, as to which caused her to lose sleep, she was the best witness. George Amlaw says the music

annoys him from sleeping. Wilbur Patriquan says he is annoyed out of one hour's sleep each night. F. A. Cruikshank says: "The music and whistle from the engine annoys me. I imagine the whistle blows every five minutes, if it don't blow." George S. Ramsey says it slightly annoyed his little girl when she was sick. But he considers it a great source of amusement, and not a nuisance. C. E. Wolford says: "It keeps me awake some. It makes considerable annoyance." This is the substance of all the evidence in favor of the prosecution. Three were annoyed by the music, one by the noise of the crowd, one by the whistle, which he imagined blew, whether it did or not; and, being early bed-goers, they were each cheated out of from half to one hour's sleep each night. This is the evidence of nuisance on which the judgment of abatement was founded, and the defendant deprived of his legitimate business. If the whistle was an offensive annoyance, the council could have prevented its blowing. If the music was an offensive annoyance, the council could have required the playing of tunes low and soothing, or stopped it altogether. The children's mirth and laughter could have been suppressed in the same manner, and their shouting could have been prevented by the promise of a free ride. And, that these witnesses should enjoy their twilight rest, they could have caused the "machfne" to abate at early candle-lighting, or when the chickens go to roost. "The power to abate nuisances, like all other powers, must be exercised reasonably." It is not unlimited power, but only such as is reasonably necessary for the public good. The general authority to declare what is a nuisance will not "justify the declaring of acts, avocations, or structures, not injurious to health or property, nuisances." *Teass v. City of St. Albans*, 38 W. Va. 1, 17 S. E. 400. On the side of the defense, 23 witnesses testify that it is an innocent, harmless, healthful amusement, which the children enjoy very much; that the music is greatly enjoyed, is a pleasant soporific, and that there is really not enough of it; that it is conducted in an orderly, careful manner, and is beneficial to the community. They fully establish it to be of great utility and benefit to the public, instead of being a nuisance. If the testimony of the prosecution was sufficient, that of the defendant has a decided preponderance. The evidence, and the law independent of the evidence, was for the defendant, and such should be the judgment of the court. The attempt was once made to enjoin the erection of a school-house, for the reason that it was a nuisance. How would the public regard such an attempt at the present time? All other buildings must give way to public schoolhouses, and the education, elevation, comfort, and happiness of the children is considered a primary duty of mankind; and anything that contributes to their harmless amuse-

ment should receive the encouragement of the public conscience, rather than be placed under the ban of the law. The power to abate, if it exists, should never be exercised by a town council when the power to regulate will accomplish the same end without the destruction of property or of a lawful avocation.

BRANNON, J. (dissenting). I cannot agree that a merry-go-round is a public nuisance, to which the harsh and vigorous remedies provided by law for public nuisances shall be applied. This merry-go-round is not proven a nuisance, and is not, in its nature, such. It is an amusement from which children derive great pleasure and enjoyment, and, with them, their parents. A great many most respectable grown people enjoy their presence in our towns. They want that element necessary to stamp them as nuisances,—that their harm or annoyance shall be so extensive as to affect the public at large, not merely a few persons. Many things annoy, perhaps hurt, a few persons, but a few must not make law for the many. A band discoursing music in a park, very frequently, in summer, no doubt, annoys aged or sickly persons in the neighborhood, and others tired of its music, from repetition; and shall we say it is a nuisance? Shall we say a church wherein, for weeks, religious revivals are held until late at night, is such? Is the ringing of church bells? Are theaters and circuses? Are even billiard tables and bowling alleys that are open until late in the night? Many things annoy a few; but they cannot deny the rights, even the amusements or pastimes, if decent, and not immoral, of the many. They must submit to the inconvenience peculiar to themselves. I do not attempt a discussion at large. We must not make government too rigid and exacting, upon even the amusements of the people, else it becomes, in their eyes, an engine of oppression and tyranny. The action of the council in this case, under the form of law, took away the right of the owner to use his property to earn a livelihood, and invaded the right of the people to go to a decent place for harmless and pleasurable amusement. If the company frequenting such places, as it seldom or never does, becomes disorderly or immoral, that is a matter of police control, but does not make a merry-go-round a public nuisance.

(116 N. C. 782)

YOUNGER et al. v. RITCHIE et al.  
(Supreme Court of North Carolina. May 14, 1895.)

FRAUDULENT CONVEYANCE OF HOMESTEAD—ACTION TO SET ASIDE.

Act 1893, c. 78, providing that, in an action to set aside a voluntary conveyance to a wife as in fraud of creditors, the fact that the lands do not exceed in value the homestead exemption

shall be no defense, provided that the act shall not be construed to authorize the sale of the land until after the expiration of the homestead exemption, enables the creditors to immediately sue to set aside such a conveyance as a cloud on the title, and render their judgment a lien on the reversion.

Appeal from superior court, Stanly county; Robinson, Judge.

Action by L. C. Younger and others against M. Ritchie and others. From a judgment of nonsuit, plaintiffs appeal. Reversed.

Brown & Jerome, for appellants.

CLARK, J. This is an action by several creditors of the male defendant to set aside his conveyance to his wife, on the ground that it was made with intent to hinder, delay, and defraud the creditors of the grantor. It was admitted that he was a resident of the state, and that he could still claim a homestead in the land conveyed if the deed was declared fraudulent, it being worth less than \$1,000, and no other homestead having been allotted him. *Crummen v. Bennet*, 68 N. C. 494; *Dortch v. Benton*, 98 N. C. 190, 3 S. E. 638; and numerous other cases affirming the same doctrine. The plaintiffs are not seeking to assert that the defendant is estopped to assert his homestead rights in the property, by reason of the fraudulent conveyance thereof, but they contend that their docketed judgments, being liens upon the reversion after the termination of the homestead (*Jones v. Britton*, 102 N. C. 166, 9 S. E. 554), they are entitled to have the cloud or obstruction of the fraudulent conveyance removed now, because the evidence may by the process of time become unavailable. Had there been any doubt of their right to maintain this action for that purpose, it is removed by chapter 78, Acts 1893, which expressly provides that it shall be no defense to actions to set aside fraudulent conveyances to "allege and prove that the lands therein embraced do not exceed in value the homestead allowed by law," providing, however, that the act shall "not be construed to authorize the sale of the land until after the homestead exemption has expired." It was competent for the legislature to so enact, and the meaning of the statute is clear and unambiguous. It is not improbable that its enactment was brought about by the doubtful intimation in *Rankin v. Shaw*, 94 N. C. 405, that such was not the case as the law formerly stood, and to cure such defect. The judgment of nonsuit must be set aside. Reversed.

(116 N. C. 486)

#### WEBSTER v. SHARPE.

(Supreme Court of North Carolina. May 14, 1895.)

#### ISSUANCE OF SUMMONS—SLANDER.

1. A summons is "issued" (Code, § 161), so as to prevent the running of the statute of limitations, only after it has passed from the hands of the clerk to be delivered to the sheriff for service;

a summons merely filled up, and held by the clerk for a prosecution bond to be given, is not "issued."

2. The use of words which from the conversation as a whole, to the apprehension of a person within hearing, intentionally charge another with a crime, is slanderous, though the words do not in terms charge such crime.

Appeal from superior court, Alamance county; Hoke, Judge.

Action by Arthur D. Webster against James P. Sharpe. There was a judgment for defendant, and plaintiff appeals. Affirmed.

The action was brought to recover damages for defamation of character. The plaintiff alleged, among other things, that defendant did maliciously speak of and concerning the plaintiff, in presence of plaintiff and one W. T. Webster, the following words, in substance, speaking to plaintiff, to wit, "I found out who went into my store"; and plaintiff asked, "Who was it?" Defendant replied, "It was you and your brother, W. T. Webster, and if you and he will give up what you took I will hush it up, and have no more to do with it"; whereby defendant maliciously intended to charge plaintiff with breaking into his store and stealing goods and money, etc. Defendant denied the allegation, and says, substantially, that, believing the said parties did enter his store, and being anxious to recover what he had lost, he did not make the statement with malice, but only to give expression to an honest opinion in their presence and others that they were the parties, and if he could get back his money, etc., he would say nothing more about it, etc.; and, further, that more than six months elapsed after the alleged words were spoken and before the commencement of this suit.

#### Issues.

(1) Did defendant utter to Alexander Trogden, of and concerning plaintiff, slanderous words charging that plaintiff entered the store of defendant and stole money therefrom? Ans. No. (2) Were the slanderous words charged in the complaint uttered within six months before the commencement of this suit? Ans. No. (3) What amount of damages is plaintiff entitled to recover?

#### Case.

There was an issue as to the statute of limitations, and it was to the charge of the court on this issue that the plaintiff excepted, and takes the appeal. All the evidence tended to show that the alleged breaking was on the night of December 31, 1892, and defendant made the charge next morning to various persons for a day or two, till January 3, 1893, and that there was no evidence tending to show any charge after January 3, 1893, except the evidence of witness Trogden, who testified that he was at defendant's store three or four weeks after the breaking; and in talking with defendant some one said,

"If you accuse the Websters of breaking in to your store, they would go on to you"; and defendant, Sharpe, thus replied, "Well, I have told them to their face they were the boys, and I have never accused any one else with doing it." That defendant, Sharpe, afterwards, on that same occasion, offered witness Trogden \$20 to find out who did do it, and also said to witness that he did not believe much in liquor, but he thought it would be a good plan to get them drunk, and get it out of them in that way. Defendant testified that he never made charge to any one after January 3d, and that the conversation with Trogden was before that time, and not after. Plaintiff also offered in evidence the summons docket or the entries kept by the clerk in his court summons docket, purporting to give date when suit commenced. The case at bar was 820, and entry opposite, "Docketed May 30, 1894." The case just before this, being 819, was entered as docketed May 3d, and case just after, being 821, was entered as docketed June 14th. The clerk testified that he never put these summonses on his docket till they were issued, but he knows this summons was not issued the day it bears date and the day of this entry, because there was no deputy, and he himself was in Greensboro; that he supposes in making the entry he was misled by the date of the summons. The clerk stated also that he is right confident summonses must have been issued before the date of the next case, June 14th, because he did not docket these cases at all till the summons was issued; that is, that it was his custom not to do so, but he could not state this positively. He states this summons was issued when bond was given, but does not know when that was. Bond is in handwriting of Mr. Long, except name of one of the sureties, which is in the handwriting of the clerk. The clerk further stated that he recollected the sheriff coming for the summons once, when bond had not been completed, and when bond was completed summons was issued by him. By issuing summons he means handing same out to sheriff to be served. The summons has entered on back, in handwriting of sheriff, "Rec'd July 10; served July 11." Sheriff Hamilton testified these entries were in his handwriting, and give dates correctly; that summons was handed to him by the clerk on the 10th day of July, 1893. Before this Mr. Long had handed to him a summons, and asked sheriff to give same to clerk to have docketed. He took same to clerk, and when he did clerk said no bond had been given in the case, and summons could not be issued. He asked clerk to give summons back to him when bond was completed, and says the entries on back of summons were a correct return. He thinks there was one name on the bond when Mr. Long first handed him the summons, which was in May before. He cannot recollect whether summons was signed by clerk when

Mr. Long first gave it to him or not. He asked clerk for summons once before it was handed out to him in July, and did not get it. Bond was not then completed. This was on May 30th. The court charged the jury that the action was commenced by issuing the summons, and the summons was issued whenever it was put out from the clerk's office by direction, and under sanction and authority, of the clerk, and handed to the officer for the purpose of being served; that, if it was sent out and handed to some one else to give to the officer for the purpose of being served, this would be an issuing of the summons, but it must leave the office for this purpose by the direction or under the sanction or authority of the clerk. Plaintiff excepted. That the burden of this issue was on the plaintiff to show, by the greater weight of evidence, that the action was commenced within six months from the last utterance of defamatory words; that if the plaintiffs failed in this, or the minds of the jury were left in doubt about the matter, so that they were unable to determine it from the evidence, verdict should be for the defendant. Plaintiff excepted. On first issue court charged the jury that if the words used to Trogden intentionally charged plaintiff with robbing store, or the words used to him, or in his presence, by reasonable intentment, and from the rest of his conversation, amounted to such charge to the apprehension of Trogden, or of any one who heard them, they would be slanderous and defamatory, even though they did not make charge in express terms. Plaintiff excepted. There was no exception to any other portion of the charge on statute of limitations, nor to any other portion of the charge except as before noted. There was verdict and judgment for defendant.

M. S. Parker, for appellee.

FURCHES, J. This is an action of slander, in which plaintiff alleges that defendant falsely charged him with breaking into defendant's store and taking his goods. Defendant answered, denying the allegations in plaintiff's complaint, and pleads the statute of limitations. On the trial three issues were submitted to the jury,—one as to whether defendant uttered the slanderous words as alleged; another as to the statute of limitations; and the third as to the amount of damages. All the evidence tended to show that defendant's store was broken into on the night of the 31st of December, 1892, and the summons bears date the 30th of May, 1893. But it was contended by defendant that in fact it was not issued until the 10th of July, 1893. If the summons was issued at the time it bears date, it was in time. But, if it was not issued until the 10th of July, it was not in time, and the statute of limitations was a bar. The presumption is that it was issued at the time it bears date,

and the burden is on defendant to show that it did not. To do this, defendant introduced the clerk and the sheriff, and their testimony tended to show that the summons did not issue at the time it bears date, and that, as a matter of fact, it was not issued until the 10th of July, 1893. An action is commenced by issuing a summons. Code, § 199. And an action is commenced when a summons is issued against a defendant. Id. § 161. This involves the question as to what is meant by the word "issue," and we are of the opinion that it means going out of the hands of the clerk, expressed or implied, to be delivered to the sheriff for service. If the clerk delivers it to the sheriff to be served, it is then issued; or if the clerk delivers it to the plaintiff, or some one else, to be delivered by him to the sheriff, this is an issue of the summons; or, as is often the case, the summons is filled out by the attorney of plaintiff, and put in the hands of the sheriff. This is done by the implied consent of the clerk, and, in our opinion, constitutes an issuance from the time it is placed in the hands of the sheriff for service. But a summons simply filled up and lying in the office of an attorney would not constitute an issuing of the summons, as provided for in the Code. Nor would the fact that a summons being filled up and held by the clerk for a prosecution bond (as the evidence in this case tends to show was the fact) constitute the issuing of a summons, until the bond is given, or at least until it goes out by the consent of the clerk for the purpose of being served on the defendant. This being so, we see no error in the judge's charge on the question as to when the summons issued and the statute of limitations. The jury finds the first issue for the defendant; that he did not utter the defamatory words as alleged by plaintiff; and plaintiff excepts to the judge's charge on this issue. But no error is pointed out in the exception, and we see none. Judgment affirmed.

(116 N. C. 462)

# WRIGHT v. HARRIS.

(Supreme Court of North Carolina. May 14, 1895.)

## TENANCY IN COMMON.

Testator devised all his land to his widow for life, and the remainder to his nephew, with a provision that, if a former slave remained with his wife and nephew until the death of his wife, he should have 50 acres of land. Testator, before his death, settled the slave on 50 acres, where he remained until after the death of the widow. *Held*, that he was a tenant in common with the nephew, and entitled to hold possession of the 50 acres and the profits thereof until partition was had.

Appeal from superior court, Person county; Hoke, Judge.

Ejectment by Thomas D. Wright against Jesse Harris. From a judgment for defendant, plaintiff appeals. Affirmed.

Shepherd, Manning & Foushee, for appellant. W. W. Kitchin, for appellee.

MONTGOMERY, J. The defendant, Jesse Harris, was a former slave of the testator, and the latter, in his will and testament, bore witness to the old servant's character and devotion in requesting him to remain with his (testator's) widow until after her death. There are services and kindnesses which these old family servants can and do render to their former owners which none other can or will render, and the testator understood this as no one else can who never occupied such a relation. The widow survived her husband some years; and when the end came to her, on the 23d of December, 1894, this old family servant, the defendant, was present, faithful to the end. In fact, from the record it seems that he had never left the old plantation. The testator appears to have been a just man, appreciative of the defendant's services, and in his lifetime had settled him on 50 acres of his land, and in his will made provision for him in compensation for past services and for those to be rendered by him in future to his widow. He devised his tract of land of 1,200 acres to his widow, for her life, with remainder to his nephew, the plaintiff, but charged it with an interest in favor of the defendant in the following language: "However, I request that Jesse Harris and Henry Harris, former slaves of mine, remain with my wife and nephew until the death of my wife; and, if they shall remain with them during that time, that they, Jesse and Henry, shall have, at some suitable place, fifty acres of land each." The defendant remained with the widow till her death, and was faithful to her; and therefore, upon her death, under the will, he became entitled to 50 acres of the 1,200-acre tract of the testator, which was the only land he owned. He is a tenant in common with the plaintiff of the tract of land as to the 50 acres devised to him in the will, and is entitled to partition. *Harvey v. Harvey*, 72 N. C. 570; *Grubb v. Foust*, 99 N. C. 286, 6 S. E. 103. The plaintiff ought to have recognized the right of the defendant, under the will, to 50 acres of land in the tract of 1,200, and to have had the same allotted to him in some proper manner. Not having done so, he will not be allowed to eject the defendant from that particular 50 acres of land which he occupies, and which was indicated by the testator during his lifetime as a suitable home for the defendant; and the defendant will be allowed to remain in the possession of it, until, in the manner prescribed by the judgment of the court below, 50 acres of the 1,200-acre tract shall be allotted by commissioners to him. *Redf. Wills*, p. 390. The defendant is entitled to such of the crops or proceeds of sale of same as are now in the hands of the receiver, and which were grown on the 50 acres which the defendant has heretofore cultivated. His

honor committed no error in refusing the instructions asked by the plaintiff, and the judgment of the court below is affirmed.

(116 N. C. 422)

**HUNT v. WHEELER et al.**

(Supreme Court of North Carolina. May 14, 1895.)

**WILLS—CHARGE AGAINST LAND—LIMITATIONS—ESTOPPEL.**

1. Under a will giving certain land to a grandson, he to pay a daughter one-half of its value out of the rents of the same or from any other source, except by sale of the land, the daughter's share is a charge upon the land.

2. An action by an administrator for intestate's share of an estate is governed as to limitation by Code, § 158, providing that actions not otherwise provided for shall be brought within 10 years after the cause of action accrues.

3. Defendant can take no benefit from an agreement to compromise a charge against land when he has not complied with the terms of the agreement, claiming that there was no charge against the land, because the debt was a personal one, and that it was barred by limitation.

Appeal from superior court, Granville county; Green, Judge.

Action by W. H. Hunt, administrator for the estate of Elizabeth Gay, against W. T. Wheeler and another, for a share of intestate's father's estate. From a judgment for plaintiff, both sides appeal. Modified and affirmed.

A. J. Field, for plaintiff. Edwards & Royster, for defendants.

**MONTGOMERY, J.** This case is presented upon an agreed state of facts. From the judgment which was rendered in the court below, both parties appealed. We will treat both appeals together. The value of the tract of land devised by the testator, Moses Wheeler, to his grandson, William T. Wheeler, in remainder after the death of the widow of the testator, was ascertained, according to the manner prescribed by the will, to be \$1,380. One-half of this amount was under the will to be paid to the daughter of the testator, Elizabeth Meadows, a married woman. The defendants contend that the land itself is not charged with the amount in favor of the daughter, and the plaintiff insists that it is. The solution of the question depends upon the true construction of the following clause of the will: "Item First. I lend to my wife, Elvira, during her natural life, the tract of land lying near and adjoining the lands of my son, Dudley; and at her death I give the said tract of land to my grandson, William T. Wheeler, son of my said son Dudley, with this understanding: that, at the death of my said wife, the said tract of land is to be valued by three freeholders, to be chosen by my executors; and my said grandson is to pay to my daughter, Elizabeth Meadows, one-half of said valuation. Said one-half may be paid by and from the rent of the same, or from any other source, except by the sale of the same, as I do not wish it sold for division, being too

small a tract for division between them, and my desire being to secure said tract of land to my said grandson."

We are of the opinion that the one-half value of the land (to wit, \$690), the daughter's share under the will, is a charge upon the land. *Carter v. Worrell*, 96 N. C. 358, 2 S. E. 528; *Aston v. Galloway*, 3 Ired. Eq. 126; *Rice v. Rice*, 115 N. C. 43, 20 S. E. 185. The daughter, after having become a widow, married a second time, and died on the 28th of January, 1888, leaving her husband surviving her. The plaintiff qualified as her administrator on the 12th of November, 1894, and on that day commenced this action against the defendants. The defendants insist that the statute of limitations (Code, § 155, subd. 1) is applicable to the facts in the case, and is a bar to the action. We are not of this opinion. Section 158 of the Code<sup>1</sup> applies. The defendants insist again that the agreement made on the 2d of January, 1888, between the daughter and the grandson of the testator, relieved the land of the charge upon it (if it ever existed), and made the compromise obligation on the part of the grandson purely a personal one against him. This cannot be so, for the agreement especially and particularly recites the contrary. The following is the agreement: "I, Thomas P. Meadows, attorney in fact for Robert L. Gay and Elizabeth Gay (formerly Elizabeth Meadows), a daughter of Moses Wheeler, deceased, having been appointed by them attorney in fact to represent their interest in the settlement of the estate of said Moses Wheeler, having agreed with W. T. Wheeler to accept of him the sum of four hundred dollars in full satisfaction of the amount due from him to said Elizabeth Gay as a charge upon the land devised to W. T. Wheeler in and by the last will of Moses Wheeler, provided the same shall be paid in two months from this date, and whereas he has paid me fifty dollars of the said four hundred, now I do hereby authorize John W. Hays, as my attorney, to receive from W. T. Wheeler the balance of said sum, to wit, \$350, provided the same shall be paid within two months from this date; and, when so paid, the said Hays is authorized to execute to W. T. Wheeler such release and acquittance as shall fully discharge him from all further liability on account of said charge upon said land." The defendants can take no benefit from the agreement of compromise, for, although it appears that the daughter died before the time when the money agreed upon in the compromise should be paid, and that there was no personal representative to receive it when it fell due, yet, after the plaintiff was appointed administrator, no part of the same was paid or offered to be paid; the defendants all the time setting up the plea of the statute of limitations to defeat all recovery, and also relying upon the debt being a personal one against

<sup>1</sup> Code, § 158, provides that actions not otherwise provided for must be brought within 10 years.

the grandson, and not a charge upon the land. The judgment of the court below is affirmed in so far as it declares that the amount due to the plaintiff's intestate (the daughter of the testator) is a charge upon the land, and to be paid by the rents from the same, and the appointment of a receiver to take charge of the land and rent it out. The plaintiff, however, ought to have had judgment for the sum of \$690, half the value of the land, less \$50, which was paid by the grandson on the 2d of January, 1888, with interest from the 9th of April, 1885, until paid. The judgment is affirmed and modified as above.

(116 N. C. 418)

### HARGROVE v. HARRIS.

(Supreme Court of North Carolina. May 14, 1895.)

#### JURISDICTION OF JUSTICE—SUIT FOR RENT—CLAIM AND DELIVERY—LIEN ON CROPS.

1. All forms of actions having been abolished, an allegation in the complaint, in an action to recover for rent, that defendant wrongfully detains the crop on which the rent is a lien, does not deprive the justice of jurisdiction, on the ground that the action is one of claim and delivery, and not one *ex contractu*.

2. In such case the justice should assume jurisdiction, merely denying the relief of a delivery of the crop.

3. Since under Code, § 1754, a judgment for rent is a lien on the crops, a judgment of a justice's court for rent, also adjudging the judgment a lien on the crops, is not invalid as being in excess of his jurisdiction, as the portion of the judgment adjudging the lien will be treated as surplusage.

Appeal from superior court, Granville county; Green, Judge.

Action in a justice's court by Mary L. Hargrove against Henry P. Harris. From a judgment of the superior court dismissing the action on appeal, plaintiff appeals. Reversed.

J. W. Graham and P. C. Graham, for appellant. A. J. Field, for appellee.

CLARK, J. There is no such thing as an action for claim and delivery. Under our constitution (article 4, § 1), there is but one form of action in civil cases. In that many ancillary remedies may be asked; i. e. arrest and bail, claim and delivery, injunction, attachment, and appointment of receivers. These need not be asked, even if the party is entitled to them (*Wilson v. Hughes*, 94 N. C. 182); and, if they are improperly asked, they are simply denied or dismissed; but that does not affect the action itself, which goes on if the plaintiff is entitled to any other remedy (*Deloatch v. Coman*, 90 N. C. 186; *Morris v. O'Briant*, 94 N. C. 72). This is the broad distinction between the present system of procedure and that formerly in force. Under the old system, all these were distinct forms of action; and so much regard was paid to the mode in which relief was asked that, however meritorious the cause of action, a mistake in the exact manner of seek-

ing the remedy sent the plaintiff out of court. The common sense of mankind and the intelligence of the age have caused the old system to be abrogated in the large majority of states and countries of the English-speaking race. Indeed, it was never in force in any other. It was abolished in this state over a quarter of a century since.

The gist of the present action is that the defendant was indebted to the plaintiff \$75, due for rent. Incidentally, the plaintiff asked, or might be construed as asking, for claim and delivery of the crop, which is not alleged to be worth "not more than fifty dollars." The justice of the peace properly ignored the ancillary remedy, of which he would have had no jurisdiction, and rendered judgment for the amount of rent found to be due,—\$36.87. *Starke v. Cotten*, 115 N. C. 81, 20 S. E. 184. In that case the action was for \$70.80, for "damages for breach of a contract" as to the delivery of certain tobacco, and to subject the proceeds of the sale of the tobacco. It was held that while the justice had no jurisdiction of the latter, "the damages for breach of contract" being *ex contractu*, the justice properly retained jurisdiction, and rendered judgment for the debt. It is true that in the present case the summons recites that the defendant "wrongfully detains" the crop, on which \$75 is due for rent. The same words were used in *Deloatch v. Coman*, *supra*; and the court held that this was the basis for claim and delivery (Code, § 322, subd. 2), but that the justice retained jurisdiction to render judgment for the debt,—less than \$200,—though he did not have power to grant the claim and delivery for the property, which was in excess of \$50.

In the present case the court below erred in dismissing the action, and that is the only point before us. To prevent misconception, however, we notice that the justice not only gave judgment for the debt, and adjudged that it was due for rent, as he might have adjudged that it was due by open account or on a bond or on a promissory note, but he went further, and adjudged that it was a lien on the crop. This was unnecessary, and must be held mere harmless surplusage, as the statute made it a lien. Code, § 1754. The lien was the result, and no valid part, of the judgment declaring the amount of the indebtedness, and that it was due for rent. *Id.*; *Wilson v. Respess*, 86 N. C. 112. There is analogy on the criminal side of the docket, where disfranchisement of one convicted of a felony is held to be the effect of the sentence, and no part of it. *State v. Jones*, 82 N. C. 685. So here the lien on the crop is the effect, but no part, of the judgment that the defendant is indebted in the amount named for rent. The plaintiff did not ask for a judgment declaring it a lien, and, if he had, it would not have destroyed the jurisdiction to grant the valid demand for judgment for the sum due, be-



cause a judgment for the amount due for rent ascertains the extent of the lien on the crop, and does not throw every petty dispute about rent into the superior court. This would virtually be a denial of justice in the majority of instances, for the amount would usually not justify seeking relief in that forum. In truth, the lien exists by virtue of the statute before and independent of the judgment, and even if no judgment is ever rendered. The judgment simply ascertains the amount of rent due. Reversed.

(116 N. C. 797)

**ALPHA MILLS v. WATERTOWN STEAM-ENGINE CO. et al.**

(Supreme Court of North Carolina. May 14, 1895.)

**SALE OF PERSONALTY — ACTION FOR FALSE WARRANTY—LIMITATIONS—FOREIGN CORPORATION—DISCOVERY OF FRAUD—DAMAGES.**

1. Where a person, acting as agent for another, contracted to sell plaintiff an engine of a certain kind, and knowingly delivered an inferior one, plaintiff may retain the engine, and sue both principal and agent for damages.

2. An agent authorized to sell is authorized to make a warranty.

3. Where B. sold an engine to plaintiff, and, in an action against B. and M. for damages for false warranty, the jury find on a distinct issue that B. was M.'s agent in the transaction, it is not error to refuse to submit an issue as to whether or not there was a sale.

4. Code, § 155, subd. 9, providing that, when relief is sought on the ground of fraud in cases which heretofore were solely cognizable by courts of equity, the cause of action shall not be deemed to have accrued until the discovery of the fraud, was amended in 1889 by striking out "in cases which were heretofore solely cognizable by courts of equity." *Held*, that the amendment applies to an action for a false warranty on a sale made before the amendment.

5. A foreign corporation cannot set up the statute of limitation in bar of an action for false warranty.

6. Where, in an action for false warranty, there is a question as to when plaintiff first knew of the fraud, the question as to whether the action is barred by the statute of limitations is one of fact for the jury.

7. In an action for false warranty in the sale of an engine, plaintiff is entitled only to damages naturally arising from the fraud and cannot recover interest or insurance on such engine.

Appeal from superior court, Mecklenburg county; Winston, Judge.

Action by the Alpha Mills against the Watertown Steam-Engine Company and others. From a verdict for plaintiff, defendants appeal. Reversed.

The following is Exhibit 5:

"Office of Brem & McDowell, Machinery, Mining Supplies and Safes. Agents for Liddell & Co., Manufacturers of "Boss" Cotton Presses, Saw Mills, Shafting, Pulleys, Hang-

ers, &c. Agents for Watertown Engines. Cleveland & Hardwick Engines. The Pratt Improved Cotton Gin. Corn and Flour Mills. Victor Wagon and Platform Scales. Emerson, Smith & Co. Planer and Solid Tooth Circular Saws. Marvin's Fire Proof Safes. Steam and Water Fittings and all sizes of Wrought Iron Pipe and Rubber and Leather Belting, Constantly on Hand.

"Charlotte, N. C., April 9th, 1888.

"E. K. P. Osborne, Esq., President Alpha Mills—Dear Sir: We will sell to your mill the following machinery, at prices given:

One Watertown automatic cut off engine, 18x28 cylinder, 150 H. P. nominal, or 155 H. P. cutting off at half stroke 70 lbs steam.....	\$1,500 00
80 horse still boilers, at \$843 each	1,686 00
No 3 pump.....	175 00
No. 11 heater.....	250 00
Steam and water connection.....	100 00
Machinist's time.....	30 00
Freight about.....	43 00

**\$4,154 00**

"—With pump and heater.

"Yours, respectfully, Brem & McDowell.

"Accepted: E. K. P. Osborne, Pres."

Geo. E. Willson and George F. Bason, for appellant Steam-Engine Company. Jones & Tillett, for appellants Brem & McDowell. Burwell, Walker & Canaler, for appellee.

**FURCHES, J.** This is an action for damages upon an alleged false warranty in the sale of a steam engine, in which plaintiff recovered, and defendants appeal, and file 44 exceptions to the ruling of the court. We do not expect to take up and discuss these exceptions seriatim, but only to discuss such of them as will dispose of the case on appeal, as many of them will in all probability not arise again.

The defendants moved to dismiss the action for want of due service. This motion had been made and passed upon some terms ago, upon affidavit as to whether the defendants Brem & McDowell were agents of the other defendant in making the sale complained of; and, if there had been any reason for doubting the correctness of the finding of the court at that time (and we do not see that there was), there certainly is none now, when this question has been submitted to a jury, and found that they were the agents of the Watertown Steam-Engine Company. This motion is overruled.

Defendants then moved for judgment on the findings of the jury (non obstante, we suppose). This exception was not argued, and we suppose was virtually abandoned; but, if it was not, we see no ground upon which it can be sustained, and it is overruled.

Exhibit 5 contains the contract for the sale of the engine, which, in our opinion, shows that Brem & McDowell acted as agents of the Watertown Company in making the sale; and that it also constitutes a sale with warranty (*Thomas v. Simpson*, 80 N. C. 4; *Love v. Miller*, 104 N. C. 582, 10 S. E. 685); and that plaintiff might retain the engine, and have an action against defendants for damages (*Lewis v. Rountree*, 78 N. C. 323; *McKinnon v. McIntosh*, 98 N. C. 89, 3 S. E. 840). An agent authorized to sell is authorized to make a warranty. *Hunter v. Jamieson*, 6 Ired. 252. We do not think the fact that Brem was a member of the plaintiff corporation benefits the defendants. If he acted as the agent of the Watertown Company in making this sale,—was in its employ, and pay,—he could not at the same time be acting for the plaintiff corporation; and, thus acting, it is not to be supposed that he would give plaintiff information injurious to his principal, and which would likely prevent a sale of its property. *De Kay v. Water Co.*, 38 N. J. Eq. 161; *Hickman v. Green* (Mo. Sup.) 27 S. W. 440; *Bank v. Harris*, 118 Mass. 147; *Allen v. Railroad*, 150 Mass. 200, 22 N. E. 917. It has been held that, if the agent did not know of the defects at the time of making the sale, he would not be guilty of a moral fraud, but still it would be a legal fraud. *Peebles v. Guano Co.*, 77 N. C. 236. But in this case the jury, by the seventh issue, find that the agents had knowledge at the time of the sale that the engine was not a 150 H. P. engine. So it is not necessary to invoke the rule in the case of *Peebles v. Guano Co.*, supra.

The defendants insist that they were entitled to their first issue as to whether there was a sale or not; and ordinarily it seems to us that this would be so. But in this case it seems not to be denied that there was a sale of an engine by Brem & McDowell to the plaintiff; and we suppose defendants insisted on this issue upon the ground that Brem & McDowell were not the agents of the Watertown Company, and as this was submitted as a distinct issue, and found that they were, we think this supplies any apparent necessity for this issue. There has been much discussion (to be found in our Reports) as to what are proper issues. But we think it has been finally settled that if the issues as submitted embrace the substantial contention of the parties, in such manner as not to deprive either party of the benefit of a substantial right, this is sufficient; and, applying this rule, we do not see that defendants were prejudiced on account of the court's not submitting this issue, and we must overrule this exception.

Defendants contend that plaintiff's action is barred by the statute of limitation; and, as to the defendants Brem & McDowell, we would hold this to be so, under the cases of *Blount v. Parker*, 78 N. C. 128, and *Jaffray v. Bear*,

103 N. C. 165, 9 S. E. 382, but for Act 1889, c. 269, amending subdivision 9, § 155, of the Code. This amendment strikes out of section 155 of the Code that part upon which the decision in *Blount v. Parker* and *Jaffray v. Bear* was put. This amendment leaves all actions subject to the same rule, whether they were heretofore cognizable solely in courts of equity or not, and makes all actions come under the same rule as if they had been originally cognizable in courts of equity; and, the jury having found the issue of fraud in favor of plaintiff, it makes this point in the case, as to defendants Brem & McDowell, depend upon the time when the fraud was discovered by plaintiff; that is, when they first discovered that the engine was not a 150 H. P. engine. As to the other defendant, the Watertown Company, we think a different rule obtains. This defendant is a foreign corporation. Its citizenship is in New York. In matters of litigation it has the right to avail itself of this fact, as is often done in cases of removal from state to federal courts; and we see no reason why it should not be subject to the same rule that individuals are who are citizens of other states. We, therefore, do not think the statute of limitations applies to them, whether the fraud was discovered within three years before the commencement of the action or not. Code, § 162; *Grist v. Williams*, 111 N. C. 53, 15 S. E. 889.

The defendants Brem & McDowell contend that, as the act of 1889 was passed after the sale complained of was made, the amendment does not apply in this case, and that the law as it stood before the amendment must govern. We do not agree to this contention. The statute of limitation is no satisfaction of plaintiff's demand. It is only a bar when set up to the action of the court. It does not act on the rights of the parties, but only affects the remedy. It is created by the legislature, and can be removed by the legislature. This is certainly so where it had not run so as to become a bar. As it affects no vested rights, there is no reason for holding that it is unconstitutional; and that is the only ground we see upon which defendants' contention can be sustained.

This brings us to the consideration of his honor's charge upon the statute of limitations. The question of the statute of limitations is a mixed question of fact and law; and it is true, as stated by his honor, if there is no dispute as to facts, then it becomes a question of law, and the court should instruct the jury as to their verdict. But, where there are disputed facts as to when it started to run, then it is the duty of the court to submit that question to the jury. In this case it depended (as to Brem & McDowell) as to when plaintiff first had knowledge that the engine sold it was not a 150 H. P. engine. It was in evidence that plaintiff, more than three years before the commencement of this action, had in its possession a catalogue of the Watertown Company, which tended to show

that the engine sold plaintiff was not a 150 H. P. engine. What Ward said about it, and other evidence which tended to show knowledge, was at least enough to make it a disputed question of fact. And, this being so, we think it was error in the court to instruct the jury that from all the evidence in the case they should find that the statute of limitations had not run.

We also think there was error in his charge upon the question of damages. Plaintiff gave in evidence the cost of transportation and putting down both engines; and defendants contended that, under his honor's instructions, the jury charged them with this expense for both engines. If this is so, it seems to us it is clearly wrong. If plaintiff had gotten the last engine first, it would have been compelled to have borne this expense. Why, then, charge it to defendants? If defendants are liable, it should only be for the expense of the defective engine. It may be the defendants were not charged for both by the jury. But we have examined his honor's charge, and can nowhere find that they were instructed as to this matter; and as the evidence was allowed, and they were not instructed as to it, we think it probable—indeed, most likely—that the jury did charge defendants with both. We also think there were other errors in his honor's charge upon the question of damages. It was too broad. The rule in cases like this, as we understand it, is to allow such damages as naturally arise from the false warranty, but not for everything that may result therefrom (*Ashe v. DeRossett*, 5 Jones [N. C.] 301); and we cannot see how such things as interest and insurance could have been in the minds of the contracting parties, or can be said to grow out of the breach of contract between the parties. Would not plaintiff have to pay interest and insurance, whether there was a breach of this contract or not? And did this in any way depend upon this contract between plaintiff and defendants? These and any other matters that could not have been in the minds of the contracting parties, and did not arise from the breach of warranty, should be eliminated from the question of damages.

There are other exceptions in the case, which we do not think necessary to pass upon now, as they will likely not arise on a new trial; but, for the errors pointed out, we are of the opinion there should be a new trial.

(116 N. C. 490)

#### HOLT v. SOUTHERN FINISHING & WAREHOUSE CO.

(Supreme Court of North Carolina. May 14, 1895.)

#### EXAMINATION OF ADVERSE PARTY BEFORE TRIAL—BOOKS OF CORPORATION.

1. Under Code, § 579, et seq., providing for the taking before trial of the testimony of the adverse parties to an action, in an action by a stockholder to set aside an assignment of a contract by the corporation as fraudulent, the di-

rectors may be compelled to disclose facts so as to enable plaintiff to draw his pleadings, though their evidence may subject them to pecuniary loss.

2. A stockholder may compel the directors of a corporation, under Code, § 579 et seq., to permit him to examine the books of the corporation, so as to enable him to procure evidence in order to set aside an assignment by the corporation of a contract as fraudulent.

3. An order refusing to discharge a motion to take the testimony of the directors of a corporation, in an action against the corporation to set aside an assignment of a contract as fraudulent, is not appealable.

Petition for a writ of certiorari by the Southern Finishing & Warehouse Company in an action by Lawrence S. Holt against petitioner and others. Denied.

The plaintiff, a stockholder in defendant company, for himself and all other stockholders, brings this action against the defendant, and files affidavit, dated April 13, 1895, as follows: "(1) That he has begun a civil action in the superior court of Alamance county, in which the pleadings have not yet been filed. (2) That Neil Ellington, E. T. Garset, and J. W. Lindau are stockholders in defendant company, and directors in the same, and that, as such, are parties to this action, or persons for whose benefit the action is immediately defended. (3) That, in order to get facts upon which to base a complaint, it is necessary to examine the parties above named, under sections 579-586 of the Code, and that they have information which is necessary and material evidence for the plaintiff. (4) That the object of the action is to set aside a pretended transfer by defendant to Moses H. Cone of a cause of action arising out of an alleged contract, also of an alleged contract executed September 9, 1892, by the plaintiff with the defendant company, and that the reasons for seeking to set the same aside are that Cone is a stockholder and director in the company, and has been since its organization, that he was the promoter of the enterprise, and that any purchase or pretended purchase by him of the said contract from the company is fraudulent, and voidable at the option of a complaining stockholder, and that defendant is now, and has been since its organization, one of the largest stockholders in the company. (5) That the board of directors consists of men largely under the influence of Cone, and one of them is a brother, and another a brother-in-law, of Cone, as affiant is informed and believes, and that five persons only constitute such board. (6) That the pretended sale aforesaid took place some time in January, 1895, at a meeting, or an adjourned annual meeting, of the directors; that affiant has made diligent effort to get at the truth of said alleged sale, and to this end has made inquiry of the directors as to the same, and has also made application to the secretary and treasurer of the company, to see the books of the company bearing upon said sale or transfer, but that all his efforts have been in vain. (7) That defend-

ants have said knowledge, and that plaintiff is entitled to the same; he being a stockholder in the company, and interested in said contract. Wherefore, plaintiff prays the court to appoint some suitable person commissioner to take said examination, at such time and place as the court shall designate, and shall meet the wishes of the parties."

Order of Green, J., April 19, 1895: "The court adjudges that plaintiff is entitled to take the examinations of the directors in defendant company, named in his affidavit, to be used in preparing the complaint, and as evidence in the case at the trial, and appoints T. J. Shaw commissioner, as provided in section 580 of the Code, and designates Saturday, April 27, 1895, at Greensborough, N. C., at the law office of Shaw & Scales, as the time and place when and where he will cause said parties to be and appear by subpoenas, and whose evidence he will then and there take, as required by law. Copies to be served on parties. [Signed] Green, Judge."

Thereupon, on April 19th, the commissioner notified the parties, in pursuance of the above order. And the defendant company, on April 20th, notified the plaintiff that on the 24th of April, 1895, at Oxford, a motion would be made before Judge Green to set aside the order heretofore made, appointing a commissioner to take examination, etc., upon the ground that the same was improvidently granted, and was granted upon insufficient affidavit, and without notice, and for other causes.

Affidavit of J. W. Lindau, secretary and treasurer, and a director in the defendant company, April 23d: "That on the 21st of March, 1895, plaintiff began this action, and caused summons to be served on defendant company, but which has not been served on defendant Cone. No pleadings have ever been filed. Plaintiff, upon notice to defendant, applied to the judge for an order requiring defendant to furnish to plaintiff a copy of all books, papers, and documents in its possession and under its control relating to the controversy between plaintiff and defendant, or for permission to inspect and copy the same, alleging that the same contained information necessary to enable him to file his complaint. That in the affidavit filed by plaintiff it was stated that the purpose of the suit was to set aside an alleged transfer by the company to the codefendant Cone of an alleged contract which plaintiff is alleged to have made with said Cone for the company, which said contract was set out in the affidavit. That an answer to the affidavit, and numerous affidavits in support of the answer, were filed by the company, and after argument the motion of plaintiff was granted by the court, and defendant prayed an appeal to the supreme court, and has perfected the same, and it is now pending in said court. That while the appeal was pending, wherein the right of plaintiff to have the benefit of said books, etc., is de-

nied by defendant, and whereby all proceedings to obtain the relief asked were suspended in the lower court, the plaintiff procured from the clerk a commission to take the depositions of Ellington and Garset and this affiant before said commissioner, and caused subpoenas duces tecum to issue for said officers, commanding them to appear before the commissioner, and bring said books, etc., and this notwithstanding the question of the right of plaintiff to have the books was pending before the supreme court. That said commission was issued without notice to defendant while the question was so pending, and before any service of summons on the defendant Cone, and before any pleadings were filed; and in this state of things the defendant, by its counsel, appeared before the clerk, and moved, for reasons set out in its affidavit, to revoke said commission, which motion was allowed, and an order made directing the commissioner to proceed no further. That affiant is advised and believes that if it was competent for the superior court to make any order affecting the right of plaintiff to an inspection and copy of the books, etc., of the company, while the question of such right was pending as aforesaid, the clerk of the court below, acting as and for the judge, had power to issue and revoke the commission, and the act of the clerk in revoking the same amounted to a judgment that plaintiff was not entitled to the relief sought, and that judgment, remaining still in force, not appealed from, and unreversed, and being the judgment of a court of competent jurisdiction, is conclusive upon the plaintiff, and is res adjudicata as to his rights in the premises. That notwithstanding the right of plaintiff in the premises is questioned in the appeal pending as aforesaid, and notwithstanding the said judgment, which is still in force, the plaintiff applied for and obtained an order adjudging that plaintiff is entitled to take the said examinations, and appointing a commissioner to take the same, and directing him to cause the parties to appear at a certain time and place, and that accordingly the commissioner has issued subpoenas commanding affiant and said parties to bring with them the books, etc., of the company; and affiant believes that this is but another attempt of plaintiff to have the superior court give him the relief, his right to which being questioned as aforesaid, and which has already been denied him by a court of competent jurisdiction as aforesaid. That the object of plaintiff's suit, as set out in his affidavit, is to set aside an alleged transfer of an alleged contract by the company to the defendant Cone,—a matter properly provable, by the rules of evidence, only by the records of said corporation, showing its doings in this behalf; and the pretense of plaintiff that he desires to elicit any information as to said transfer resting in the knowledge of any of the parties sought to be examined amounts

to nothing, as neither of the parties could testify as to the contents of the books, etc., which are the best evidence of the alleged transfer, and any testimony of theirs as to this matter could not be used on the trial of the action, for the reason that the same would affect the defendant Cone, who has not yet been served with process. Affiant is advised and believes that it was incompetent for the court to make said order pending said appeal, and that plaintiff had been denied the rights thereby granted by the clerk of the superior court of Alamance county, acting as and for the court; and, if it was competent at all, affiant is advised and believes that the order should not have been made, except upon notice to defendant; that it was made upon insufficient affidavit, and is erroneous, in that it appoints a commissioner to take the examination, instead of ordering the same to be taken before the judge or court. Affiant believes the fact to be, and so charges, that the purpose of plaintiff is not bona fide to secure information upon which to file a complaint, but that the purpose is to elicit information for use in a case now pending in the supreme court of the city of New York, wherein Moses H. Cone is plaintiff, and Lawrence S. Holt is defendant."

Facts found by the court upon the motion of defendant to set aside the order heretofore made, on April 19th: "(1) That the right of plaintiff to an inspection and copy of the books, etc., was pending in the supreme court at the time the order was granted. (2) That under the order the commissioner appointed thereby has issued subpoenas duces tecum, commanding the presence of the persons named in the order at the place therein named, and that they bring with them the books, etc., of defendant company, and that similar subpoenas were issued under the commission of the clerk of the superior court of Alamance county, hereinafter referred to. (3) That while said appeal was pending in the supreme court the plaintiff applied for and obtained from the clerk of the superior court of Alamance county a commission to take the depositions of the same persons named in said order, which commission was subsequently revoked by said clerk, who had competent power and authority to issue and revoke the same. (4) That defendant company and witnesses sought to be examined had no notice of the order made on April 19th as aforesaid. (5) That the persons sought to be examined are parties to this suit. [Signed] Green, J."

Order made at chambers in Oxford on the 24th April, 1895: "On consideration of the motion to recall a former order appointing Shaw commissioner to examine J. W. Lindau, E. T. Garset, and Neil Ellington, as set out in said order, the court here now considers and adjudges that said order be affirmed and approved in all things, and that the motion be overruled. In considering the said exam-

ination of said parties, no inspection of the books of the company by the plaintiff, and no copy of such books by him, will be allowed, but in all things said examination will be conducted as like cases are conducted by commissions in taking such examination. [Signed] Green, J." From this order the defendant prayed an appeal. The appeal was refused by the court, as being premature, and the defendant excepted.

Fuller, Winston & Fuller, for plaintiff. Dilard & King, L. M. Scott, and Shepherd & Busbee, for defendant.

MONTGOMERY, J. This is an application for a writ of certiorari, as a substitute for an appeal alleged to have been denied to the defendants by the judge below. The record presents a most unusual condition of affairs. Five members constitute the board of directors of the defendant company, of which number the defendant Cone, his brother, and his brother-in-law constitute a majority. The plaintiff, one of the largest stockholders in the company, is denied the right to inspect the books of the company; and that, too, after he has made known to the directors his belief that the books contain evidence of matters deeply prejudicial to his interests, both as a stockholder and as an individual, and which a majority of the directors have corruptly and secretly entered therein. Very cogent reasons must be shown this court before it will conclude that such a right does not belong to the plaintiff. The plaintiff has commenced a civil action in the superior court of Alamance county against the defendant, for the purpose of setting aside an alleged pretended transfer by the defendant corporation to Moses H. Cone of a cause of action arising out of an alleged contract, and also an alleged contract executed September 9, 1892, by the plaintiff with the defendant company, for the reasons set out in the affidavit of the plaintiff of April 13, 1895, as appears in the statement of facts in the case. To enable him to draw his complaint with greater certainty, the plaintiff desires to examine Neil Ellington, E. T. Garset, and J. W. Lindau, stockholders and directors of the company, under sections 580 and 581 of the Code. He has as much right to examine Ellington and Garset and Lindau before the trial as at the trial, and they are subject to the same rules of examination as prevail in the examination of witnesses on the trial of actions before the courts, and they are compelled to answer all pertinent and material questions put to them, except such as the constitution and laws relieve them from answering. We know of no such exemption, except that a man may not be compelled to give evidence against himself, which is found in article 1, § 11, of the constitution, which section, by judicial construction, has been extended to witnesses in civil actions. *Fertilizer Co. v. Taylor*, 112 N. C. 149, 17 S. E. 69. It makes no difference whether the

answer will result in pecuniary injury to the witnesses, or not. They must answer the questions as they would be required to do before the courts. In the case before us the matters about which the plaintiff wishes to examine the defendants appear to be most material to the plaintiff, and are in no sense inquisitorial. The plaintiff appears deeply interested, as a stockholder, in the business of the company, and he alleges that he is being injured by the acts of the company, because he is not allowed to inspect its books; and he wishes to examine the defendants, who, he declares under oath, can furnish him with evidence necessary and material. It seems idle, under the facts of the case, as brought out by the plaintiff's affidavit, to talk about inquisitorial powers being given to the commissioner by the judge who made the order of examination. The affidavits of the defendants offered on the hearing before Judge Green to vacate his order allowing an examination of the defendants, furnish nothing which goes to show any reason why they should be excused from being examined. They simply deny the plaintiff's right to have the examination, without furnishing any legal excuse for such a denial. The papers filed in the matter bring up, and there was argued before us by counsel on both sides, a certain order made in a proceeding concerning this matter by Judge Green, at Durham, on the 1st of April, 1895, which is as follows: "This matter coming on to be heard, and being heard in chambers, in Durham, on April 1, 1895, the plaintiff and defendant being represented by counsel, the defendant Cone not being represented, upon reading and considering the affidavit of the plaintiff, and the answer of defendant company, made through its president, Nell Ellington, and duly verified, and the affidavits of E. T. Garset and J. W. Lindau, and a part of what purports to be a copy of an affidavit made by Moses H. Cone in an action pending in the state of New York between this plaintiff and said Cone, which was offered by plaintiff, as well as his own affidavit in reply, the court adjudges and declares that under section 578 of the Code the granting or refusal of plaintiff's motion is a matter purely within the discretion of the court, and that it is unnecessary that the court should find any facts; and, in the exercise of this discretion, the court adjudges that the defendant company permit the plaintiff, L. S. Holt, to inspect the books in its possession, or under its control, which contain entries of the acts and doings of the directors and stockholders of the defendant company at the annual meeting, or an adjourned meeting, of said directors and stockholders, in January, 1895, and that plaintiff may inspect and copy such entries above described, in such books, as he deems material, or containing evidence relative to the merits of the action, at any time during business hours within the next ten days, and said inspection and copy may be made by the plain-

tiff in person, or by his attorneys, Fuller, Winston & Fuller, or any one of them. Let the clerk issue a copy of this order, to be served on the defendant company." The defendants treated this order, and the application upon which it was made, as a bill of discovery in equity. They deny, on affidavits, that the books sought to be inspected by the plaintiff contained any entry about the matters of which the plaintiff wished to have knowledge. There was no other reason given why the inspection should not be had. Sections 580 and 581 of the Code are a substitute for the old bill of discovery, and only a substitute. In fact, section 579 of the Code declares that "no action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter." Upon the whole matters brought before us, and argued on the motion for the writ of certiorari, we are of the opinion that the appeal from the order of his honor, Judge Green, made on the 1st of April, 1895, was premature, and ought not to have been allowed. There is no error in his honor's refusing to allow an appeal from his other order of the 24th of April, 1895; and his honor committed no error in making either one of said orders, except that in the last one he denied the right of plaintiff to examine the books of the defendant corporation, which ought not to have been denied. With this exception, both orders are affirmed. *Helms v. Green*, 105 N. C. 251, 11 S. E. 470; *Vann v. Lawrence*, 111 N. C. 32, 15 S. E. 1031; *Fertilizer Co. v. Taylor*, *supra*. Motion denied.

(116 N. C. 821)

**BLACKBURN et ux. v. ST. PAUL FIRE & MARINE INS. CO.**

(Supreme Court of North Carolina. May 14, 1895.)

**FIRE INSURANCE—ASSIGNMENT OF POLICY—ESTOPPEL—FRAUDULENT BURNING—SUFFICIENCY OF EVIDENCE—EXCEPTION TO CHARGE—TIME OF TAKING.**

1. A defense to an action on a fire policy that the property was fraudulently burned by insured must be proved by a preponderance of evidence only, not beyond a reasonable doubt.

2. An exception to a charge, if made in the statement of case on appeal, is in time.

3. An assignment of a fire policy to one having no interest in the property is valid where made on the assent of the insurer, procured without false representations or suppression of facts.

Appeal from superior court, Buncombe county; McIver, Judge.

Action by W. A. Blackburn and wife against the St. Paul Fire & Marine Insurance Company on a fire policy. Judgment for plaintiffs. Defendants appeal. Reversed in part.

M. E. Carter and Fry & Newby, for appellants. J. H. Merrimon, C. M. Stedman, and Moore & Moore, for appellees.

CLARK, J. The consolidation of the five actions upon concurrent policies of insurance on the same property was consented to, but, if it had not been, the judge had authority to so order, as there might properly have been only one action brought. *Pretzfelder v. Insurance Co.* (at this term) 21 S. E. 302.

The charge of the court upon the eighth and ninth issues is not entirely clear, but it in effect amounts to an instruction that the defendants must show the conspiracy between the plaintiffs to burn, and also the burning by W. A. Blackburn, "beyond a reasonable doubt"; for the court instructed the jury that there was a presumption of innocence, and that they must find "that there was no reasonable hypothesis consistent with the innocence of the plaintiffs," and that it is not sufficient "that the facts and circumstances relied upon to establish the truth of the charge are consistent with it; they must be inconsistent with his innocence." This is not the correct rule in civil actions, which have nothing to do with guilt and innocence. The burden was upon the defendants as to these two issues to prove their allegations by the preponderance of the evidence, but not beyond a reasonable doubt. It is true the authorities in other states are conflicting, but this is the general rule in civil actions, and our courts have seen no reason to depart from it. *Kincade v. Bradshaw*, 10 N. C. 63; *Barfield v. Britt*, 47 N. C. 41; *Outlaw v. Hurdle*, 46 N. C. 150. Both reason and the weight of authority, especially the later cases, sustain the proposition that "in an action on a policy of insurance against fire, when the defendant pleads that the property was fraudulently burned by the plaintiff, the defendant is not bound to prove such defense beyond a reasonable doubt." *Blaeser v. Insurance Co.*, 19 Am. Rep. 747; *Elliott v. Van Buren*, 20 Am. Rep. 668; *Jones v. Greaves*, Id. 752; *Insurance Co. v. Johnson*, 21 Am. Rep. 223; *Kane v. Insurance Co.*, 23 Am. Rep. 239, citing *Steph. Ev.* p. 115, art. 94; *Insurance Co. v. Berry*, 8 Kan. 159; *Munson v. Atwood*, 30 Conn. 102; *Wightman v. Insurance Co.*, 8 Rob. (La.) 442; *Marshall v. Insurance Co.*, 43 Mo. 583; *Rothschild v. Insurance Co.*, 62 Mo. 356; *Huchberger v. Insurance Co.*, 4 Biss. 265, Fed. Cas. No. 6,822; *Sibley v. Insurance Co.*, 9 Biss. 31, Fed. Cas. No. 12,830; *Insurance Co. v. Usaw*, 112 Pa. St. 80, 4 Atl. 355; *Insurance Co. v. Jachnichen*, 110 Ind. 59, 10 N. E. 636; *Mack v. Insurance Co.*, 4 Fed. 59; *Scott v. Insurance Co.*, 1 Dill. 103, Fed. Cas. No. 12,533 (by Dillon, J.); *Schmidt v. Insurance Co.*, 1 Gray, 529; *Ellis v. Buzzell*, 60 Me. 209; *Insurance Co. v. Wilson*, 7 Wis. 169; *Matthews v. Huntley*, 9 N. H. 150; *Simmons v. Insurance Co.*, 8 W. Va. 474; 1 Greenl. Ev. § 13a, note; 2 Greenl. Ev. § 408, note b; *Whart. Ev.* § 1246; 1 May, Ins. § 583; *Bld. Ins.* 443; *Wood, Ins.* § 101.

The defendants took no exception to the charge at the time, but, in making out their statement of case on appeal, they specifically excepted to the charge in this particular. This

is in sufficient time for exceptions to the charge, though not as to any other matters. *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383, and other cases cited in *Clark's Code* (2d Ed.) p. 383, and *Tillett v. Railroad Co.* (at this term) 21 S. E. 698.

If the assignment of the policy by Cynthia A. Blackburn was defective because her husband did not join therein, she and her husband being parties to the action, the defendants cannot complain. But, taking the assignment as sufficient as to its execution, the defendants are estopped; for, through their agents, they assented to the assignment being made, and there is neither allegation nor proof that there was any suppression of the facts, or that said agents were misled or deceived in assenting thereto. It would be a fraud on the plaintiffs if the defendants could assent to the assignment, lull the assignee and assignor into a belief that the property was protected by the insurance, and continue to receive the premiums, yet, when there is a loss by fire, could assert that they had been released from liability by an assignment which, by their assent duly indorsed on the policy, they had agreed might be made, and which was relied on by the plaintiffs. It is very certain that, if the defendants had not indorsed their assent, the assignment would not have been made; else why the care taken to procure such assent to be indorsed? It is true the rule is that a policy of insurance against fire is not valid if taken out by or if assigned to one who has no interest in the property insured. But here the defendants agreed that the plaintiffs might execute this assignment. It is not alleged that the companies had any representations made to them, in order to procure their assent, that the assignee had an interest in the property, and they were not incapacitated to give a valid and binding assent. That, under such circumstances, the assignment is valid and binding on the companies, is held in *Insurance Co. v. Flack*, 56 Am. Dec. 748, and is noticed in *Bibend v. Insurance Co.*, 30 Cal. 78, where it is held that an assignment of this character is regarded in the light of a transfer of the right to receive the money that might become due upon the happening of a loss. *Fertilizer Co. v. Reams*, 105 N. C. 283, 295, 11 S. E. 467.

As the error only affects the verdict upon the eighth and ninth issues, a new trial is granted only as to them, the judgment being affirmed in all other respects. *Burton v. Railroad Co.*, 84 N. C. 192, 201; *Tillett v. Railroad Co.*, 115 N. C. 632, 20 S. E. 480. New trial.

(116 N. C. 375)

#### CARDEN v. McCONNELL.

(Supreme Court of North Carolina. May 14, 1895.)

#### SLANDER OF TITLE—PAROL EVIDENCE.

In an action for slander of title, where it is alleged that defendant had, by misrepresenting plaintiff's title to land, prevented a written contract for the sale of the land between plaintiff

and I. from being carried out, the contents of the contract (the contract being collateral to the gravamen of the charge, and material only as to the measure of damages) may be shown by parol.

Appeal from superior court, Olay county; Shuford, Judge.

Action by G. B. Carden against W. R. McConnell for slander of title. From a judgment of nonsuit, plaintiff appeals. Reversed.

G. B. Carden, for appellant. J. B. Batchelor, for appellee.

FURCHES, J. This is an action by plaintiff to recover damages for slander of his title to land. Plaintiff offered in evidence a deed from T. M. Ledford and wife to himself, and was then introduced to prove a sale of the land to one Isbell; and, on stating that the sale was in writing, the defendant objected to his speaking of the contents of the paper writing, and the objection was sustained. Plaintiff then introduced Isbell, who testified that he took the paper writing, and assigned it to one Hoffman, of Detroit, Mich. Plaintiff then offered to prove the contents of the paper writing. Defendant objected, and the objection was sustained. Plaintiff excepted to his honor's rulings, and submitted to a nonsuit, and appealed.

It is a well-settled principle of the law of evidence that where a transaction takes place between parties, which is reduced to writing, and signed by them (or it may be otherwise assented to by them), and an action is brought to enforce this transaction, the written evidence must be produced or accounted for before other evidence is admissible as to the transaction. This rule is put upon the ground that the parties have agreed that the writing shall be the evidence of their contract or transaction. This learning is too familiar to call for citations to support it. But this rule only obtains in actions between parties to the written evidence of the contract, and where its enforcement is the gravamen,—the grievance complained of, the substantial cause of the action. Burrill, Law Dict. 568; 1 Greenl. Ev. 366. This action is not between the same parties who made the written contract to sell the land. That was between the plaintiff and Isbell, and this action is between the plaintiff, Carden, and the defendant, McConnell. The defendant, McConnell, is no party to this writing, and is in no way bound by it; and as he is not bound by it, as between him and the plaintiff, the plaintiff is not bound by it. If it binds one, it binds the other; and, as it does not bind defendant, it does not bind the plaintiff. Reynolds v. Magness, 2 Ired. 26. But this action is not brought upon this written contract between the plaintiff and Isbell. It is brought against the defendant upon the allegation that he had falsely claimed, to the party to whom plaintiff was about to sell his land, that he (the defendant) was the owner of one-half of the mineral interest in the

same, and plaintiff's title was not good; and that defendant, by this means, had prevented him from making the sale. This false representation is what the plaintiff complains of. This is the gravamen,—the grievance. Burrill, Law Dict., supra. The sale to Isbell, and the writing which was the evidence of that transaction, as between plaintiff and Isbell, is collateral to the gravamen,—the issue in this action; and is only material as to the measure of damage to which plaintiff would be entitled if he sustains the issue as to the slander,—the alleged grievance he has against defendant. This paper, then, being collateral to the issue,—the grievance complained of,—its contents may be shown without producing the paper. Reynolds v. Magness, supra; Pollock v. Wilcox, 68 N. C. 46; Wilson v. Derr, 69 N. C. 137; State v. Wilkerson, 98 N. C. 696, 3 S. E. 683. There was error in sustaining defendant's objections to the testimony. New trial.

(116 N. C. 882)

### MERONEY v. ATLANTA NATIONAL BUILDING & LOAN ASS'N.

(Supreme Court of North Carolina. May 14, 1895.)

BUILDING ASSOCIATIONS — USURY — MORTGAGES — CONFLICT OF LAWS — ACCOUNTING.

1. Where a loan is made through a local branch of a corporation of another state, the by-laws of which provide that the treasurer of the branch shall receive 2 per cent. on collections, and that he shall give bond for prompt remittance of collections to the parent office, the contract, though reciting that it is solvable in the other state, will be held to have been intended to be solved by payment to the local treasurer, and therefore governed by the laws of the state of such branch.

2. In the enforcement of a mortgage on land, the usury law of the state in which is the land will govern, the security having been given for money to be used in the state, though payment of the loan in another state was provided.

3. A foreign building and loan association, having some of the features of the building and loan associations organized under the laws of North Carolina, but having, in addition, power to raise funds by issuing interest and dividend bearing stock, to buy and sell property in general, and to act as agent and trustee for the investment and management of funds, is not entitled to exercise the special powers and privileges of such local organizations.

4. The transaction between a quasi building and loan association and its borrowing stockholder is simply a loan, and is usurious, where he is liable, under certain circumstances, to pay more than the amount loaned and legal interest.

5. On an accounting between a quasi building and loan association and its borrowing stockholder, he should be charged with all he received, with legal interest thereon, and should be credited with entrance fee, stock dues, premiums, and interest on payments in advance of legal interest, and should not be charged with fines for noncompliance with provisions as to payment of premiums.

6. Act March 9, 1895, restricting, in its first section, building and loan associations to 6 per cent. interest, if held to allow greater interest by the provision of a subsequent section authorizing them to charge costs, expenses, interest, premiums, and fines, is repealed by Act March 13, 1895, prohibiting any one, without exception, to exact more than 6 per cent. for the loan of money.



Appeal from superior court, Cherokee county; Armfield, Judge.

Action by J. S. Meroney, Jr., against the Atlanta National Building & Loan Association to enjoin foreclosure of a mortgage and for an accounting. Judgment for plaintiff. Defendant appeals. Affirmed.

J. W. Hinsdale, for appellant. J. W. & R. L. Cooper, for appellee.

CLARK, J. The following full and convincing opinion, prepared by Mr. Justice BURWELL at last term, is adopted by the court:

"The question between these parties is, what sum is legally due to the corporation called the 'Atlanta National Building & Loan Association' from the plaintiff on account of a loan of \$300 made by it to him on September 11, 1890, the payment of which was secured by a deed in trust made by the plaintiff and his wife to the defendant Goldsmith, by which they conveyed to him, as trustee, a certain town lot in Murphy, Cherokee county? What the defendant corporation contends for as its dues, under its contract with the plaintiff, is clearly set out in the letter of its able counsel, which has been made by it a part of its answer. This letter is dated March 10, 1892, is addressed to the plaintiff, and, after telling him that he is instructed 'to foreclose said deed of trust,' gives him 'an opportunity to settle' without a sale of his property, as follows: 'You were a subscriber to five shares of the common stock, class B, of said association, upon which you have paid the dues of 60 cents per month on each share from March, 1890, to January, 1891, inclusive, eleven months, at \$3 per month, \$33. See by-law No. 3. On September 11, 1890, you borrowed \$300 from the association, and made your note and deed of trust to secure the same, according to the charter and by-laws of the company. By this contract you agreed to pay the association, in addition to the dues or monthly installments upon your stock which you contracted to pay upon becoming a stockholder, the sum of \$3 per month as interest and premium on said advance, until the stock should reach its par value; and you stipulated that, if you failed to pay promptly when due and payable the said monthly interest or premium, fines, and monthly payments on said stock for a period of three months after the same became due, or any installment thereof became due, then, at the option of the said association, the whole indebtedness shall at once become due and collectible. You owe interest and premium for the same time, according to your contract, \$3 per month, for 14 months, \$42. The association has exercised its option, and now requests due payment of the whole indebtedness. You owe, under your contract of subscription to five shares of stock, dues from February, 1891, to March, 1892, 60 cents per share per month, for 14 months, at \$3 per month, \$42. You likewise owe for 14 months, at 10 cents a

share per month, or 50 cents per month, for 14 months, \$7. See by-law No. 8. This makes a total of \$91 to be added to the principal of your note, \$300, which makes a total of \$391. By-law 22, paragraph 22, provides: "After a member has made not less than 11 successive monthly payments of dues, exclusive of the admission or entrance fee, provided he has paid dues for every month up to the date of withdrawal, and all fines or other charges against him, he may withdraw the amount of dues paid by him, less that part of the same apportioned to the expense fund," as prescribed in by-law No. 25, with interest at 6% per annum for the average time on the amount withdrawable. Paragraph 4 of the same by-law provides: "No withdrawal of shares which are in arrears will be allowed until such arrears, with all fines and other charges, have been paid. Payment of dues must be continued until the month of actual withdrawal. The admission or entrance fee and the ten cents per share per month appropriated to the expense fund cannot be withdrawn. Sixty days' notice in writing, to be signed by the shareholder, is required for all withdrawals. A withdrawal fee of \$3 must be paid on each certificate. Each notice to withdraw will have attention in order in which it is received. Dues are the monthly installments paid on shares, and do not include the admission or entrance fee of one dollar per share." By-law 25 provides: "There shall be retained and reserved from the monthly dues paid on the shares the sum of ten cents per month per share for the payment of expenses, to be known as the 'expense fund'; the excesses over and above expenses to go to the profit account." In this settlement the company will concede to you the withdrawal value of your shares as if you were not in arrears. Your dues on stock from March, 1890, to March, 1892, at \$3 per month, would be \$75, less expense fund, ten cents a share, fifty cents a month, for 25 months, \$12, leaving due \$62.50. Add interest at 6% for average time, 12 months and a half, \$3.40, making \$65.90, less withdrawal fee, \$3, leaving \$62.90. So, deducting from \$391 the credit of \$62.90, we have \$328.10 as the amount which the association is now claiming to be due by you. If the same shall be paid without foreclosure, you will be relieved of the additional expense of 10% of \$32.10, attorney's fee, and expense of sale. Unless you shall at once pay to me the amount due by you to said association, I shall, under my instructions, proceed to foreclose the deed of trust according to law. I will call your attention to the fact that this contract is solvable in Georgia, and is made with reference to its laws. The courts of Georgia have decided such a contract to be valid and binding.

"The defendant is organized under the laws of the state of Georgia, and an examination of its charter, a copy of which is filed with the brief of its counsel, discloses the fact that the scope of its power is very

extensive. "The object of said association," it is said, 'shall be pecuniary profit for its stockholders, to encourage the saving of small sums of money, to aid persons of limited means in obtaining homes, the accumulation of a fund which shall be paid in monthly installments by its stockholders, and lending the same on real estate, personal, or other acceptable security, to members of said association, or to persons not members thereof, or to corporations, and to take and hold deeds, mortgages, executions, or other liens, or personal security therefor; to sell, assign, transfer, or otherwise dispose of all such securities or any part thereof; to make, issue, and sell bonds or other obligation based on the security and property held by the association; to buy, sell, own, and deal in any real or personal property; to improve any such real estate by erecting buildings, machinery, or other appliances for increasing the value thereof, to lease or rent the same, and to sell the same for cash or on installments; also to act as agent or trustee for the investment and management of funds for persons, corporations, administrators, executors, guardians, and trustees. To carry out all of which objects, as well as to do any and all other acts or things necessary and lawful in the prosecution and management of said business and businesses, petitioners pray to be invested with full power and authority.' And by its charter it is given full power and authority to carry out all these objects of its organization.

"Now, if we leave out of our consideration, for the present, all questions about the alleged special powers and privileges of this corporation, and all questions that pertain to the intricacies of the business of building and loan associations, and the application of payments made by the borrower from such an association on stock in indicating his indebtedness, we have here a loan of money made by a foreign corporation to a citizen of this state, and secured by mortgage on land in this state, at a rate that is plainly usurious under the law here, 12 per cent. (6 per cent. as interest, and 50 cents per month as premium), and an insistence by the foreign lender that, because it stipulated in the contract that it is 'solvable' in the foreign state, and is made with reference to its laws, and those laws allow the taking by it of that rate of interest for the loan of money, the courts of this state are bound to enforce such a contract by a decree of foreclosure. The proposition challenges careful attention. It is important that foreign capital invested within our borders shall have, to the very utmost, its just dues, and that it shall find our courts ready now, as they have always been, to protect its interest and enforce all its lawful rights. But it is important, also, that the settled policy of the state should be upheld by its courts, and that schemes which to them seem manifestly adopted merely to

evade its usury laws should not be allowed to bring about a virtual abrogation of those statutes. If a foreign bank or other lender of money may establish local branches or offices in this state, and through its agents solicit and take application for loans on mortgages of land here to be sent to the home office to be passed upon and allowed there, and if, because of such arrangement and the insertion of a statement put in the note or mortgage that the contract is 'solvable' in the foreign jurisdiction and is made 'with reference to its laws,' the courts of this state are required to enforce such contracts, and decree a foreclosure of the mortgage and a sale of the land, that the foreign usurer may have his usury, then surely will it have come to pass that it is no longer true that there is no 'cover or device' by which the wholesome restraints put upon the money lenders by our statutes may be escaped. Upon this subject there is *Martin v. Johnson*, 84 Ga. 481, 10 S. E. 1092, a most emphatic declaration from the highest court of the state that is the domicile of the defendant corporation. A loan of money had been made by a citizen of Massachusetts through an agent in Georgia to a citizen of the latter state, secured by mortgage on land there, but payable in the former state. It was contended that the rights of the mortgagee were not to be governed by the laws of Georgia in respect to usury, because the note was payable in Massachusetts. The court said: 'If this court should hold that a note made in this state, but payable in the state of Massachusetts, for money advanced by the agent of a person who resides in Massachusetts, could be collected, notwithstanding it contained 16 per cent. usurious and unlawful interest, then the law of this state as to usury would be inoperative and useless. The money lenders of those states that have no usury laws, but which allow to be collected any rate of interest contracted for, could flood this state with their agents, and by the loan of money exact the highest rate of interest, even a hundred per cent. It seems, therefore, that the principle for which the defendant corporation contends is denied in the courts of its own domicile; that a foreign money lender loaning money in Georgia on mortgage on Georgia land must be content, in a foreclosure proceeding, to have the amount due determined by Georgia law. The reasons that support the rule there are valid here. The rules of comity require us to allow foreign corporations a standing in our courts to enforce the valid contracts they may have made with our citizens, and all such liens upon property situated within this state as they have lawfully acquired. But that comity does not require that we should allow foreign corporations to enforce contracts here if such enforcement would be in conflict with our laws, and being thus in conflict the enforcement thereof would work against our own

citizens; and give to the foreigner an advantage which the resident has not. *Walters v. Whitlock*, 9 Fla. 86. Much less does it require that we should allow a Georgia corporation to enforce a mortgage loan which is illegal and void by our laws (*Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717), while in that state the rule is as stated in *Martin v. Johnson*, supra. It is well settled—so well settled that authorities need not be cited—that a purely personal contract, made in one place to be executed in another, is to be governed by the laws of the place of performance. This general rule is subject to the qualification that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. *Tyler, Usury*, 83. Now, it seems very manifest to us, considering all the facts and circumstances, that this Georgia corporation required the plaintiff, a citizen and resident of this state, to declare, in the obligation given by him to it for the money loaned him, that the contract was solvable in that state, and was made with reference to its laws, not because it was contemplated by either of the parties that the money would be paid there, or that the parties would enforce their respective rights under the contract in the courts of that state, but because this money lender desired to escape the restraints of the laws of this state, and, by this formal declaration inserted in the contract, compel the courts of this state, in a suit for the foreclosure of the mortgage, to adjust the rights of the parties according to the laws of Georgia and the decisions of its courts, and in disregard of the laws of this state and the decisions of this court.

"The by-law in relation to the establishment of local branches is as follows: 'In accordance with the authority conferred in its charter, this association will establish local branches in Georgia and other states at such points as the board of directors may approve. The local branches shall elect their own officers and directors, and may make such by-laws as they desire to govern their own bodies, not inconsistent with those of the parent office. The treasurers of the local branches shall give such bonds to the association for the faithful performance of duties, and the prompt remittance of all collections by them, as the board of directors of the parent office shall determine in each particular case. They shall receive 2 per cent. on all collections from the local branches made and paid over to the treasurer of the parent office by them.' It appears from the record that there was a 'local branch' at Murphy, through which this loan was negotiated. It is evident that the borrower was expected to make his payments to the treasurer of this local board, who was under bond 'to the association' for the prompt remittance of all collections. The by-laws provided for compensation for this treasurer,—2 per cent. of his

collections. The local treasurer must be considered the collecting agent of the association. A payment to him must be considered a payment to the association. Asseveration that he is the agent of the local branch, not the parent company; that he was expected to receive and remit money, not as agent of the lender to whom he had given bond for the faithful performance of his duties, but of the borrower,—cannot avail. It is evident that this contract, which the borrower was required to say was solvable in Georgia, was in fact to be solved by payments to this local treasurer, and that the form of the transaction was adopted to disguise its real character.

"Considering the transaction, therefore, without any regard to the intricate questions pertaining to what are called 'building and loan associations,' but merely as a loan of money made by a money-lending corporation of another state through its local branch in this state, in the manner detailed in the case on appeal, to a citizen here, we conclude that in this contract between the parties, as to their respective rights and liabilities under the contract, those rights and liabilities must be determined by the laws of this state; that it is in truth a North Carolina contract, to be governed by our laws, and not a Georgia contract, to be governed by the laws of that state. If there was no local board and no local treasurer; if the application of this resident of North Carolina for a loan of money to be secured by a mortgage on land in this state, to be executed here, had been forwarded directly to the home office of this foreign corporation, and had been there granted upon the condition that the note or bond given by the borrower should be made payable at the home office, and should bear interest at a rate allowed by the laws of that jurisdiction, but illegal here,—it has been declared by high authority, that in a suit to foreclose the mortgage, the decree of foreclosure will limit the recovery of the lender to the rate of interest allowed by the laws of this state. Wharton, in his treatise on the Conflict of Laws (section 507), says of the question 'whether, when a mortgage is given as security for a loan, and the mortgage is in one state, and the place of payment of the loan is in another, the law of the former state or that of the latter state is to prevail in the settlement of interest,' that it has been frequently litigated in the United States, and 'with results which on their face are irreconcilable.' And the learned author says: 'The true test is, was the mortgage merely a collateral security, the money being employed in another state and under other laws, or was the money employed on the land for which the mortgage was given? If the former be the case, then the law of the place where the money was actually used, and not that of the mortgage, applies. If the latter, then the law of the place where the mortgage is situate must prevail.'

"It is stated in the elaborate brief of the learned counsel for appellant that the authorities cited by Wharton do not sustain the rule thus laid down by him. Among these cases is *Chapman v. Robertson*, 7 Paige, 627, in which it was adjudicated, as stated in the headnotes of that case in 31 Am. Dec. 284, that 'the construction and validity of personal contracts depend on the laws of the place where they were made, unless they were entered into with the view of being performed elsewhere'; and also that 'transfer of land or other heritable property, and the creation of liens thereon, is governed by the laws of the place where such property is situate.' Of this case, Folger, J., said in *Dickinson v. Edwards*, 77 N. Y. 573: '*Chapman v. Robertson* is a case often cited and relied upon, but it does not impinge the general rule that the validity of a purely personal contract is to be tried by the law of the place of its performance. The learned chancellor concedes that the case would have come clearly under that principle if the contract in suit had been only the personal contract of the defendant; but he holds that as it was a mortgage actually executed here, by a resident here, upon land here, for money borrowed to be used here, though to be repaid elsewhere, the law of this state would fix the legality of the rate of interest reserved, and his further reason that the contract was partially made here actually in reference to our laws, with an appeal to our courts contemplated by the parties, if necessary.' A distinction seems thus to be clearly recognized between a contract, 'purely personal,' as, for instance, a promissory note executed in this state, but made payable bona fide in Georgia, and a contract not 'purely personal,' as, for instance, a loan of money by a citizen of Georgia to a resident here, to be repaid in that state, and to be evidenced by note so payable, and mortgage on land in this jurisdiction. In *Jackson v. Mortgage Co. (Ga.)* 15 S. E. 812, Bleckley, C. J., speaking of a loan of money made by the defendant to the plaintiff in New York, but secured by mortgage on land in Georgia, where he resided, says: 'There was not one contract for making the notes, and another for securing them by a conveyance, but a part of one and the same contract was expressed in the note and a part in the deed executed at the same time. \* \* \* There was no intention to make a loan without having it secured both by the notes and the deed. It was therefore impossible to accomplish the object without calling in the laws of Georgia as a part of the transaction. New York had no law which could make any contract conveying land situated in Georgia operative or obligatory. As the laws of Georgia would thus be essential with respect to a part of the transaction, that law, if possible, ought to be applied to the whole. There was no intention to make a mere personal contract, but the scheme was to make one

partly personal, and partly confined by its very nature to a given situs, to wit, the state of Georgia.' See, also, *Martin v. Johnson*, supra, which was a suit to foreclose a mortgage, the debt being payable in Massachusetts. It is there said: 'There is a portion of the contract which under no circumstances could be enforced in the state of Massachusetts,—that as to the land upon which it is sought to set up a lien. Nor do we readily see how any portion of this contract could be enforced in the state of Massachusetts against a person resident in the state of Georgia.' The difference in the contracts makes a difference in the rule applicable to their enforcement. Hence in *Pine v. Smith*, 11 Gray, 38, it was decided that a note made in Massachusetts, and secured by mortgage on land in that state, although payable in New York, was to be construed by the Massachusetts law; and in *Thompson v. Edwards*, 85 Ind. 414, it was held that if A., of Indiana, borrowed, in Indiana, on note secured by a mortgage on land there, money of a citizen of New York, some of the note being payable in New York, and as to some the note specifying no place of payment, the contract was an Indiana contract, and the question of its being usurious was to be tested by the law of that state. In *Pancoast v. Insurance Co.*, 79 Ind. 172, the notes and mortgage were payable in Connecticut, and the court said: 'It is true that the notes and mortgage are made payable in Hartford, in the state of Connecticut. But it is true that they were executed in this state, the mortgagor lives in this state, the lands lie in this state, and from the terms of the mortgage it is clear that the intention of the parties was that the contract was to be enforced in this state. The mortgage could be enforced nowhere else. In such a case the law of this state governs, the rate of interest being fixed in accordance with the laws of this state.'

"The doctrine which Dr. Wharton announces seems to us just and reasonable. It has been repeatedly held that such transactions would constitute 'doing business' in this state, so as to subject the foreign money lender, thus conducting himself, to a license tax. *Murfree, Foreign Corp.* §§ 65, 69, and cases cited. The contention of the defendant corporation seems to us to amount to this: That it must be allowed to do business in North Carolina in total disregard of North Carolina's statutes and the decisions of her courts; that it shall be allowed to take mortgages on North Carolina land from a resident owner for money loaned to the resident, to be used here, and foreclose them in North Carolina courts, where alone jurisdiction for foreclosure could reside, and where alone it must have contemplated enforcing its rights, if a resort to courts should be necessary, not by North Carolina statutes and the decisions of her courts, but by Georgia statutes and the decisions of its courts;

in fine, that it shall be allowed to override in the courts of this state the laws of this state and its well-settled policy as to the borrowing and lending of money. We cannot accede to this proposition, but, instead, we choose to adopt the doctrine announced by Wharton, quoted above, which seems to us more reasonable, and which he assures us is sustained by the authorities. We have, indeed, as it appears to us, an affirmation of that doctrine in *Commissioners of Craven v. Atlantic & N. C. R. Co.*, 77 N. C. 289, where the learned Justice Rodman, speaking of certain bonds which the defendant company had delivered in New York and which were payable there, and which, it was contended, were 'governed by the laws of New York in respect to the rate of interest,' says: 'These bonds were clearly a North Carolina contract. The precedent debt, which was the consideration, was incurred and payable in North Carolina. Both parties resided in North Carolina. The bonds were secured by a mortgage on real property in North Carolina, which could only be enforced through the courts of this state. In our opinion, the bonds could legally bear no greater rate of interest than that allowed in North Carolina.' Now, if the reason given by this able judge for declaring that these bonds were clearly a North Carolina contract be analyzed, it will be found that the fact that 'both parties resided in North Carolina' could not have been an important factor; for in *Roberts v. McNeely*, 7 Jones (N. C.) 506, it was proved that both parties lived in Salisbury, in this state, and yet the contract between them, a promissory note, executed at their residence, but payable in New York, was declared to be governed by the law of that state as to the rate of interest it would bear,—to be a New York contract in this respect. The really controlling reason for the conclusion announced so unhesitatingly about that contract seems to have been that the parties manifestly contemplated the courts of North Carolina as the tribunal for the enforcement of the contract; the security, the mortgage, being enforceable, as is there said, only through the courts of this state, and, this being so, the laws of the former must govern the rate of interest. We do not deem it necessary to discuss each one of the many authorities cited by defendant to show that our courts must be governed by the decisions of the courts of Georgia in ascertaining what is due, on an accounting, from this mortgagor to this mortgagee. In not one of them, so far as we can see, did the court enforce a contract which was illegal and void by the law of the forum, illegal and void by the law of the place where the contract was made, and illegal and void by the law *rei sitae*, and valid, if at all so, only by the *lex loci solutionis*. *Falls v. Building Co.* (Ala.) 13 South. 25, was an action to foreclose a mortgage. The facts were very similar to those in

our case. The court decided that 'the contract which gave rise to the present suit is an Alabama contract, and can only be enforced to the extent our statutes permit'; and added: 'Any statute of this state which may be supposed to confer on building and loan associations the right to charge more than 8 per cent. interest, even if we concede such statutory authority, must be confined in its operation to such corporations as are chartered in Alabama. It cannot be supposed that our legislation had a greater purpose or intent than that.' In that case, as in this, the borrower was required to have paid three months' installment on stock before he could obtain a loan, and yet that court declare that the transaction was 'practically a loan of money,' and quotes from *Uhlfelder v. Carter*, 64 Ala. 527, the following language: 'In determining whether a contract is infected with usury, its substance and effect, not its form, are material.'

"Holding, therefore, as we must, that the contract of a loan between this mortgagor and mortgagee is governed by the laws of this state, we come to the question, what is due the mortgagee according to those laws? We are met at the threshold of this investigation by the contention of the defendant corporation that, being a 'building and loan association,' it is entitled to exercise the same powers and privileges as if it had been organized in this state according to the provisions of 2 Code, c. 7; that the same effect is to be given to its contract with the plaintiff as if it were a North Carolina corporation formed in strict compliance with the provisions of that chapter of the Code, and therefore entitled to exercise special powers and privileges. 'A building and loan association is an organization created for the purpose of accumulating a fund by the monthly subscriptions or savings of its members, to assist them in building or purchasing for themselves dwellings or real estate by loaning to them the requisite money from the funds of the society, upon good security.' 2 Am. & Eng. Enc. Law, p. 604. Mr. Endlich (section 283), speaking of the proper and legitimate purposes of the creation of such corporations, says: 'To all practical intents, it may be said to be, to enable a number of associates to combine and invest their savings to mutual advantage, so that from time to time any individual among them may receive out of the accumulation of the pittances which each contributes periodically a sum by way of loan, wherewith to buy or build a house, mortgaging it to the association as security for the money borrowed, and ultimately making it absolutely his own by paying off the incumbrance out of his subscription. It is only so far as they serve these purposes, and are confined to the objects necessarily involved therein, that the acts of building associations fall properly within the powers granted. As soon as they transgress these limits, they are *ultra vires*.' Nearly every state in the Union has a general statute relating to the incor-

poration of building and loan associations or associations of that class called by some name of similar import. Each of these statutes differs from the other. All agree in this: that the contemplated organizations are all strictly co-operative in their nature. Prof. H. B. Adams, of Johns Hopkins University, an eminent writer on economics, in his essay on corporations in 13 Appl. Enc. (Annual, 1888), speaks of these associations as a 'peculiarly American form of co-operation.' Mr. A. B. Burke, to whom Mr. Endlich acknowledges his indebtedness in a note to section 7 of his work, cited heretofore, has lately used the following language in a journal published in the city of Philadelphia: 'As the term "building society," is very indefinite, and as applied to Philadelphia societies an actual misnomer, it is necessary to specify exactly what is meant by such society. The name was first applied to organizations which built houses to be sold. It was also applied to speculative loan associations, whose stockholders had no relation with the borrower except that of lenders of money; and more recently it has been applied to "national" loan associations, having agencies all over the Union, and salaried officers and agents. The term "building society," as here used, is not intended to apply to any organization of the character above mentioned. It is essential that the true plan should be clearly understood, and that its co-operative principles should be faithfully followed, or those who are tempted to imitate the Philadelphia workingman in buying a house may \* \* \* lose, not only their money, but their faith in co-operative enterprises.'

"If we consider the scope of the powers of this corporation, we find that they far exceed those conferred upon 'homestead and building associations' by the Code of this state. The powers conferred upon it have been heretofore fully set out, and need not be repeated. Suffice it to say that it has powers under its charter to do things far exceeding in risk the assisting of its members 'in building or purchasing for themselves dwellings or real estate.' If we consider the manner in which its funds are to be raised, we find that it is not by 'accumulating a fund from the monthly subscriptions or savings of its members,' but mainly by inducing capitalists to invest their surplus in one or the other of the kinds of stock provided for in the following by-law: '(2) Full-pay interest-bearing stock in class B, which shall be sold at \$50 per share, and which shall bear interest at 6% per annum, payable semiannually, on \$50 per share. This stock shall be redeemable upon maturity of the installment stock in said class, at \$100 per share, less the aggregate sum of dividend paid thereon. (3) Permanent investment stock, which shall be sold at \$100 per share, and which shall participate in the profits of the association from the date of issuing the certificate of stock to be paid semiannually, to wit, on the first day of February and Au-

gust of each year. The par value of all stock at maturity shall be \$100 per share. A member may hold any number of shares.' A corporation having the authority to incur such risks and responsibilities, and deriving its funds from such a source, in whole or in part, is not a 'building and loan association,' except in name. It is merely a money-lending, dividend-paying corporation, to which, for some purposes, some features of a 'building and loan association' have been attached. Its purposes and powers put it outside of the pale of the beneficent statute which was intended to encourage co-operation among the saving poor, and not to run the risk in finding good investments for their capital. The purpose had in view by the legislation of the different states, allowing the incorporation of these building and loan associations, as they are called, is thus stated by Mr. Endlich in section 119 of his work on the laws of such corporations: 'As a mere savings institution, the building association would never have recommended itself to the favor of legislatures to so unprecedented a degree. As a mere bank for the depositing of money lying idle, for the purpose of fructifying it for the rich, by fleecing the needy, it would never have acquired the unusual rights it exercises. But the idea, the possibility, of making membership in it the means of raising a property-holding, homestead-owning class of citizens, precisely as those whose improvident habits and petty earnings had hitherto debarred them from the blessing or feeling the stimulus of the prospect of owning their own homes. The desirableness of augmenting the proportion of landowners among the working classes, particularly in a republic, seems so weighty a consideration in the minds of legislators that they were willing, in exchange, to make a sweeping exception to many of the best-settled rules of general policy applicable to dealings between man and man.' If, as the defendant contends, our statute confers upon building and loan associations those special powers and privileges, constituting, as the learned author says, 'a sweeping exception to many of the best-settled rules of general policy applicable to the dealings between man and man,' it is certain that no corporation, except such a one as is contemplated by the statute, can lay any claim whatever to those special powers and privileges. A true building and loan association, such as our statute provides for, has no authority to declare or pay dividend on its stock. End. Bldg. Ass'ns, § 324. 'As to participation in profits, the scheme has reference to the final adjustment of accounts, not to any intermediate realization.' The defendant corporation has two classes of stockholders to whom, as shown by the by-law heretofore quoted, dividends are to be paid each year, and, having power so to conduct its business, is not the kind of an association which our legislature designed to pro-

mote. A corporation of that class cannot risk its members' money and houses by engaging in many of those enterprises enumerated in the defendant's charter heretofore set out. The defendant has 'full power and authority' to do all those things. Therefore it is not of that class, and can lay no claim to those special powers and privileges with any justice whatever. In section 39 of Mr. Endlich's treatise it is said that these associations are founded upon principles of strict neutrality and equality of benefits and obligations. A corporation not founded on those principles cannot be truly a building and loan association, within the purview of our statute. The benefits are not strictly mutual and equal where one stockholder, according to the plan of the organization, is entitled to semiannual interest on what he has paid in, and another to semiannual dividends, while others must await the termination of the life of the association, or some other time, indefinitely future, before reaping any profits. There is no strict equality of obligation where one stockholder pays \$50 for a share of stock, and another obligates himself to pay \$100 per share. 'In Maryland, a corporation which made its loans to members in the approved form of building association loans, but whose aims and nature did not bring its property within the statute as a building association, was not allowed to enforce reservations lawfully permitted to such institutions.' *End. Bldg. Ass'ns*, § 355; *Williams v. Association*, 45 Md. 548. The same doctrine is established in Pennsylvania. *Jarrett v. Cope*, 68 Pa. St. 67; *Kupfert v. Association*, 30 Pa. St. 465; *Rhoads v. Association*, 82 Pa. St. 180.

"The wisdom of this doctrine will be apparent, we think, to all who will consider the possible consequences of a contrary rule. For illustration: Let us assume, for the sake of argument, that a building and loan association organized under our statute has a right to loan money to its members at the rate of  $\frac{1}{2}$  per cent. per month and a like 'premium,' or 1 per cent. per month; that it requires its members to pay 60 cents per month as dues on each share of \$100, of which 10 cents is to go to the expense fund of the association, and enforces prompt payment by a fine of 10 cents per month per share. Let us now suppose that one of those worthy citizens for whose special benefit it is said this 'beneficent statute' was adopted is induced to subscribe for 10 shares in one of these beneficent institutions. His first duty is to pay \$10 for the privilege of being enrolled. Let us assume that the agent who induced him to subscribe takes this for his trouble, and gives that particular sum no further consideration. Let us now suppose that this member, wishing to become a home owner, selects one to cost \$1,500, and, using \$500 which he had and \$1,000 borrowed from the association on a mortgage of the property, he takes the title, and bravely sets

out to battle with the debt he has incurred, to provide a home for his family, in good cheer at the prospect held out to him by the company's agent, that at the end of seven years, 'at the furthest,' his 10 shares of stock will be worth \$1,000, and that then, by a very simple process of adjusting the accounts, he will at the same moment cease to be a debtor to the association, and also a stockholder in it, and the mortgage on his house will thereupon be canceled. Let us assume that the mortgage provides that he will pay 'said monthly interest or premium, fines, and monthly payments on said stock' until the said shares shall become fully paid in, and of the value of \$100 each, as the mortgage set out in this record does. Now, let us suppose that this workman, at the end of seven years, having promptly, out of his hard earnings, paid each month \$10 interest and \$6 stock dues to the association, asks that his stock be exchanged for his debt, and his home be disincumbered of its lien, and is told that, while the soliciting agent was no doubt entirely sincere in his belief that the payments thus far made by him would satisfy his indebtedness, those rosy-hued hopes constituted no part of the contract; that it stipulated that he should keep up his dreary round of monthly payments until he had fully paid up his stock, and it was worth \$100 per share; that, contrary to everybody's expectations, the expenses had been larger than was anticipated, and net profits had been smaller than hoped for, and that his stock was not worth \$100 per share, as the books of the company plainly showed; that, while his engagement was that if the exigencies of the association required it he would pay \$1,000 in stock dues alone, he had in fact only paid \$504 (84 times \$6) on that score, and out of that he had agreed that \$84 (84 times 10 cents) should be used in expenses, leaving, it might be, only \$420 really credited on his stock account. Let us suppose that, still hoping for good results, he resumes his payments, and tolls on; that from month to month, from year to year, the happy day when the stock is worth par is put off by accumulating expenses and constantly recurring losses, until, at the end of 166 $\frac{2}{3}$  months, he insists that his stock dues, at least, in any event, are all paid, because 166 $\frac{2}{3}$  payments, of 60 cents each, amount to \$100, and is told that 10 cents of each 60 cents paid in by him had, according to his agreement, been applied to the expenses, and that the association was in debt, and that all the subscriptions for stock which he was informed constituted 'a trust fund' must be paid in; and hence, as the expenses of the business, including the interest and dividends paid to certain classes of the stockholders, had consumed all the profits, it would be required of him to pay stock dues for 200 months, as it takes 200 times 50 cents to make \$100. Let us suppose that he continues his payments for 200



months, and thus, beyond all question, pays all his stock dues, and, when he then asks for the application of his paid-up stock to the satisfaction of his mortgage debt, is told that, while the company was called a building and loan association, it had acted also 'as agent or trustee for the investment and management of funds for persons, corporations, administrators, executors, guardians, and trustees'; that it had dealt in real estate, and had been engaged in erecting buildings and machinery thereon, and that those enterprises, all of which were *infra vires*, had proved disastrous; and is informed that, though the receiver who had been appointed to wind up the affairs of the corporation would find that his stock was all paid in, and that there was no claim against him on that account, he would also ascertain that the stock of the company was of no value, owing to the disasters that had come upon some of its various undertakings, and that it would be necessary for all mortgagors to continue to pay the interest (12 per cent.) on the amounts advanced to them, until he had collected enough to adjust all the liabilities of the company, or else to take advantage of the option allowed, and pay back the whole sum borrowed—\$1,000—at once. Surely, the trusting home builder, caught in such toils, might justly exclaim against a statute, called beneficent, that would produce such a result. Such an outcome is possible. Of its probability in different degrees it is not for us to judge. The class to which the defendant corporation is by us to be assigned is the point under consideration,—whether to the class of money-lending, dividend-paying corporations of the investors of capital, or to a class of incorporated associations, co-operative in their very nature, and designed by means of such co-operation to foster a home-*stead-owning* class of citizens, with little risk to them, because of the severe limitations put by the law of their creation upon the corporate powers and purposes. An examination of the charter of the defendant corporation, its methods and powers, leads us unhesitatingly to put it in the first-named category, and to declare that there is no such conformity by it to the building and loan association of our statute as to entitle it to claim any special rights or powers therein granted to associations organized according to its terms, with the limited powers and the restricted purposes therein set out.

"If the charter of a building association, or what is called its 'constitution,'" says Mr. Endlich (section 64), 'contains the grant of power \* \* \* in excess of what the statutes regulating the formation and powers of such organizations sanction, the objectionable grant is simply void. Each such illegal feature may become the basis of a proceeding by the state against the society, and result in the forfeiture of the franchise.' Applying this principle to the case in hand, we have here a corporation calling itself a 'building and loan association,'

and asserting the possession of special powers and privileges as such, and yet having in its charter or constitution grants objectionable because in excess of what our statutes, regulating the formation and powers of such organization, sanction. We cannot declare these objectionable grants simply void, for the state of Georgia had the right to invest this legal entity of its creation with all of these powers. Each such feature cannot become the basis of a proceeding by this state against the society, and 'result in the forfeiture of the franchise,' for those features are not, it seems, illegal where conferred, and the power of forfeiture which this commonwealth may properly exercise over the corporations of its own creation cannot be applied to this foreign corporation. A member of this association, who should seek in the courts an injunction against the exercise by its managing board of these powers and the assumption of the accompanying risks, or should endeavor to hold those officers responsible to him for losses incurred in the exercise of those powers, upon the ground that a building and loan association, within the purview of our statute, could not lawfully engage in such business and incur such risks, would be promptly confronted with the reply, not to be gainsaid, that the restraints of our statute could not affect the right and powers of this foreign corporation. Because of these things, it must follow that there is no course open to the courts of this state but to declare that so-called 'building and loan associations,' whose charters legally invest them with the powers not contemplated by our statute (2 Code, c. 7), are not building and loan associations, within the purview of that statute.

"We come, now, to the consideration of the defendant corporation's contention that its contract with the plaintiff, 'without reference to the statute specially authorizing it, is not usurious.' Here we may quote the language of O'Neal, C. J., in *Association v. Bollinger*, 12 Rich. Eq. 124, when speaking of the contract similar to the one we have under consideration: 'How the contract \* \* \* can be anything else than usurious \* \* \* it is difficult to conceive. Indeed, it must task, and has tasked, human ingenuity, in every tribunal where the question has been presented, to find the reason whereby such a contract could be sustained.' The defendant's counsel sets out as the basis of his argument the following facts: First, the contract of borrowing is separate and distinct from that of subscription, and the obligation to pay monthly dues upon the stock was incurred by the contract of subscription; second, the money which Meroney received, whether considered as an advancement upon a portion of his stock or as a loan, was never to be repaid except by the maturing of his stock at an uncertain time; third, if Meroney should perform his contract, it would be uncertain whether he would in the end pay more or less than 8 per cent. interest upon the statement of an account, with the strong probability in favor of



his paying less; fourth, his liability to pay a greater rate of interest than 8 per cent. was caused by his own default, which he might have avoided by simply keeping his contract; fifth, being interested as a stockholder, only three of his five shares having been pledged to the association, Meroney was directly interested in any profits which the company might make upon his loan. It was in the nature of a dealer with partnership funds.

"As to all this, we may say what was said by Mr. Justice Reade in *Mills v. Association*, 75 N. C. 292, 'We look at the substance'; or what was said by Judge Gaston in *Shober v. Hauser*, 4 Dev. & B. 91: 'It is the duty of courts to look, not merely at the words, but at the substance, of the transaction; on the one hand, not to be governed by the words, if the substance goes to defeat the provision of the statute, and, on the other hand, not to rely on the words, so as to defeat the contract, if in substance the transaction be legal. \* \* \*

In spite of every effort of the courts to carry into complete effect the legislative will, no doubt the true character of usurious securities is very frequently concealed under cunning contrivances; but when that character is seen, whatever may be the contrivance, the court must and will act upon the transaction such as in truth it is.' We see in this whole transaction only a lending of \$300 to the plaintiff at 12 per cent. per annum, payable monthly, coupled with an engagement on the part of the defendant that, if the plaintiff makes no default in his stipulated payments, whether as borrower or stockholder, the defendant would not require the repayment of the sum advanced or loaned to him until the value of his stock reached \$100 per share, and that in that event three shares of his stock should cancel the debt. A contract for the loan of money is usurious, if the lender reserves the right, in any event, to collect more than 8 per cent. and the sum loaned. The liability of the plaintiff to pay a greater rate of interest than 8 per cent. grows out of the contract. The existence of such liability shows the contract to be usurious. We quote, as applicable here, the emphatic language of Justice Reade in the case cited above: 'We know of no device or cover by which these associations can take from those who borrow their money more than the legal rate of interest without incurring the penalties of our usury laws. Calling the borrower "a partner," or substituting "redeeming" for "lending," or "premium" or "bonus" for an amount which they propose to have advanced, and yet withhold; or "dues" for "interest," or any like subterfuge, will not avail. We look at the substance.' The doctrine announced in that case by the learned justice has been consistently followed by all the decisions of this court since that time. It was foreshadowed by the strong language of Chief Justice Pearson in *Smith v. Association*, 73 N. C. 372, the first case in which such an association appeared in this court, and in which Mr. William N. H. Smith, afterwards

chief justice of this court, was of counsel for the association, and filed an elaborate brief, in which he argued many of the points now again presented. Yet this learned chief justice, who had himself, as counsel, argued earnestly to the contrary, yielded cordial assent to the doctrine of the *Mills Case*, and the opinions of this court in *Overby v. Association*, 81 N. C. 56, and *Hoskins v. Association*, 84 N. C. 838, delivered by him, distinctly affirm the rule there laid down, which is also approved in *Dickerson v. Association*, 89 N. C. 37; *Pritchard v. Meekins*, 98 N. C. 244, 3 S. E. 484; and *Heggle v. Association*, 107 N. C. 581, 12 S. E. 275. Indeed, that the doctrine of the *Mills Case* is well settled in this state is recognized on all sides. Mr. Endlich says (section 347) that that case has been consistently followed in cases arising subsequently in this state. And in 2 Am. & Eng. Enc. Law, p. 612 (note), North Carolina is put among those states where the transaction between a building and loan association and its borrowing stockholder is 'considered simply a loan.' The legislative branch of the state government has tacitly recognized and approved the doctrine of the *Mills Case*, and those cases that follow it; for, though the general assembly has repeatedly convened since the adoption by this court of the rules applicable to the conduct of the business of building and loan associations organized under the statute of 1868-69, it has never seen fit to alter that statute so as in any way to free them from the effect of those rules. If the contract under consideration must, according to the well-settled doctrines of this court, be held to be clearly usurious, though the defendant corporation were a true building and loan association under our statute, much more clearly is it usurious when made by a corporation having, as we have said, no just claim whatever to such special powers and privileges as such associations may be entitled to, if any. Our constitution most wisely provides that 'no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.' Can the legislature grant to a corporation, or to a certain class of corporations, the exclusive or special privilege of charging more than 8 per cent. for money loaned, while the general law of the state, by which all other individuals and corporations are controlled, declares all such contracts usurious and void? See *Gordon v. Association*, 12 Bush, 110, where the negative of that proposition is held to be clearly the law; and see, also, *Birmingham v. Association*, 45 Md. 541. Such seems to be the conclusion of this court in *Simonton v. Lanier*, 71 N. C. 498, where, speaking of this constitutional provision, Justice Bynum said: 'The wisdom and forethought of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever-working foes of free and equal government.' Whatever may be said upon

that subject, this is at least clear: The intent of the legislature to confer such a privilege upon a claimant must be entirely free from doubt, or it will not be allowed; both the grant and the identity of the grantee must clearly appear.

"It was proper, therefore, that his honor should adjudge that the contract set out in the defendant's answer, as that which it claimed the right to enforce by a sale of the plaintiff's land, 'was usurious under the laws of North Carolina.' We have declared, for the reasons heretofore set out, that for the purposes of this action it is a North Carolina contract, and that the sum due to the defendant must be ascertained upon an accounting by applying to the disputed items the rules established by the decisions of this court. One of those rules—that one which has been fixed by a long line of decisions and has been repeatedly approved—is that this court, looking at the substance of the matter, as bound to do, sees in this whole transaction simply a loan of money by the defendant to the plaintiff. In the account taken by the referee under the directions of his honor, the plaintiff is charged with all he received, with 8 per cent. interest thereon. Entrance fees, stock, dues, and premium must all go to his credit; for, as we view it, all these payments are but parts of the transaction which we have declared to be merely a borrowing and lending of money at an illegal rate. If the plaintiff was to be charged with interest at 8 per cent. upon the sum loaned him, he was entitled to a like rate upon his payments. He should not have been charged with any fines, for this defendant, as we have said, has no right to lay any fines upon its borrower, under any circumstances here, and certainly cannot collect fines from the plaintiff because he refused compliance with its illegal demands. Whatever may be the decisions in other states, in this one all these matters are well settled. 2 Am. & Eng. Enc. Law, p. 639, note 1. We can see no good reason for reviewing at this late day what has been so long acquiesced in by all.

"It may not be improper for us to say in this connection that the insertion in such contract, as we now have under consideration, of a stipulation that in no event should the aggregate of all the sums to be paid by the borrower (interest being allowed to his credit) exceed the sum loaned him, and interest thereon at 6 per cent. per annum, would perhaps entirely relieve all such transactions from the imputation of being usurious. The remedy seems easy. It is insisted with great confidence that the rate which he would be required to pay, if he and his fellow borrowers would carry out their engagements, will be much less than 6 per cent. If that be true, no loss can come to the lender by reason of the incorporation of such a stipulation in the contract. It would be merely to make that a part of the

contract which is in fact an inducement to it, but an inducement put in such shape as to be of no legal effect to protect the borrower from usurious exactions. The proposition is a simple one. Let the money-lending corporations that, under the guise of building and loan associations, are professing to loan money, in a complicated and somewhat confusing method, at 6 per cent. or less, insert in their contract a binding stipulation to the effect that in no event will they exact more than 6 per cent., and all trouble and difficulty will vanish. The courts will be content, for the law against the taking of usury will be obeyed. The borrowing mortgagor will be fully protected against illegal and ruinous exactions, and what has been told him with confidence by the lending mortgagee will be, in a measure, legally secured to him. The lending corporation cannot reasonably object, for the limit proposed (6 per cent.) stands far beyond the rate it assures the borrower it will exact. An objection on its part to the insertion of this safeguard for the house builder would but emphasize the necessity for the rigid enforcement of the rule of the Mills Case, showing, as it would, that there was some danger that the exigencies of its business might frustrate all its hopes and calculations, and bring to the confiding borrower ruin or disaster. In *Taylor v. Association*, 56 Ark. 340, 19 S. W. 918, such a restriction was in the contract between the borrowing member and that association, and the court held that that stipulation relieved the transaction of all charge of taking illegal interest.

"We have proceeded thus far upon the assumption that the promise of the plaintiff borrower to pay the defendant lender for the use of money 6 per cent. as interest and 6 per cent. as premium, so called, was such a contract as would be enforced in the courts of the state of Georgia if it was solvable in that jurisdiction, and made with reference to its laws. The general law of that state makes 7 per cent. the legal rate, but parties may lawfully contract for 8 per cent. Charging interest beyond this limit is illegal. How, then, can it be lawful for the defendant corporation to charge in that state what is clearly the equivalent of 12 per cent., to wit, 6 per cent. interest and 6 per cent. premium? We are told that in *Parker v. Association*, 46 Ga. 166, and in *Van Pelt v. Association* (Ga.) 4 S. E. 501, the supreme court of Georgia so declared. An examination of the first-mentioned case, which is very fully reported, enables us to see that the Fulton Building & Loan Association was a corporation differing in many respects from the defendant. It seems to have been a true building and loan association, as defined by Mr. Endlich. Its contract with Parker was not identical with that of this defendant with this plaintiff. It differs from it in many material respects.

Neither Parker nor Van Pelt was charged 6 per cent. interest and 6 per cent. premium on the money advanced to them. We have not been able to find in any of the cases from the supreme court of Georgia, to which we have been cited, any adjudication upon a contract exactly similar to the one we have here under consideration. In Parker's Case, at page 192, the court says of the transaction: 'Whether the scheme, taken as a whole, is or is not a device to avoid the usury laws, is a question of fact for the jury, under the proof. The court so charged the jury, and the finding is, in effect, that it was not such a device. We think the jury found rightly upon the evidence.' The evidence in that case was the charter and by-laws of the association and the contract with Parker. Non constat that, because it was proper for the jury to find there was no device to evade the usury laws of Georgia in that scheme upon that evidence, it would be necessary for all juries to find that there was no such device in this defendant's scheme, as evidenced by its charter, by-laws, and contract with the plaintiff. Comity may require that the courts of this state shall adjudge to a citizen of Georgia, suing here upon a purely personal contract solvable in that state, a citizen of this state, such a sum as by the laws of Georgia he could there recover on the contract; that the measure of his recovery shall be determined by the *lex loci solutionis*; but surely comity does not require us to assume, in order to give the foreign plaintiff more than our own citizens in like circumstances could recover, that because the courts of that state had declared one scheme of a genuine building and loan association not usurious 'upon its face,' therefore the law of that state was that the very different scheme of a very different corporation is not usurious. A decision of the supreme court of Georgia (*Butler v. Investment Co.*, 20 S. E. 101), which has been rendered since the trial and argument of this cause, is confirmatory of our view of the law above expressed. In that cause, which was an action by the Mutual A. L. & I. Company of Atlanta, Ga., against Butler, to foreclose a mortgage, such as we here have under consideration, the mortgagor, among other pleas, averred: 'It claims to loan money at 6 per cent. per annum, payable and collectible monthly, but under the name of "premium," which is but another name for usury, collects another 6 per cent. monthly, by such device collecting really 12 per cent. per annum, payable monthly on loans; thus, under fancy names, carefully eschewing the name of "interest," which said charges really are, and, with the object and intent to do so, contracting to take and collect a higher rate of interest than is allowed by law.' The lower court, considering, no doubt, that the principle established by Parker's Case, supra, was applicable, overruled this plea, and gave judgment for the foreclosure of

the mortgage, but on appeal the supreme court said: 'The plaintiff, as indicated by the record, not being a building and loan association, pure and simple, like the one involved in Parker's Case, 46 Ga. 166, the object of which was to enable its members to acquire houses and homes by the payment of small sums monthly, but, on the contrary, being apparently a composite institution, embracing for its objects insurance, loans, and investments, the plea of usury should have been entertained for investigation and determination by the jury, under proper instructions from the court, as to whether the scheme of the institution as a whole embraced usurious measures and designs, and whether the loan to the defendant was infected with usury or not, and, if so, to what extent.' The record here fully shows that the Atlanta Building & Loan Association is, as we have said, 'not a building and loan association pure and simple, like the one involved in Parker's Case, 46 Ga. 166,' but is what the highest court of its own state has well described as a 'composite institution,' and therefore not entitled to claim benefit under that decision. Thus is swept away the claim of the defendant corporation that by the *lex loci solutionis* it is allowed to charge and collect on its loans 6 per cent. interest and 6 per cent. 'premium.'

"Our attention has been called to the act of 1893, c. 434, to show that building and loan associations are, as it is said, favorites of our law, and that they are granted special favors by our statute. This is true. And it also seems to be true that our legislature has invited, as it were, foreign associations of that kind to do business in this state under certain prescribed regulations. The act which thus seems to invite them to come, with the assurance that they shall enjoy privileges and exemptions here not allowed to corporations of other classes, is an amendment to the general law for the incorporating of building and loan associations (2 Code, c. 7). It is evident that the legislature intended to confine its liberal invitation to those foreign corporations whose powers, purposes, and methods corresponded with the powers, purposes, and methods of home corporations organized under this general law, and that it did not intend to thus favor corporations the scope of whose powers extended far beyond the limits imposed upon domestic corporations by the act. The powers of a building and loan association organized under our law are very limited. It is a strictly mutual co-operative organization. It cannot borrow money except for specified purposes. It cannot act as a banking institution. It cannot deal in real estate or personal property. It cannot issue bonds. It cannot engage in manufacturing. It cannot act as a trustee or trust company. All these things are *ultra vires*. If its officers engaged in them, and loss follows, they are personally liable to the members. They may be enjoined from engaging in them. If the charter of a foreign

corporation, called a 'building and loan association,' shows that these businesses and others of like nature are, as to it, *infra vires*, then it follows that the privileges and exemptions of the act cannot be claimed by it. The charter, not the name, determines the class to which it belongs. In *Isley Royale Land Corp. v. Secretary of State*, 76 Mich. 162, 43 N. W. 14, there was a petition for a mandamus to compel the defendant to file the articles of association of the relator, a foreign corporation, under an act of that state. The mandamus was denied upon the ground that the relator was not such a corporation as the act contemplated. The court said: 'The method of organizing, the extent and condition of creating, holding, and transferring stock, the authority and constitution of the governing body, and the powers and functions of the corporation, and of its constituent members and bodies, are all matters of importance. \* \* \* The secretary of state based his principal objection to filing these papers on the fact that, instead of being organized for mining and treating metals, those were but partial, and to some extent incidental. \* \* \* But this company, as a corporation already organized under foreign laws for the multifarious purposes named in its articles, cannot obtain any legal standing by filing its papers, under section 23 of the mining law, without the subversion of settled principles.' Our statute contemplates the licensing of corporations organized for a certain single purpose, with certain prescribed methods and powers. One organized under foreign laws, for multifarious purposes, has no right to the license under the act. It can depend for the enforcement of its rights in our forums only on the rules of comity.

"We are not forgetful of the earnestness with which it was argued before us that because, as it was said, large sums of money had been loaned in this state by foreign companies upon schemes similar to that one we have here under consideration, and much other foreign capital stands ready for investment within our borders upon like contracts, it was most important that such transactions should not be declared usurious; and we were told, in effect, that if our conclusion was as herein declared, the foreign lenders would at once proceed to foreclose the mortgages to the great inconvenience of those who had borrowed from them. We cannot change our opinion of the law to suit the exigencies of any occasion. The law applicable to the case in hand and to others of like nature has been, as we think, for a long time clearly settled in this state. In all the legal literature pertaining to the perplexing matters of building and loan associations, so far as we have found, the doctrine of this court is conceded to be plainly stated and consistently followed. We merely reiterate what our predecessors long ago decided. If, under these circumstances, the lender gets less hire for his money than he hoped for, the blame, if there be any, must

rest on those who have acted in defiance of the decisions of this court, not upon us who only decline to reverse those decisions. But can harm come to the lender? Certainly not, unless it is exacting more than 6 per cent. for the hire of money, for that rate it is allowed to collect. How can the borrower be harmed? His mortgage cannot be foreclosed or his lands sold so long as he makes the stipulated monthly or weekly payments set forth in it. When these payments, treated as partial payments on the debt, are sufficient to extinguish that indebtedness, the account being taken according to the principles repeatedly announced by this court, the lien on his property will have been discharged, and the courts will decree its formal cancellation. We guard him from unreasonable, and perhaps ruinous, exactions in the future. We do not precipitate upon him any new burden. We merely fix a limit when his burden bearing shall in any event cease; and we fix that limit far beyond the line where the lender says he will wish to go. So the assurance of safety we give to the borrower works no restraint on the lender, and both should be content.

"When this cause was before this court on a former appeal, 17 S. E. 637, the sole question was whether there was sufficient ground for enjoining the sale of the plaintiff's property till the controversy could be heard and determined on its merits. The record as then presented contained an allegation on the plaintiff's part that the transaction, as detailed in the complaint and answer, was contrived to evade the usury laws of this state. We did not consider it at all necessary then to discuss the very important matters involved in this controversy, as it nowhere appeared that they had been passed upon by the court below. The order then appealed from was not erroneous, we said, for the sufficient, but not necessarily sole, reason that there was evidently a 'serious issue' between the parties. We merely declined to reverse an order continuing the injunction in force until the hearing."

So far we have adopted the very full and convincing opinion prepared for the court at last term by Mr. Justice BURWELL, but which was not then filed. A reargument was had at this term of this and the cognate case of *Rowland v. Association*, 115 N. C. 825, 18 S. E. 965, embracing substantially the same controversy. This is five times the questions involved alike in these two cases have received the fullest and most exhaustive argument before the court. It must be conceded that we have not acted hastily, and that we have had, at least, opportunity to comprehend the points presented in all their bearings. Counsel for defendant frankly admitted in the argument that their client began business in this state knowing that the decisions of this court in the *Mills Case*, which has for 20 years remained undisturbed by the courts and the legislature, prohibited the mode which it proposed to

follow and has followed, but that it came expecting to procure a reversal of that decision. For a party to deliberately and systematically violate the law, as it has been announced and continuously recognized by the highest court of the state for a series of years, with the avowed purpose of causing the court to take back and reverse its decision under the better instruction of such law-breaker, is a proceeding hitherto unknown in this state. The nonresident counsel of the nonresident corporation, who thus admit their deliberate violations of our statutes, used, as one of their most persistent arguments to change the views of this court, that the combined capital of such corporations mounts up into millions of dollars. It is not the first time that accumulated wealth has demanded exclusive favors and privileges, but it has probably never before been so unreservedly asserted in a court of justice, in this state, at least. Our Revolutionary ancestors anticipated the force, the exactions, the indifference to equality of overgrown combinations of capital, and placed in the bill of rights of 1776 the provision against the grant of exclusive privileges, which remains in our present constitution as a protection to the plain, common people against these excessive claims of money-gathering corporations. The opinion of Justice BURWELL, above adopted by us, shows how little claim such institutions as this defendant is shown to be have to use the beneficent title of "building associations," and that they are in fact thinly-disguised banking associations, claiming to be superior to our usury law because chartered elsewhere. Such discrimination, if legal, would destroy all our home banks, and other like institutions, which faithfully observe the law limiting the rate of interest, and pay their taxes to the support of the state and county government. Thus freed, if its claim is allowed, from both our taxation and usury laws, the defendant would yet seek to obtain the use of our courts to collect the money which it has secured by mortgage on real estate here. The circumstances would justify sharper criticism than we have so far given to any case before us. The defendant asserts immunity from the restrictions and burdens imposed by law on all others, and at the same time asks the best security given by law, and the use of the process of the courts to enforce it. The defendant also called to our attention a bill which it procured to be passed at the last session of the general assembly, and claims that it protects it in the violation of our usury laws. This statute, which is drawn with considerable art, provides, in the first section, that building and loan associations are restricted to 6 per cent., which has by a general act of the same legislature been restored as the limitation upon interest. In a subsequent paragraph the association is allowed to charge costs, expenses, interest,

premiums, and fines. The controlling idea in the first paragraph, restricting these corporations to the 6 per cent., which is the general policy of the state, must govern, and calling these other exactions "premiums," "penalties," and the like does not make them other than interest, or authorize the exaction of more than 6 per cent. for the totality. A similar case was *Simonton v. Lanier*, 71 N. C. 498. When two constructions of a statute are possible, the court should adopt that which is most reasonable, and in accord with the declared and recognized public policy of the state. It would neither be reasonable, nor in accord with our recognized policy, nor just to the legislature, to construe that they deemed that public opinion and considerations of justice required that the industries of the state should be protected against the exactions of a greater rate than 6 per cent. for the use of money, and yet that the same legislature provided that combinations of capital might, by dubbing themselves "building and loan associations," and euphoniously styling their exactions of interest "premiums," "fines," "penalties," and the like, exact pay for the use of money without limitations. This would be one law for the rich and another for the poor. Could we hold that the legislature intended to so enact (and they certainly did not), the wisdom of the organic law has placed its ban upon such discrimination and special privileges. A penalty or fine for nonpayment of money is interest. If money is loaned at 6 per cent. interest and 5 per cent. premium, this is simply 11 per cent. interest. The courts have always said that in usury cases they "look through all disguises, to the real nature and truth of the transaction." The shifts and devices of avarice are countless in attempting to evade the protection which the lawmaking power sees fit to erect against its exactions. Calling "interest" by other names, as "premiums," "fines," and "penalties," is a threadbare device, and was laid open in the very clear language in our leading case of *Mills v. Association*, 20 years ago. Recurring to the act of 1895, which the defendant pressed on our notice as an exemption in its favor, it may be noted that, if the legislature could be understood as having so intended it to be, thus overriding the first clause thereof and the general statute as well, and if there were no constitutional prohibition against the grant of such exclusive and special privileges, even then the act in question took effect on March 9, 1895, while the general act prohibiting any one, without exception, to exact more than 6 per cent. for the loan of money, took effect April 13, 1895, and would have the effect of repealing all exceptions, and stopping on that date the exaction of a higher rate by the defendant under its prior special act. **Affirmed.**

AVERY, J., dissents.

(116 N. C. 859)

**BROWN v. HOUSE et al.**

(Supreme Court of North Carolina. May 18, 1895.)

**BOUNDARIES—COURSES AND DISTANCES.**

A deed to B., dated March 28, 1799, granted 10,240 acres, the boundaries beginning at a birch, and "running south 360 chains to a stake supposed to be in D.'s line; thence with his line east 390 chains to his N. E. corner." The D. line was a mile and a quarter from where the calls in the B. grant gave out. The D. grant, issued in 1795, was for 60,000 acres, some of its boundaries being over 20 miles long. If the lines running south were extended to the D. line, the B. grant would contain about 25,000 acres. If it stopped after running 360 chains, the grant would still contain more than 10,240 acres, the amount the deed called for. *Held*, that the calls "running south 360 chains to a stake supposed to be in D.'s line, thence with his line east 390 chains to his northeast corner," were too vague and uncertain to vary the course and distance called for in the grant. Avery, J., dissenting.

Appeal from superior court, Madison county; Armfield, Judge.

Action in ejectment by Van. Brown against John House and others. From a judgment for defendants, plaintiff appeals. Reversed.

V. S. Lusk, for appellant. W. W. Jones and H. T. Rumbough, for appellees.

**FURCHES, J.** This is an action of ejectment, brought to this court on appeal of plaintiff. Plaintiff, for the purpose of making out his title, offered in evidence a grant from the state of North Carolina to himself, issued on the 18th of June, 1890; and, it being admitted by defendant that it covered the land in question, and it also being admitted that defendant was in possession, plaintiff rested his case. And the defendants, for the purpose of showing that the land claimed by plaintiff had been granted prior to the date of plaintiff's grant, and was not the subject of grant in 1890, offered in evidence a grant from the state to John Gray Blount and William Steadman, dated March 28, 1799, which he claimed covered the land in controversy. The calls of this grant are for "ten thousand two hundred and forty acres of land in Buncombe county, on the west side of the French Broad river, beginning at a birch, ash, and pine on the west bank of said river, opposite the painted rock below the warm springs, running south 360 chains to a stake, supposed to be in 'Stokley Donelson's line; thence with his line east 390 chains to his northeast corner; thence south 275 chains to a bunch of dogwood on a branch of Spring creek, near the Puncheon camp, Donelson's beginning corner; thence east 80 chains; thence 150 chains to a line of David Allison's 250,240-acre survey; thence with that line north, 45 degrees east, to the French Broad river; thence down the river with the meanders of the bed of the river, and around the line of the old patented land on the west side of said river, to the beginning." The beginning call of this grant on the west bank of the French Broad river at the painted rock was agreed upon by plaintiff and de-

fendant; and it is admitted by defendants that to run south from this agreed beginning 360 chains, and then east, will not include the land covered by plaintiff's grant. But defendant claims that the Blount grant, under which he is defending, calls for the line of the Stokley Donelson grant, which he alleges is further south, and that the Stokley Donelson line is the southern line of the Blount grant. Under this claim of defendant, the surveyor, as it was proper for him to do, extended this south line for one and one-fourth miles further than the 360 chains called for in the Blount grant, to a point that defendant claimed to be the Stokley Donelson line. And it is admitted by plaintiff that if this point, claimed by defendant to be the Stokley Donelson line, is the southern boundary of the Blount grant, and thence east, it does cover the land contained in his entry of 1890.

There was much evidence offered by both sides as to the location of the Donelson grant, which was for 60,400 acres, issued August 28, 1795; defendant's evidence tending to establish it at the point contended for by him, and plaintiff's evidence tending to show that this line—the one contended for by defendant—was not the Stokley Donelson line. There are some exceptions taken to the evidence, which we are not prepared to approve, as we understand the ruling of the court. But, as the point does not distinctly appear, and we may not understand the point intended to be made, and as a ruling on this point in favor of the plaintiff would probably not materially affect a new trial, we prefer to put our opinion on a more substantial point. At the close of the evidence the plaintiff asked several special instructions of the court, which we will not repeat in full. But in these instructions he asked the court to charge that the first call: "South 360 chains to a stake, supposed to be Stokley Donelson's line; thence with his line east 390 chains to his northeast corner,"—was too vague and uncertain to vary the course and distance called for in the grant; and that the court should so charge the jury, and instruct them that said grant stopped at the end of the call for 360 chains, and thence ran east. The court refused this prayer of plaintiff, and instructed the jury: "That if they should find that the beginning corner of the Donelson grant was at the point designated by the hand at the figure 28, as contended for by defendant, and that its lines had been run out and marked and located at the date of Blount's grant, or that they were susceptible of location to a mathematical certainty from the Donelson grant, the beginning corner of the Blount grant being admitted, the call of the Blount grant 'beginning at an ash opposite the painted rock, running south 360 chains to a stake supposed to be in Stokley Donelson's line, and then east with his east line 390 chains to his northeast corner,' etc. [though the distance gave out before the Donelson line was reached by the first call], the second call would carry the line to the nearest limit in the Stokley

Donelson line, and then with that line to the northeast corner of Donelson's grant, if such a line can be found; and if they believe from all the evidence that the Stokley Donelson line was the line called for in the Blount grant, that the land in controversy was covered by the Blount grant, and the plaintiff could not recover. That if they should find that the Stokley Donelson grant had been correctly located; that its beginning corner was established at the date of its issue, and its lines were located, or were susceptible of location to a mathematical certainty from the grant, and the lines of the Stokley Donelson grant were the lines called for in the Blount grant, that the law would extend the second call in the Blount grant to the line of the Stokley Donelson grant, and then with it to its northeast corner, etc. So that at the date of the plaintiff's entry and grant there was no land vacant and open to grant within the said boundary, the same having been previously granted to Blount by the state." So, then, the question is, was the refusal to give the instructions asked, and the charge as given, erroneous? If they were, the plaintiff is entitled to a new trial. If they were not, then the judgment should be affirmed. In the early history of this state there were a great many very large grants of land obtained by speculators, commonly called "Speculation Grants." As the country did not fill up rapidly, these lands did not increase in value rapidly, and but few of these "speculators" derived much benefit from such lands. But many of them have floated down with the current of time, and are now in the hands of other speculators, who now hold them under tax titles or otherwise, purchased for small sums. And as these lands now begin to grow in value and importance, we have more and more litigation growing out of these old grants, the most of them being located in an almost unsettled rough mountain country, the lines of which often extended for miles. Many of them, it is said, were never actually surveyed, but a party wanting to make an entry would locate a beginning corner, and then plot the boundaries, and, in the language of the court below, locate them "with mathematical certainty" by simply making a plot of a survey. And it is evident to our minds that both the Blount grant and the Donelson grant (some of the lines of which were 20 miles long) were located in this way, and this may afford some explanation for the Blount grant calling for "a stake supposed to be in the Stokley Donelson line," when the Stokley Donelson line is a mile and a quarter from where the calls in the Blount grant give out, if the Stokley Donelson line is where defendant contends it is.

The general rule is that the calls in a grant or deed control in locating the land granted or conveyed. But this general rule is subject to the exception that when a natural object or monument is also called for in the deed or grant, susceptible of loca-

tion, and is identified and located, this will control course and distance as called for in the instrument; and the courts have held the line of an adjacent tract, if known and established at the time of issuing the grant or executing the deed, may constitute such natural object or monument. But this exception is put on the ground that the natural object is more certain than course and distance, as these depend upon the correctness of the compass, the accuracy of the surveyor, and the faithfulness of the chain carrier. To take the case out of the general rule that course and distance, as called for in the conveyance, control, there must be another call more certain than course and distance. Then, is the call to a stake "supposed to be Stokley Donelson's line," one mile and a quarter from where the course and distance called for in the grant give out, more certain than course and distance called for? It is manifest from the call itself that the party locating this grant did not know where Stokley Donelson's line was. And if he did not know where it was then, but it should, a hundred years after the grant was issued, be found that the Stokley Donelson line was one mile and a quarter from where the calls of the grant located the grant, can it be reasonably contended that this uncertain call, "supposed to be in the Stokley Donelson line," is more certain than the call, "thence south 360 chains to a stake"? This it must be, or the calls of course and distance contained in the grant will control. This is the general rule, and the exception must be established, or the general rule will prevail. Then, if there was nothing more in the call than this (a stake, supposed to be in Stokley Donelson's line), it seems clear to us upon the "reason of the thing" that this call would not be sufficient to take the case out of the general rule, and the course and distance called for in the grant must prevail. But this is not only so upon the reason of the thing, but it has been so held by our court. *Mizell v. Simmons*, 79 N. C. 182. But the call does not stop with the call for a stake "supposed to be in Stokley Donelson's line," but it then calls as follows: "Thence with his line east 390 chains to his northeast corner." And it is claimed for the defendant that this call is more certain than the other, and carries the south line of the Blount grant to the Donelson line, wherever it may be. But we do not assent to this proposition. In our opinion, any call, to take the case out of the general rule, must be both reasonable and certain, and we do not think this is either. We do not think it reasonable that when the state granted to Blount a tract of land commencing on the west side of the river at the painted rock, thence south 360 chains, it intended that line to extend  $1\frac{1}{4}$  miles further than was called for; and to have this effect the call must be to some well-known and well-established object at the time of the



grant. But, as it appears to us, this call depends upon the other call, "supposed to be in Stokley Donelson's line"; and it is no stronger than that call, which, we have seen, is not sufficient. If the Blount grant had extended to Stokley Donelson's line, thence east would have necessarily run with Stokley Donelson's line, as his line was an east and west line. But if the grant did not go to the "supposed line," then it did not run east with the "supposed line." Whether we get to the Stokley Donelson line or not does not change the calls in the Blount grant. It is thence east from wherever the Blount grant stops.

And it is not pretended that the defendant established or found any corner or line of the Stokley Donelson grant, except the beginning corner. And the other lines and corners of a 60,400-acre grant are attempted to be established by a survey "with mathematical certainty" to control the course and distance called for in the Blount grant. It is not contended that any marked line or monument is found locating the Stokley Donelson line at the point where defendant contends that the Blount grant should terminate. We do not think such a mathematical line as this can be used to control the positive calls of course and distance contained in the Blount grant. Who can tell that there are no errors in the calls of course and distance in the Stokley Donelson grant, or in the survey, made in a rough and almost unbroken forest, of a 60,000-acre tract of land, granted a hundred years ago? The surveyor testified (and his testimony is made part of the judge's case on appeal) that to survey the Blount grant as contended for by defendant it would contain between 25,000 and 30,000 acres of land, and to survey it by the calls and distances in the grant, as contended should be done by plaintiff, it will contain more than 10,240 acres (this being the amount called for in the grant). We are not inadvertent to the fact that, as a general rule, quantity of acres called for in the conveyance cannot be invoked to establish lines and locate the deed. But it has been held by this court that, "where the boundaries are doubtful, it becomes an important element." *Cox v. Cox*, 91 N. C. 256. We do not think this south boundary of the Blount grant doubtful. But, if it should be considered so, then this question of quantity comes in to sustain the view we have taken of this case. We are of the opinion that plaintiff was entitled to the prayer as above stated, and there was error in the court's refusing to give the same, and there is also error in the charge as given. The plaintiff is entitled to a new trial, and it is so ordered. New trial.

AVERY, J. (dissenting). It was conceded that the call from a known beginning, "running south 360 chains to a stake supposed to be in Stokley Donelson's line," would not con-

trol course and distance under the ruling in *Mizell v. Simmons*, 79 N. C. 182, even where the location of the line called for was unquestioned, and no difficulty would arise about the point where an extended line would intersect with the Stokley Donelson line. But the question presented by the appeal is whether the judge erred when he refused to charge the jury that the two calls, "south 360 chains to a stake, supposed to be in Stokley Donelson's line, thence with his line 390 chains to his northeast corner," were "too vague and uncertain to vary the course and distance called for in the grant," though the defendant offered evidence tending to show the location of the Donelson line as contended for by him, viz. where he contended the extended line intersected. The court instructed the jury in substance that, if the Stokley Donelson line could be ascertained with "mathematical certainty," the first call, taken in connection with the second, would be construed so as to give effect to all of the descriptive words, and would extend the first line to the Donelson line, and run with it the distance called for. If the first call had been for a stake "in" Stokley Donelson's line, and that line had been, at the time of taking out the grant, "an established line, or capable of being then established," then, upon the authority of *Mizell v. Simmons* (on page 187), and *Carson v. Mills*, 1 Dev. & B. 546, there cited, it would have been competent, by a survey of the Donelson grant, to establish the line called for, and then extend the first line till it should intersect with it. This would be done upon the fundamental maxim that the law regards as certain whatever can be made certain with the data available for the purpose. The opinion delivered by Justice Bynum in *Mizell's Case*, that a line which was capable of being established would control distance as effectually as one actually marked, finds support in a long line of decisions. Judge Pearson, in *Corn v. McCrary*, 3 Jones, 499, said of a similar line: "It makes no difference whether it is a marked or an unmarked or 'mathematical line,' as it is termed in the case, provided it be the line which is called for." In the same opinion he defines a mathematical line as one not marked, but ascertained by running the call from one known corner to another. It is admitted that there was evidence tending to show the location of the Donelson line that would have been intersected by extending the first call. The same learned justice, in *Graybeal v. Powers*, 76 N. C. 70, announces the doctrine distinctly that, whenever a line of another tract (whether a marked or a mathematical line) is called for, course must be disregarded, if the jury find that the evidence is sufficient to locate the line mentioned.

It being conceded, then, that there was testimony tending to locate the line mathematically, it follows, upon the authorities cited above, that distance must be disregarded if the jury think it established mathematically by running between two known corners, just



as if there had been additional evidence that it was marked. If there is any established rule of construction which would require that the second line should be run direct to the Donelson line, if the jury considered the evidence sufficient to locate it, the judge did not err in his instruction to the jury that, if they found from the evidence that the Donelson line had been run out and marked and located, or that it "was susceptible of being located to a mathematical certainty," then the second call would be run to, and then with, that line according to the call. If the Donelson line could be ascertained with mathematical certainty (that being a question for the jury when the testimony was conflicting), the call "thence with his [Donelson's] line" would be, according to all of the authorities, more certain than the other description, "east 300 chains to his northeast corner." But it is a familiar and well-established rule that in cases like this the line must be run so as to fulfill both descriptions as near as possible. *Buckner v. Anderson*, 111 N. C. 573, 16 S. E. 424; *Shaffer v. Hahn*, 111 N. C. 12, 15 S. E. 1083; *Proctor v. Poole*, 4 Dev. 370; *Shultz v. Young*, 3 Ired. 385. "It is a leading rule in the construction of all instruments," said Judge Gaston, in *Shultz v. Young*, *supra*, "that effect should be given to every part thereof, and in expounding the description in a deed or grant of the subject-matter thereof they ought to be reconciled if possible, and as far as possible. If they cannot stand together, each of them is to be considered as declaring the intent of the parties. The lines of other tracts may be as notorious and certain as any natural object, and by making one of these lines a part of the description of the thing granted the parties represent it as a known line, by which the certainty of the thing granted is defined." Upon the principle stated, the court held in that case that, in order to fulfill the whole of a description from a certain point "south with A. B.'s line 310 poles to C. D.'s corner," where the direction of C. D.'s corner was at right angles with that of A. B.'s line, it was proper to run the distance called for 310 poles with A. B.'s line, and thence direct to C. D.'s corner. Our case presents the question whether precisely the same leading purpose of the following two descriptions, whenever they can be reconciled, would not, as the judge told the jury, extend the distance so as to reach the Donelson line, if, in the opinion of the jury, it was properly located, and meet the description fully by running with it to the objective point called for. In this way the three purposes of the grantor—to run with a certain line, to run a certain distance, and to reach a given object—would all be carried out. Among the older cases which recognize the doctrine of diverging from a course so as to run with a natural boundary, and return by the most direct route to a known objective point, is that of *Cherry v. Slade*, 3 Murphy, 82, and among the later cases that of *Long v. Long*, 73 N. C. 370. The principle

which governs this case was recognized by both parties in *Buckner v. Anderson*, *supra*, but the controversy grew out of the difference as to its proposed application. Upon looking into the facts, it is manifest that the ruling in that case sustained the instruction excepted to in this.

I do not think that the court can take judicial cognizance of the history of land grants, certainly not outside of what appears in the judicial annals of the state. But even the judicial history indicates that the original grantee, under whom the defendant claims, obtained patents for large bodies of land covering a considerable portion of many counties, notably Yancey, Madison, Buncombe, and Haywood, and that a large number of small landowners trace their titles to that source. I cannot concur in speaking disparagingly of any title acquired in a way that the law pronounces legitimate. Proprietors of large bodies of territory and owners of small homesteads should feel that they meet with equal favor before the courts; and even claimants under tax titles, which will rarely, if ever, be found valid where they were executed before the passage of the statute regulating the sale of land for taxes, which is now in force, are entitled to the full protection afforded by the laws. It is true that nearly all of the surveys made a hundred years ago, whether for large or small tracts, covered far greater acreage than they purported to include, and many grants for small tracts embraced within their limits proportionally as great an excess over the acreage called for as the large grant offered in this case would cover if surveyed according to the contention of the defendant. We cannot make a rule for large tracts without disturbing the principles under which the boundaries of smaller ones have by common consent been settled.

(116 N. C. 731)

#### COMMISSIONERS OF BURKE COUNTY v. CATAWBA LUMBER CO.

(Supreme Court of North Carolina. May 14,  
1895.)

##### FLOATABLE STREAM—WHEAT CONSTITUTES.

1. Floatable rivers are navigable highways, in which the public has an easement paramount to the rights of riparian owners; and, in order to establish such easement, it is unnecessary to show that the river is susceptible of use continuously during the whole year, but it is sufficient if it appears that business men may calculate that, with tolerable regularity as to seasons, the water will rise and remain at such height as will enable them to make it profitable as a highway for transporting logs to mills or markets lower down. 20 S. E. 707, 847, affirmed.

2. Between a point on the river where defendant's mill was located and the place where logs were cut for transportation thereto were shoals where the water was not deep enough to permit the passage of logs, but 8 or 10 times a year, at irregular intervals, the river rose several feet, remaining at such height from 24 to 48 hours, during which time logs were carried over the shoals without artificial assistance. *Held*, that the river was a floatable stream, in which the public had an easement, the reasonable use of

which was paramount to the rights of riparian owners. Furches, J., dissenting. 20 S. E. 707, 847, reversed.

On rehearing. Reversed.

For former opinion, see 20 S. E. 707, 847.

Moore & Moore, I. T. Avery, and C. M. Busbee, for petitioner. S. J. Ervin, J. T. Perkins, and Burwell, Walker & Cansler, for respondent.

AVERY, J. It seems to be settled law in North Carolina, as in all of the states, that navigable streams of every class, however defined or distinguished from other water courses, are natural highways, and that the public easement, whatever may be its extent, is paramount to the private right of the riparian proprietor. *State v. Narrows Island Club*, 100 N. C. 481, 5 S. E. 411; *State v. Glen*, 7 Jones, 326, 327; *Broadnax v. Baker*, 94 N. C. 675; *Gould, Waters* (2d Ed.) §§ 86, 87, 107, 108, 110; *Ang. Water Courses*, 541a; 16 Am. & Eng. Enc. Law, p. 236; *Sullivan's Ex'rs v. Jernigan*, 21 Fla. 264. All waters, including bays, inlets, rivers, and creeks, "which are navigated by sea vessels," said the court in *State v. Glen*, 7 Jones, at page 323, "are called 'navigable' in a technical sense, are altogether publici juris, and the soil under them cannot be entered and a grant taken out under the entry law. \* \* \* When the tide ebbs and flows, the shore between the high and low water \* \* \* may be the subject of direct, special legislative grant. *Ward v. Willis*, 6 Jones, 185"; *Bond v. Wool*, 107 N. C. 139, 12 S. E. 281. The court in that case went on to say that the beds of other streams were "technically styled 'unnavigable,'" and were open for appropriation by individuals by means of grants from the state. In order to direct the attention more closely to the development of the principles governing the case at bar by a line of decisions in this state, and especially to controvert the contention of counsel that owners of the beds of inland rivers, not navigable for vessels, have the absolute control of the streams, we reproduce the following from the opinion of Merrimon, J., in *State v. Narrows Island Club*, supra: "The learned counsel for the appellant pressed upon our attention *State v. Glen*, 7 Jones, 321, as an authority favoring strongly the absolute right of the owner of the whole bed of the river. This is certainly a misapprehension of the real meaning of that case. The river to which it referred was ascertained to be unnavigable, and the case does not contradict what we have here said. Indeed, the court recognized the public right in case of the navigability of the stream. It said: 'As the riparian proprietor of the land on both sides of the stream, he is clearly entitled to the soil entirely across the river, subject to an easement in the public for the purpose of transportation of flour and other articles in flats and canoes.' It appeared that flatboats were occasionally used in

transporting the articles named." It still remained for this court, when the forests of the state began to attract attention, and to invite capital to utilize them in commerce, to determine in precisely what classes of streams not technically navigable the easement which was paramount to the right of the actual owner of the bed of the river, or of the riparian proprietor on both sides, existed. In *McLaughlin v. Manufacturing Co.*, 103 N. C. 108, 9 S. E. 307, this court, adopting the classification of streams laid down by Wood in his work on Nuisances (2d Ed., § 457 et seq.), defined a navigable stream of the third class to be one which is "floatable or capable of valuable use in bearing the products of the mines, forests, and tillage of the country it traverses to mills or markets." That case was cited and approved subsequently in the case of *State v. White Oak River Corp.*, 111 N. C. 663, 16 S. E. 331. In the dissenting opinion (which was written before the opinion of the court) in *Gwaltney v. Land Co.*, 111 N. C., at page 567, 16 S. E. 692, will be found a definition of a floatable stream, which was adopted by the court (see page 552, 111 N. C., and page 692, 16 S. E.), and which has been since reiterated with approval in *Gwaltney v. Land Co.*, 115 N. C. 581, 20 S. E. 405, and in *Commissioners of Burke Co. v. Catawba Lumber Co.*, 115 N. C. 595, 20 S. E. 707, 847 (the case now before us for rehearing). The language so often approved is as follows: "It is not necessary, in order to establish the easement in a river, to show that it is susceptible of use continuously during the whole year for the purpose of floatage, but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to seasons, the water will rise to and remain at such a height as will enable them to make it profitable to use as a highway for transporting logs to mills or markets lower down." Justice MacRae, in *Gwaltney v. Land Co.*, supra, quoting further from the same opinion, says: "When prudent business men may regulate their expenditures with reference to the anticipated rise, the stream becomes a factor in conducting the commerce of the country." In the former opinion in this case the court laid down as a further test of floatability the rule that "a temporary rise, passing quickly down, is not sufficient to make a stream floatable, and would not be sufficient if the freshet should continue up for even two or three days, and be reasonably expected every year. \* \* \* The increase in the depth of the streams occasioned by the rainfall sufficient to float logs occurs 8 or 10 times each year, and the water subsides in 24 or 48 hours. \* \* \* We are of the opinion that this floatability on the occasional and tolerably regular rises of the river must depend on more than a rapid freshet, subsiding as rapidly."

The first question raised by the petition and order granting the rehearing is whether

the two rules laid down as criteria for determining the capacity of streams to subserve the purpose of channels of commerce are not so inconsistent that both cannot be allowed to stand as guides to the people, who are anxious to understand and observe the law, as well as to the profession, whose office it is to advise them. If a stream rises to a sufficient height eight or ten times a year to carry down all the logs that have been rolled into it, may it not be possible that prudent business men would calculate with reasonable certainty on and regulate their expenditures with reference to an anticipated rise that will make the use of the stream as a highway profitable, notwithstanding the fact that it continues for only two or three days, or even a shorter time? The capacity to carry logs from the place, when they are shipped upon it, and deliver them at the point where they are taken out for use, depends chiefly upon the velocity of the stream and the distance they are transported. Courts are not required to so restrict the limit to which judicial knowledge extends as to exclude matters which are of common observation and within the knowledge of all intelligent men. *Deans v. Railroad Co.*, 107 N. C. 693, 12 S. E. 77.

If a stream should carry a log at a velocity of 3 miles an hour, then in three days or seventy-two hours it would be transported a distance of 216 miles, in two days 144 miles, in one day 72 miles. It may be that the longest distance for which the Catawba river is used is not 72 miles, and that Johns river is not used for more than half that distance. If all the logs awaiting removal on the banks of each stream were removed only 10 times a year, but at irregular intervals extending over the 9 fall, winter, and spring months, it is not impossible—indeed, it is almost certain—that any prudent business man could arrange to get all the logs needed in 10 deliveries; yet it is probable that all are delivered more than 50 times instead of 10. How can we arbitrarily fix a minimum period for transportation, and at the same time leave the capacity for yielding a reasonably certain profit, as a test of floatability? If it may be true that all logs placed alone in either stream would be delivered at the mills of defendant from 27 to 63 times or oftener in the course of a year, how can we hold that the rises must occur more frequently or continue longer, and leave people who wish to know and obey the law in such a state of doubt and uncertainty that they would be deterred without further information from engaging in this important branch of commerce? The rule which makes susceptibility to use, as a channel for transporting the products of mines and forests, the criterion of floatability, is a test which any intelligent lumberman can comprehend and apply. The other criterion which, without regard to the probable profits of the business or the actual

condition of the stream, would exclude from the benefits of a water highway one who locates his plant on a swift mountain water course, which subsides within two or three days, and extend the easement in a sluggish stream to another person if he settle in the low country, though the water may land as many logs for the one in one day as for the other in four days, is manifestly arbitrary and inconsistent with the rule that has so often been sanctioned, not only by this court in the cases we have cited, but approved by all of the leading text writers and the courts of those states where extensive and valuable forests have been or are being utilized. 1 Wood, Nuis. (3d Ed.) § 457; *Davis v. Winslow*, 51 Me. 284-290; *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60; *Brown v. Chadbourne*, 50 Am. Dec. 641; *Moore v. Sanborne*, 59 Am. Dec. p. 220, and note; *Booming Co. v. Speechly*, 31 Mich. 336; 6 Lawson, Rights, Rem. & Prac. § 2928. Gould, in his work on Waters (sections 108 and 109), says: "It is not necessary that the stream, in order to be a highway, should be capable of floating logs at all seasons of the year, but its public character depends on its fitness to answer the wants of those whose business requires its use. \* \* \* If the stream is not always navigable, it must be capable of floatage, as the result of natural causes, at periods recurring from year to year, and continuing for a sufficient length of time in each year to make it useful as a highway." Gould cites, among other authorities, the leading case of *Morgan v. King*, 35 N. Y. 454, to sustain the foregoing proposition; and, in view of the fact that the learned counsel for the plaintiff seemed to misconceive what the court in that case meant by the words "in its natural state," it is perhaps best to call attention to the fact that, so far from limiting the use of streams to the periods when they are not swollen from rainfall, the court said (at page 459): "Nor is it essential to the easement that the capacity of the stream, as above defined, should be continuous, or, in other words, that its ordinary state at all seasons of the year should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and occurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement." It is plain, therefore, that the text writers, all of whom give their sanction to the doctrine of floatability as it has been approved by this court, are warranted in citing *Morgan v. King*, as they do, to sustain their positions. It will be observed that in almost every instance where we find the words "in its natural state," quoted from *Morgan v. King*, in the opinions of appellate courts, the further discussion of the

subject develops the fact that they are used in the sense given to them by the court of New York. "Natural state" in that connection does not seem to have been understood by courts or text writers as confining the test of use for commercial purposes to the low-water mark, but as referring to the height attained as the result of the regularly recurring rainfalls of every year, which is a natural cause, operating with some degree of uniformity. *Lewis v. Coffee Co.*, 77 Ala. 193; *The Montello*, 20 Wall. 441; *Gaston v. Mace* (W. Va.) 25 Am. St. Rep. 862, and note, 10 S. E. 60; *Moore v. Sanborne*, 59 Am. Dec. 220, note; *Brown v. Chadbourne*, 50 Am. Dec. 649, note.

The intention of the courts seems to have been to limit the right of navigation for logs to these streams made useful by the ordinary rainfall, as distinguished from such as would only transport the logs after resorting to artificial means, as by blasting out and deepening the channel, or putting in locks or dams with gates. 6 Lawson, Rights, Rem. & Prac. § 2924. We see no reason for following to its logical results the argument of the learned counsel for plaintiffs, and taking this occasion to overrule the line of our decisions which recognize and define easements for the purpose of floatage. We think that any rule which attempts to fix a definite period of time during which a water course at each recurring rise must remain at a sufficient height to transport logs, and to adopt that rule alike to long and to short, to swift and to sluggish, streams, is in conflict with the general doctrine which makes capacity for profitable use the test, and, if adhered to, would close for commercial use many water courses that have all of the elements of natural highways, under the general definition approved by the courts of this and other states containing valuable forests. To illustrate the inconsistency of applying the rule which makes time the test; suppose that logs were floated in Johns river for a distance of only 20 miles, and in the Catawba for 60 miles, and that the velocity of the current in the former stream were 6 miles an hour, in the latter 3 miles; would it require precisely the same length of time necessarily to supply a mill with all of the logs it could saw by the one as by the other? Under a fundamental principle of our system, every man is presumed to know, and is therefore required to observe, the law of the land; and no rule ought therefore to be laid down for the government of the people, unless its terms are, or are capable of being made, so certain that they can be understood. Doubtless, the instruction which was sustained in *Gwaltney v. Land Co.*, 115 N. C. 579, 20 S. E. 465, was intended to apply to extraordinary freshets, upon the recurrence of which prudent business men could not rely for the success of a milling enterprise, but which often do occur at some time during the year, and are therefore not

unexpected. Construed in any other sense, it would establish a rule that would prove so inconsistent with the general proposition that has received our sanction, and with the leading authorities, that both could not be applied as tests in any conceivable case.

We are brought, therefore, to the consideration of the question whether the judge below properly applied the correct definition of a floatable stream to the facts found by him in the case before us. The action is brought to restrain the defendant from floating logs down the Catawba and Johns rivers; because, when the water rises to a sufficient height to carry the logs over the shoals, they necessarily come in contact with and partially or totally destroy a low bridge across the Catawba and another across Johns river, on a highway in Burke, and a third bridge across the Catawba river between Burke and Caldwell counties, one-half of which is under the official management of the plaintiffs. The defendant has been using both of these rivers above the two bridges in Burke county to transport logs to a point on the Catawba below all three of the bridges, where the mill of the defendant is located. At this mill the defendant employs about 75 laborers, and saws about 35,000 feet of lumber a day, and has invested between \$250,000 and \$350,000 in establishing the plant. The depth of the Catawba river at the bridge known as the "Rocky Ford Bridge" and "Lovelady Bridge," when the water is at ordinary height, averages 2 feet, but in some parts of it reaches 4 feet, and is about 300 feet wide. The depth of Johns river at the bridge over that stream is about 4 feet, and it is about 100 feet wide. There are shoals on the Catawba at intervals of about half a mile and on Johns river about one-fourth of a mile apart, where the water is only from 8 to 12 inches deep at ordinary low water. Between the shoals, when the water in either river is at ordinary low-water mark, logs will be carried by the current of both rivers between, but not over, the shoals, without taking out stones and resorting to other artificial helps. Both of these rivers rise 8 or 10 times a year to a height of from 2 to 4 feet above ordinary water, and remain at that height from 24 to 48 hours, during which period all of the logs placed in the channel of either will be carried over the shoals without obstruction. These rises occur in the fall, winter, and spring months, not at fixed periods, but some time during nine months. Besides these rises, about two freshets usually occur during every year, when these rivers rise 8 to 15 feet above the low-water line. Eliminating from this discussion the arbitrary rule prescribing a fixed period for the continuance of the rise, it seems very clear that the learned judge, to whom both parties intrusted the trial of all issues of fact and law, was not in error in holding, upon the facts found by him from the testimony, that both the Catawba and the Johns rivers were, in contemplation

of law, floatable streams. If eight or ten times a year every log placed in either stream above these bridges will be carried without hindrance or obstruction over the shoals to the defendant's mill lower down, then it inevitably follows that, by cutting and placing logs upon the bank in the way described in the findings of the judge, a sufficient number can be transported on these highways to supply the mills. The reasonable expectation that it would be within its power every year to transport a sufficient number of logs to keep its mills in operation without resorting to artificial assistance at the shoals justified its managers in establishing their business. If the judge was correct in finding that these rises, "occurring at irregular intervals" during the fall, winter, and spring months, are sufficient to carry every log committed to either river over the shoals, then the principle involved here is not affected by the fact that, instead of being so provident as to lay in its supplies at the proper seasons, the defendant had sometimes opened a channel at the shoals during the summer months for the passage of logs, though, as his honor finds, the mill had been almost exclusively supplied by floatage. The question is whether the company was warranted in calculating, when its business was established, that these two highways could be utilized legitimately to furnish it full supplies of raw material for its mill. We think that the facts justified the heavy expenditure it has made in the reasonable expectation that the law would protect it in the proper use of these natural highways. If these rivers are floatable, they are natural highways, in which the public have, as in other water highways, an easement, the reasonable use of which is paramount to the rights of all others. Gould, Waters, 87-91, 107-110; Broadnax v. Baker, *supra*; Ang. Water Courses (7th Ed.) § 536; 16 Am. & Eng. Enc. Law, pp. 269, 270, and notes; Id. pp. 259, 260, and notes; Gwaltney v. Land Co., 111 N. C., at page 559, 16 S. E. 692. Where a stream is navigable for any purpose, it is generally a nuisance to obstruct it. Wood, Nuis. § 464; State v. Dibble, 4 Jones, 107; State v. Parrott, 71 N. C. 311; 6 Lawson, Rights, Rem. & Prac. § 2936; State v. Harper, 71 N. C. 314; Lewis v. Keeling, 1 Jones, 299; Hettrick v. Page, 82 N. C. 71; Elliott, Roads & S. p. 491, and note. This principle, as a general rule, applies to interference with the right of floatage just as to attempts to prevent the passage of vessels in streams affording a sufficient channel for them. Wood, Nuis. § 464. But the right of floatage must be exercised reasonably, and with a due regard to the rights of riparian proprietors and the owners of the beds of fresh-water streams, especially such as belong to the third class of navigable waters, and are only used as highways for the purpose of transporting logs. The owners of the soil have a right to the reasonable use of the water as a power for propelling machinery

and operating the various kinds of mills. While the right to an easement for floatage is superior to that of the proprietor of the soil, the law enforces the use of the dominant easement with due regard to the servient interest. A person using a stream as a highway for transporting logs, as well as one in charge of a steamer plying on navigable water, is answerable for wanton injury in even removing a nuisance. Gwaltney v. Land Co., *supra*; Lewis v. Keeling, 1 Jones, 299.

The governing principle is that the right to the use of a water highway for the transportation of timber is subject to the maxim that we must so use our own as to avoid needless injury to another. The public have the paramount right of way in the public roads; yet that does not excuse one driving a carriage or wagon over it for needlessly injuring a person or even an animal that is temporarily obstructing it. Davies v. Mann, 10 Mees. & W. 545. It remains for us to determine in each case that may hereafter arise what is culpable carelessness in the enjoyment of this easement. We adhere to the announcement made by the court in the opinion which we are now reviewing (115 N. C. 596, 597, 20 S. E. 707, 847) that the right of floatage must "be exercised with due care for the avoidance of injury to the interests of the riparian proprietors and the owners of the soil beneath the bed of the stream. \* \* \* And, on the other hand, it would seem that if these were floatable streams, in which the public has an easement for transportation, it would be the duty of the county commissioners, certainly in the absence of express authority to the contrary, to so construct bridges on the highways as to permit the use of rivers for the purpose of floatage." If the streams are highways, then bridges constructed over them so as, by interposing a barrier to floating logs every time the rivers rise sufficiently high to carry them over the shoals, to practically prevent their use by the public, are unlawful obstructions. 6 Lawson, Rights, Rem. & Prac. § 2936; Kean v. Stetson, 5 Pick. 492; Charlestown v. Middlesex Com'rs, 3 Metc. (Mass.) 202. The case last cited was one where the county commissioners acted under the authority of an act passed by the legislature of Massachusetts, empowering them especially to build the bridge, but not specifying its character; and Chief Justice Shaw, in a strong opinion, announced the principle that the county authorities were not warranted in so constructing the bridge as to obstruct the use of the stream as a highway.

The question of reconciling the conflicting claims of the owners of the soil of the bed of the stream, who erect dams across floatable rivers for the purpose of operating mills, is not now before us. The legislature has made provision in certain cases for opening dams so as to permit the passage of logs floated over them to market (Code, § 3712); and in chapter 56 of the Code, which con-

tains this provision, county commissioners are clothed with authority to have streams cleaned out. It would seem that these sections were passed entirely with reference to floatable streams, because, without condemnation, the commissioners would have no right to enter upon and clean out the beds of streams which were not natural highways. It seems that the low bridges constructed by the plaintiffs and their predecessors have been frequently destroyed during rises in the rivers by trees floating down, but within a few years past the injuries to them have generally been caused by logs that are transported to the mills of the defendant company. We cannot destroy a great natural right which affects people scattered over hundreds of square miles, whose only prospect of disposing of valuable property is depending upon the use of water for transporting timber to market, in order to save a county the difference between the cost of bridges two or three feet above the low-water mark and more durable structures above the high-water marks. Perhaps it may not be improper to add that, where a stream is not floatable, it can be used for the transportation of logs only by a license from the owner of the bed of the stream or the riparian proprietor. Without such license, one who is using the stream for such a purpose is either a trespasser responsible for at least nominal damages, or, when he creates a nuisance, for any special damage shown to have been actually sustained. It appears incidentally from the testimony that many tributaries of the Catawba other than Johns river, and of which the floatability is not in question here, have been used in some way by the defendant for transporting logs to the Catawba, and thence to its mill. This intimation may serve as a guide in regulating its conduct or in adjusting the rights of those interested.

In reference to the argument that no sufficient ground had been shown for granting a rehearing, we need only say that the court was not inadvertent, in its former opinion, to the inconsistency of the two tests of floatability given in the same opinion. That question was not discussed in the opinion, and attention was not directly called to it on the argument.

On reviewing the rulings of the learned judge who tried the case below, we find no error, and are of the opinion that the judgment should have been affirmed. To the end that it may be now enforced, let this opinion be certified to the court below. Petition allowed.

FURCHES, J. (dissenting). Dissenting from the judgment of the court, I think it due alike to the court and to myself that I should state some of the reasons I have for so doing. The petition to rehear, in my opinion, is in violation of the rules of this court. It does not only undertake to point out the er-

ror of the court in its opinion, as reported in 115 N. C. 579, 20 S. E. 465, but it enters into an extensive argument to sustain the petition. This is not allowable, as held by the court in *White v. Jones*, 92 N. C. 388, where it is held that such arguments should not be made in the petition, but on the argument in court. As I understand the rule, interpreted by the court, "no case should be reversed upon a petition to rehear unless it was decided hastily, and some material point was overlooked, or some direct authority was not called to the attention of the court." *Watson v. Dodd*, 72 N. C. 240; *Hicks v. Skinner*, 72 N. C. 1; *Haywood v. Daves*, 81 N. C. 8; *Devereux v. Devereux*, Id. 12; *Smith v. Lyon*, 82 N. C. 2; *Lockhart v. Bell*, 90 N. C. 499; *University v. Harrison*, 93 N. C. 84; *Dupree v. Insurance Co.*, Id. 237. Nor will this court rehear, "where the grounds of error assigned in a petition to rehear are substantially the same as those argued and passed upon in the former hearing. The court will not disturb its judgment in such cases." *Lewis v. Rountree*, 81 N. C. 20. "The weightiest considerations induce the court to adhere to its decisions unless manifest error appears, especially when the decision was made by a full court, and with unanimity, and after full argument by counsel." *Lewis v. Rountree*, supra. "The court reiterates that it will rehear a case only for weighty considerations, and when the alleged error clearly appears." *Emry v. Railroad Co.*, 105 N. C. 45, 11 S. E. 162.

The matters of fact complained of by the petitioner are "that it seems that the court overlooked the finding of Judge Allen that petitioner's mill had been established in 1890," and that Judge Allen found that both the rivers, at the "points" where the bridges are were floatable streams. We do not admit these allegations. We find that Justice Avery, in a concurring opinion, starts out by saying: "If it be true, as appears from the testimony offered, and was found by the judge below, that neither the Catawba river nor Johns river affords sufficient water to float logs over the shoals that abound in the beds of both, except when they rise suddenly 8 or 10 times every year, and continue at a sufficient height to carry logs off for a period of from 24 to 48 hours, then neither of the rivers would fall within the definition of a floatable highway, heretofore given by this court. *Gwaltney v. Land Co.*, 111 N. C. 547, 16 S. E. 692." Then, it would seem that not only the findings of Judge Allen were fully considered by the court, but the evidence in the case as well. But, suppose the court did not take into its consideration the fact that petitioner's mill was established in 1890; can it be contended that the establishment of the petitioner's mill changed the character of the streams, and made two rivers navigable that were not so before? I cannot subscribe any such doctrine. And suppose these rivers are wide enough and

deep enough at the "points" where the plaintiff's bridges are to float a log, but for every quarter of a mile above and below in Johns river, and every half mile above and below in the Catawba river, there are shoals and rocks, as is found by Judge Allen, so shallow and rough that a log will not float over them, except when the water is up,—from 8 to 12 times a year; what difference could this make in determining whether these rivers were navigable or not? What good could it do the petitioner to float its logs under the bridge if it could not get them down the river? So it is perfectly apparent to me that there is nothing in these assignments, if it should be true that they were not considered by the court; and this I do not admit.

Then, the only remaining question to be considered is the question of law argued, rather than stated, in the petition, that the court erred in construing the word "usually" in Judge Allen's finding. The petition then shows that this part of the judge's findings was not overlooked by the court, and that the petition should not be allowed, and the opinion rendered at the last term of the court overruled, on this ground. See *Dupree v. Insurance Co.*, and other cases cited *supra*. This is a rehearing. The facts are now just what they were at the last term of the court. Not a word has been added, and not a word taken away. It is admitted in the petition that they were considered, and the opinion of the court shows they were, as one of the opinions filed says that the facts found by the judge and shown by the evidence established the fact that this river is not even a floatable river. It is not shown that the case was not well argued at the last term, or that it was hastily determined. Indeed, the case as published forbids any such conclusion, as there is not only a leading opinion by Justice MacRae, but a lengthy concurring opinion by Justice Avery. The opinion at last term was unanimous,—no dissenting voice. It is shown there were no mistakes of fact at that term that could possibly affect the opinion of the court. So the question comes substantially to this: that this case is an appeal from the last term of this court to the present term. And the result is that four justices at this term hold that the judgment of five justices at the last term was erroneous.

I have thus far been considering the case upon the rules and practice established, as I think, by a train of authorities, some of which I have cited, to show that this petition should not be allowed. And, as my opinion is not to be the law that governs the case, I will not enter into an elaborate discussion of the question as to whether this river is a navigable—a "floatable"—stream or not. But, in my opinion, the doctrine announced in the opinion of the court reverses what has been considered the law in this state for more than 100 years. I had supposed until recently that what was naturally a navigable water

course was settled in this state. The idea has been—and this state has acted upon that idea from its organization until now—that it has no right to grant the beds of navigable water courses, but that it had the right to grant the beds of such as were not navigable; and, acting upon this idea, the state has granted the soil under the water in most of the water courses in the western part of the state, such as the Catawba river, Johns river, Yadkin river, etc. *State v. Glen*, 7 Jones, 323. These rivers are not like they are in the eastern part of the state. There, where a river is wide enough for navigation, it is deep enough. But the rivers in the western part of the state, such as the Catawba, the Johns, and the Yadkin, are broad, shallow, rapid, and full of shoals and rocks, and valuable principally for water power which abounds all through that section of the state. Many of the citizens who wish to erect mills, and for the purpose of not being troubled about their dams, have entered, or bought of others that had entered, the beds of these streams, erected their dams thereon, and attached thereto their mills and machinery. They are the owners of this property. But the effect of this opinion is to legislate them out of their property—their vested rights—without process or compensation. The idea that the Catawba and Johns rivers are navigable water courses is one of recent origin. It has been held that the Yadkin was not,—was, because it probably is now, under this decision. In *State v. Glen*, *supra*, which is reiterated by this court through Chief Justice Merrimon in the case of *State v. Narrows Island Club*, 100 N. C. 482, 5 S. E. 411, it is held not to be navigable; and the Yadkin river is a longer and much narrower navigable water course than are the Catawba and Johns rivers. But, under the definition laid down in this case, the question will be, what is not a navigable water course? There are thousands of little streams in the west that will float a log (and how many are to be floated to make it navigable we are not told) when up. They, like the Catawba and Johns, rise when it rains, and can be counted on to rise with about as much certainty as either of these streams. Then, why are they not also navigable? Where is it to end? And where is the line to be drawn between what is and what is not a navigable stream? Whose property will be safe against an interested lumber company or lumber speculator? Our rivers in the western part of the state are not like the rivers in the northwest, the source from which the court draws its authority for declaring these streams navigable water courses. They are more like our eastern rivers. Their seasons are different from ours. They rise at regular periods, and continue so for the season; and I prefer to adhere to our own authorities and state policy rather than to these northern authorities, that reached us about the time such parties began to speculate in our timbers. "Floatable water courses" is a term not known to our law until

within the last six or eight years, and, as I say, came about the time the lumber speculators came, who, as I understand and as seems to be urged in this case, have bought up large sections of woodland, and the court must protect them. With me, this has nothing to do with my judgment in this case. I cannot see how large bodies of timbered land, as urged in the opinion of the court, can make a river navigable which was not navigable before. It may be a convenience to those having such timber to have a navigable water course. But how the fact of having timber can create the navigable condition of the water course I cannot see. I cannot help looking at this case as a contest between the parties for legal rights, and not one of policy. If these rivers are navigable water courses, the plaintiffs are trespassers, and are guilty of creating and maintaining a public nuisance, though they are only doing what had been conceded to their ancestors and predecessors for 100 years. But, if the North Carolina idea should be sustained,—that is, if these streams are not navigable water courses,—then the petitioner, in destroying plaintiffs' bridges, is a trespasser. If the plaintiffs are trespassers, every mill owner and fishery owner, though he was owner of the soil upon which his dam is erected, is guilty of creating and maintaining a public nuisance. The court says the legislature could make provision for slopes, or in some other way protect such persons. If there is to be legislation, I think it ought to be by the legislature, in declaring and providing for making that a public highway which nature has failed to make so, in which there would be provision made to compensate the property owners for their property taken for the public use, as in cases of railroads, canals, and other public improvements; that this is within the province of the legislature, and not within that of the courts.

(116 N. C. 827)

**FIRST NAT. BANK OF SPRINGFIELD et al. v. ASHEVILLE FURNITURE & LUMBER CO et al.**

(Supreme Court of North Carolina. May 17, 1895.)

**CORPORATIONS—AUTHORITY OF MANAGER — PAYMENT OF DEBTS—DIRECTORS' MEETING—VALIDITY.**

1. The treasurer of a corporation engaged in the manufacture of furniture, who had general charge of its business, with power to sell goods, purchase material, borrow money, and pay debts; took the entire stock of furniture and a large quantity of lumber belonging to the company, agreed on a value for it with certain corporate creditors, and turned it over to them, to be applied on the company's debts to them, some of which were not then due. *Held*, that the treasurer exceeded his authority, and the attempted sale was void.

2. An instruction by the directors of a corporation engaged in the manufacture of furniture, to their general manager, to sell the furniture on hand, and "apply the proceeds of sale to the payment of the debts" in the state, does not authorize such agent to dispose of the entire stock, to-

gether with a large quantity of unmanufactured material, as a part payment on certain debts of the company, some of which are not due at the time.

3. The acts of the majority of directors at a meeting held at an unusual time and place, without notice to the other directors, are not binding on the corporation.

4. Where it appears that a majority of the directors in a corporation met at an unusual time and place for holding meetings, and no record of the meeting is produced or alleged to exist, one attempting to show that the corporation, by such meeting, had ratified the act of its agent, must prove that such directors had actual notice of the meeting.

Appeal from superior court, Buncombe county; Armfield, Judge.

Actions by the First National Bank of Springfield, Ohio, and the Mad River National Bank, against the Asheville Furniture & Lumber Company, were consolidated. Property of defendant was attached by plaintiff in each action, and the National Bank of Asheville and others intervened, claiming the property. From a judgment for interveners, the plaintiff in each action appeals. Reversed.

F. A. Sondley and Moore & Moore, for appellants. W. W. Jones, C. M. Stedman, and M. E. Carter, for appellees.

MONTGOMERY, J. The plaintiffs, at the time of commencing their actions (afterwards consolidated and tried as one against the defendant, a corporation), issued and levied attachments upon certain real and personal property which they alleged belonged to the defendant. The National Bank of Asheville, the Battery Park Bank, and the Western Carolina Bank, the appellees, intervene, and claim the personal property attached by virtue of an alleged purchase by them from the defendant, on the 4th of November, 1891 (20 days before the attachments were levied). The only matter for our decision is whether that sale and purchase constituted a valid transaction, and passed the title to the property to the interveners. The interveners, having to show by preponderance of testimony their title to the property, took upon themselves that burden, and attempted to show a valid sale to them, at a fair price, by an agent of the defendant. The verdict of the jury establishes the sufficiency of the price agreed on as a fair one, and there is no contention over that matter. It is admitted by all parties that the property which the interveners claim under the alleged sale embraces the entire stock of manufactured goods (furniture) which the defendant had on hand at the time of the sale, valued at about \$19,000, and also a lot of flooring, valued at about \$3,000. W. W. Avery, the defendant's agent, who made the alleged sale to the interveners, testified that he got a full price for it, but explains that the interveners were creditors of the defendant, some of the debts not being due at the time of the sale, and that they took the property at the price agreed on (\$22,081.11): "as a payment on



their debts." The witness Avery, in writing to the secretary of the defendant corporation, two days after the alleged sale, made the following statement of the transaction: "Asheville, N. C., Nov. 8th, 1891. Mr. Wm. Edminston, Knoxville, Tenn.—Dear Sir: As telegraphed you last night, the three banks here, acting together, attached for the overdue debts due them. But they have not sued us individually, and I do not think they will, if we can make the property pay them out. They were all cocked and primed for me when I went up yesterday afternoon to meet them at five o'clock; had all the papers issued and ready to serve. I wanted to get some time, but they would not consent to give me any, as they seemed to be afraid some other creditor would come down on us and get the drop on us before they did. They were going to attach everything we had, and I knew that if they did so, and got all our property into the hands of a receiver, it would be sacrificed to such an extent that it would never come anywhere near paying our debts. As all of the creditors of the concern would be treated alike by the receiver, there would be a great deal of paper left unpaid with our personal indorsement on it, and on this paper we would be sued, and none of us ever get out from under the load of debts and judgments that would be piled up against us. So I asked them if they would be willing to take our furniture and lumber as a payment on the paper which they held against us, and on which we were individually indorsed, and give us an opportunity to sell it for them, and get as much out of it to pay on these papers as we could. After consulting some time, they agreed to do this, and I made the sale to them, as it was the only thing left for me to do, and seemed to be the best thing I could do for all of us. \* \* \* But they still insisted upon attaching our real estate and personal property for the overdue debts, in order, as they said, to make themselves secure. This they did yesterday afternoon, and our factory is now in the hands of the sheriff. To-day they seem to feel that their debts against us are secure, and, while I do not know positively, I think they will be inclined to let us work it out, if we feel so disposed, and make the property pay them as much as we can of their debts; but they have come down on us so suddenly and unexpectedly that I have no confidence left in any of them. \* \* \*

The question now arises, did W. W. Avery have authority to dispose of the property in the manner in which he did? As to his general powers, he was the treasurer of the company, and he testified that he "sold all the furniture manufactured at the works of the company," and "used the proceeds of sale for the benefit of the company in carrying on its general business"; that it was agreed that he should stay at Asheville, and run the business; that from the formation of de-

fendant company he had charge of it, managed it, sold its furniture, borrowed money for it, and paid its debts; that he had done this "for two years, and up to the date when the furniture in question was sold to the interveners, without any objection from the directors or stockholders or corporation, but with their full knowledge and consent, and that he managed all the affairs of the company." And it is also contended for the interveners that if the alleged sale by Avery was outside the scope of his general powers, described as above, his conduct was, nevertheless, authorized by the directors of the defendant corporation, who afterwards met at Cincinnati, and "talked over informally the business of the company"; that it owed a large amount of debts; and that the directors would have to make some arrangement to meet them as they became due, which would be at an early day. The particular authority thus given him is then stated by the witness: "They all agreed and so instructed me to come back to North Carolina, sell the furniture we then had on hand, and apply the proceeds to the payment of the company's debts here, with a view of removing the plant to Lenoir City, Tenn." We think that the agent, Avery, transcended his powers, as claimed for himself by his own testimony, when he attempted to make such a disposition of the property of the corporation as this transaction discloses, and, therefore, that no title to the property passed to the interveners in the attempted sale. Avery claimed, and the testimony shows, that he had very large powers in the active management of the business for which the company was organized,—the manufacture and sale of furniture; but we cannot find from a reading of the whole testimony that the company ever intrusted him with the power to do what he attempted to do in the transaction above set forth. His agency concerned the running and continuation of the business. By his act he practically put an end to it. Under his powers, he was to sell the product of the defendant manufacturing company, purchase material for its use, borrow money, and pay its debts. He was not authorized to take the entire stock of furniture, and also a large quantity of lumber, agree upon a value for it with certain of the creditors of the corporation, turn the property over to them, and have the value placed upon its indebtedness, some of which was not due, as a credit; which thing he did. At the time of the attempted sale, the agent gave to the preferred creditors (the interveners) information concerning the company's matters, showing its large indebtedness and its inability to pay the same, which resulted in the immediate action of the creditors, the interveners, by attachment of the other property of the defendant, and thereby closing up the business of the company. However broad may be the general power of an agent to conduct

the business of a manufacturing corporation, it cannot, in reason, be extended to cover such a transaction as the one which the agent in this matter attempted to perform. Neither were the special instructions which Avery claims were given to him by the directors at Cincinnati such as to confer upon him the power which he exercised in the attempted sale to the banks, the interveners. He says he was authorized to sell the furniture which was then on hand, and "apply the proceeds of sale to the payment of the debts here" (in North Carolina). This did not empower him to dispose of the entire stock, and also of some \$3,000 worth of unmanufactured material, as a part payment on debts to certain of defendant's creditors, some of which were not due. It therefore follows that Avery had neither general nor special authority to transfer to the interveners the property in dispute, and that, because of his want of authority to do so, they took no title thereto. Owing to the unusual and extraordinary disposition of the property of the defendant corporation which the agent was attempting to make, the other parties to the transaction (the interveners) were put on their guard, and they should have been particularly careful to find out the agent's power; more especially as in the matter he was attempting to relieve himself of personal liability on account of his indorsement of the notes which the banks held against the company. There was certainly enough in this transaction to have excited suspicion of lack of authority of the agent, and they should have clearly scrutinized his powers. Therefore, it follows that in his honor's refusal to instruct the jury, as he was requested to do by the plaintiffs, that there was "no competent evidence that W. F. Avery had authority to sell the furniture as attempted in this case," there was error, and on account of this error there must be a new trial.

But the interveners contend that, if Avery did transcend his powers, yet his action was afterwards ratified by defendant corporation, and by this ratification any defect in their title to the property, if there was any, was cured. Certainly, the defendant could have ratified the acts of its agent, and by so doing make valid an act which without such ratification would have been invalid. But in seeking to cure such a defect in the act of their agent, and alleging that the ratification took place at a meeting of the directors, it must be first shown that the meeting was a legal one. It is said that the alleged ratification was made at the Glen Rock Hotel, in Asheville. The interveners' evidence in regard to that meeting is as follows: Avery said: "I think there was a notice given of the meeting of the company at Glen Rock Hotel. Am not sure of that, however. The Glen Rock Hotel was not the usual place of the meeting of the company, but was the most convenient place, inasmuch as two of the directors were already there. The meet-

ing at this hotel was regularly organized at the suggestion of Carter, and the sale of the furniture to the banks was discussed and approved by the meeting." Carter's testimony concerning this meeting was as follows: "The directors of defendant company met at Glen Rock Hotel in Asheville. The meeting was organized by the president and secretary, with a majority of the directors present. I explained to them, as attorney of the company, the sale of the furniture made to the banks. All of the directors in the meeting approved of the sale. Avery held the stock of the Tennessee company of about \$100,000, which they said they wished to transfer to the banks in liquidation of the company's indebtedness to the banks. After the meeting was informed of this sale of the furniture to the banks, they directed Avery to destroy that stock, which he did by tearing it up in my presence. I do not know that there was any previous notice of the Glen Rock Hotel meeting given to the directors of the company." The testimony shows that the board of directors of defendant company consisted of five members, Avery being one of them, and that he and two others were present at this meeting. Here, then, were three out of five directors at an unusual place and time for holding the meetings of the company, without notice to the other directors, so far as appears from the testimony. Was such an assemblage a meeting of the corporation in any legal sense? We cannot think so. "Unless the meeting is one that assembles at stated times, pursuant to some provision in the constitution or by-laws, it must be duly notified to all the directors; for even if a majority of a total number of directors were present, and the vote is unanimous, so that the votes of the absentees could not have changed the result, it does not follow that those actually present would not have voted differently had they heard what the absentees, if present, might have said. To make the proceedings regular, all should have had an opportunity to be present and take part in them." *Taylor Corp.* § 260. And even though it be taken as true that the usual presumption in favor of regularity applies to the directors' meetings, and that the burden of proof to show a want of due notice of the meeting is on the party impeaching the regularity, yet we think the presumption was rebutted by the admission of the interveners that the assembling of a majority of the directors was at an unusual place, at an unusual time, and that no record of such meeting was produced or alleged to exist; and that, under all the circumstances of this meeting of a majority of the directors, as proved by the interveners' witnesses, it was incumbent on them, when they sought to show that the corporation by that meeting had ratified the act of the agent in disposing of the property in dispute, to show actual notice of the meeting given to each director.

Upon the question of ratification, his honor's charge was as follows: "Now, Avery and Carter testified that, at a meeting at Glen Rock Hotel, there was a gathering of a majority of the directors of the Asheville Company, and that then this board undertook to ratify Avery's acts. The question is, was that a lawful meeting, and had it the power to ratify? The evidence is somewhat equivocal, and not so certain that they attempted to organize, and the evidence of Carter is that he knew of no notice, but there is no evidence that there was none. As I told you before that men having a duty to perform are presumed to do that duty rightly, and to take all necessary steps in its right performance, and as you have heard all the evidence on this point, I will leave it with you to say whether there was a lawful meeting of the board there or not. Against it you will note that Carter said he knew of no notice, and you will remember that he said that the meeting was organized at his suggestion, and at an unusual place for the directors to meet,—a place where they never met before. It also appears that this board was somewhat uncertain in its method of holding its meetings; that they were in the habit of meeting at various places; and against this stands the presumption I have mentioned before, that men act according to law. And if, upon the whole evidence, you believe this was a lawful meeting, then it was lawful; but, if not, it goes for nothing, so far as ratification is concerned, but can be used for the purpose of contradicting these men, because they were then attempting to approve of this very sale. If you find this was an unlawful meeting, it is not to be considered for the purpose of proving ratification, but to contradict these men." The plaintiff excepted, because—First, "the judge should have charged the jury that the meeting at Glen Rock Hotel was not lawful"; and, second, "because there was no evidence to warrant the judge in submitting to the jury the question whether or not the meeting at Glen Rock Hotel was lawful." Our opinion is that, upon the undisputed facts concerning the assembling of the majority of the directors at Glen Rock Hotel, there was no such meeting, in law, of the governing and directing body of the defendant corporation, as to make its acts and conclusions the acts and conclusions of the corporation, binding on it and its creditors, as a ratification of an otherwise invalid act. There was error in his honor's refusal to charge on the matter of ratification as he was requested to do by the plaintiffs.

After what has been said in this opinion, it seems unnecessary to discuss any other of the exceptions filed by the plaintiffs. New trial.

AVERY, J., did not sit on the hearing of this case.

(116 N. C. 113)

# THOMSON-HOUSTON ELECTRIC LIGHT CO. v. HENDERSON ELECTRIC & GAS LIGHT CO.

(Supreme Court of North Carolina. May 16, 1895.)

CORPORATE ASSETS—FUND FOR CREDITORS—COUNTERCLAIM—FILING OF EXCEPTIONS—FINDINGS OF FACT.

1. The relation between a corporate creditor and the corporation, whether solvent or insolvent, being simply that of creditor and debtor, he has no equitable title to the corporate assets in the hands of its treasurer.

2. A counterclaim against persons other than plaintiffs for a tort not connected with the subject of the action will not be allowed.

3. Exceptions to findings of fact by the court must be filed before the court adjourns for the term.

Appeal from superior court, Vance county; Battle, Judge.

Action by the Thomson-Houston Electric Light Company against the Henderson Electric & Gas Light Company and others for the purchase price of goods. From a judgment for plaintiff, defendant gas light company appeals. Modified.

J. W. Hinsdale, for appellant. T. T. Hicks and T. M. Pittman, for appellee.

MONTGOMERY, J. The theory upon which the plaintiffs, in their complaint, seek equitable relief, rests upon the idea that the directors of the defendant corporation are trustees in the most comprehensive sense for them; that the assets of the corporation are a trust fund in the hands of the directors for their benefit; and that, therefore, in this action, they can have an order against the defendant Burgwyn for a payment into court of funds in his hands, as treasurer, to be applied to such judgment as the plaintiffs may recover against the defendant corporation. The argument of Mr. Hicks for the plaintiffs was able and ingenious, but it failed to satisfy us of the correctness of the plaintiffs' position. The relation between a creditor and a corporation, solvent or insolvent, is simply that of creditor and debtor; and where the law writers and the courts have used the words "trust fund" in connection with the assets of an insolvent corporation, it has not been intended to mean that there is a direct and express trust attached to the property. The assets are not, in any true and complete sense, trusts. 1 Pom. Eq. Jur. § 1046. In Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107, this court decided that a director of the insolvent defendant corporation, who was also a creditor, could not take advantage of the information which he had of the affairs of the corporation, to protect himself by a judgment confessed by the corporation in his favor, to the injury of other creditors, who did not have the same means of information; and that the assets of the corporation were a trust fund, and that general creditors were entitled to come in on equal terms with

directors who were bona fide creditors. It is true, too, that in that case the court used the word "lien" in reference to the claims of creditors upon the assets of the company, but the word was afterwards explained in *Merchants' Nat. Bank of Richmond v. Newton Cotton Mills*, 115 N. C. 614, 20 S. E. 765, to mean simply a right of priority of payment over stockholders of the corporation. It did not undertake to decide that these priorities were such a trust as attached to the property, and placed the right thereto in the creditors. In *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, these words are used: "A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or mismanagement in respect thereto. As between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. The assets of such a corporation [an insolvent bank] are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process." *Curran v. Arkansas*, 15 How. 304. So it appears from the authorities that the plaintiffs have no equitable title to the assets of the corporation in the hands of Burgwyn, the treasurer of the defendant company. The relations of trustee and cestui que trust between him and the creditors, for the purposes of this action, do not exist, and the plaintiffs cannot invoke the aid of the court, in its equitable jurisdiction, to enforce the payment of the judgment recovered against the defendant in this action by an order of the court, on pain of attachment for contempt. In *Daniel v. Owen*, 72 N. C. 340, where the relation of trustee and cestui que trust did not exist, the court below made an order that the judgment debtor should pay into court, on a day certain, the amount of the judgment. This court held that the order was void, because of the want of power to make it. In that case the court said: "Under the old equity system the chancellor had power to order one who held the legal title in trust for another to execute a deed. So he had power to order a defendant who held a fund in trust, whether it consisted of bonds or money, to pay 'the funds' into court, to the end that the fund should be put under the protection of the court. This power the court still has under the new system in all cases where there is the relation of trustee and cestui que trust, and the land or the fund is in contemplation of a court of equity the property of the

plaintiff in an action brought to enforce the equity, and an order made for the execution of a deed on the payment of the fund into court is a lawful order, within the meaning of *Battle's Revisal*, c. 24, § 1, subd. 4." Code, § 648, subd. 4. The judge below properly overruled the second conclusion of law of the referee allowing the counterclaim of the defendants set up in their amended answer. Upon the facts found by the referee the defendants, as a matter of law, were not entitled to it. According to the referee's finding, the counterclaim embraced a transaction not connected with the subject of the action, the plaintiffs had no connection with it, nor ever had, and it was for a tort against other persons than the plaintiffs. All of the exceptions filed by the defendants to the findings of fact by his honor were filed too late. They were not put in until after the court had adjourned for the term. *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384; *Lowe v. Elliott*, 107 N. C. 719, 12 S. E. 383. The judgment of the court below is affirmed, except that part of it which adjudges "that the said W. H. S. Burgwyn, treasurer, be, and he is hereby, ordered and directed to satisfy the plaintiffs' said recovery, and the costs, by paying the same out of the said assets." The plaintiffs may, however, at once examine, as under the chapter of the Code entitled "Proceedings Supplementary to the Execution," W. H. S. Burgwyn and the other directors of defendant corporation, or any other persons who may have any assets of defendant corporation in their hands or under their control, without any further proceedings, as it appears from the complaint and answer in this case and the proof that the defendant company, through Burgwyn, its treasurer, either received or ought to have received, at the time of the sale of the defendant corporation's property and franchise, an amount from that sale more than the judgment recovered in this action, and that there is no other creditor, nor is there any other property of the defendant corporation. Modified and affirmed.

(116 N. C. 381)

**DURHAM CONSOLIDATED LAND & IMPROVEMENT CO. v. GUTHRIE et al.**

(Supreme Court of North Carolina. May 16, 1895.)

**SALE OF LAND — PAROL CONTRACT — REPUDIATION BY VENDEE — RECOVERY OF MONEY PAID.**

1. Under Code, § 1554, which requires contracts for the sale of land to be in writing, signed by "the party to be charged therewith," a contract signed by the vendor only binds him, but not the vendee.

2. Where a parol contract for the sale of land is repudiated by the vendor, the vendee may recover the amount he has paid thereunder.

3. A parol contract for the sale of land is void only at the instance of the party who is entitled to and who does plead the statute of frauds.

4. Where the vendee in a parol contract for the sale of land repudiates the same, he cannot

recover money paid thereunder from the vendor, who is able and willing to perform his part of the agreement.

5. Where the vendee in a parol contract for the sale of land repudiates the same, he cannot, in an action brought 12 months thereafter, recover money paid on such contract, though the vendor has disposed of the property, and is therefore unable to convey to the vendee.

Appeals from superior court, Durham county; **Greene, Judge.**

Action by the Durham Consolidated Land & Improvement Company against W. A. Guthrie and others for money due on account. Defendants set up a counterclaim. From a judgment against plaintiff on its claim, and in favor of defendants for \$330 on their counterclaim, plaintiff and defendants appeal. Affirmed on both appeals.

The defendants had contracted with Fowler, Ferrell & Hicks for certain lands in Durham county, and held their bonds for title when the purchase money was paid. In 1890 the plaintiff and defendants entered into the following agreement, marked "Exhibit B," concerning the same lands: "October 1, 1890. To the Durham Consolidated Land & Improvement Company: We will let you take the property at the actual cost to us, and on the same terms as we bought it, which are about as follows: Cash payments, \$2,500; \$4,275 in one year from date of our purchase; \$1,600 in eighteen months from date of our purchase. About \$3,000 of these time payments is at 6 % interest; the balance at 8 %. You are to be at all expense of advertising and selling the property, and putting it in proper condition for sale to the best advantage, by opening streets and making whatever improvements is necessary to sell the property in one year from date; and, after deducting the actual expenses only from the proceeds of sale, the remainder of the proceeds is to be equally divided between us and yourselves. [Signed] S. T. Morgan, for 'Guthrie, Carr and Morgan.'" The plaintiff accepted the above proposition; paid the cash sum of \$2,500; took possession of the lands, cut and carried away wood, trees, etc.; received rents; and remained in possession for more than 12 months. In March, 1892, the defendants notified the plaintiff that they (defendants) were sued by Ferrell for his money then just due, and added: "We request you to comply with the terms of our contract with you, and make payment of the purchase money, and take title deeds for all the property." Nothing more was paid or done by the plaintiff, and in the spring of 1892 the defendants resumed possession of the lands. Afterwards the plaintiff demanded that the \$2,500 be paid back, which was refused by defendants. In September, 1893, the plaintiff commenced this action to recover the \$2,500, and filed its complaint, which the defendants answered, and set up a counterclaim for the value of wood, timber, rent, etc., received during the plaintiff's posses-

sion. His honor submitted these issues: "(1) Are the defendants indebted to the plaintiff; if so, in what sum? No. (2) What is the value of the timber and rents received by the plaintiff from the lands described? \$330." The court rendered judgment in favor of the defendants according to the verdict, and each party appealed.

F. H. Busbee and Shepherd, Manning & Foushee, for plaintiff. J. W. Graham and Boone & Boone, for defendants.

**FAIRCLOTH, C. J.** We find from an examination of the record that the main question is, can the plaintiff recover back the \$2,500, paid in part performance of the agreement set out in the statement of the case? The action does not seek to enforce the contract, but to recover back the money paid; and the complaint alleges that the written agreement is defective in its descriptive part, and is therefore void by the statute of frauds, and cannot be enforced against the defendants by a bill for specific performance. The defendants answer, and say: When you perform your agreement, we are ready, willing, and able to perform our part, by giving you good fee-simple deeds, according to the true boundaries, which are well known to and recognized by you, by reason of your acceptance and possession of the lands for more than 12 months. The plaintiff's position rests upon a misconception of the statute of frauds (Code § 1554). The statute only requires that the contract shall be in writing, and signed by "the party to be charged therewith." So that if A. contracts in writing to sell a tract of land to B., whose promise to pay is not in writing, A. would be bound to perform, but B. would not, if he saw proper to avail himself of the statute. *Love v. Welch*, 97 N. C. 200, 2 S. E. 242. If A. and B. contract for the sale of land by parol, and the vendor elects to repudiate the contract, the vendee may recover back the amount he has paid under the contract. *Wilkie v. Womble*, 90 N. C. 254. A parol contract for land is not void, except at the instance of the party who is allowed to and does plead the statute, and neither party who repudiates the contract can take any advantage or benefit under it. The repudiator is left in the condition in which he finds himself at the time of the abandonment. The plaintiff cannot recover in assumpsit, because it is admitted that it had a special contract, and so long as it exists it cannot fall back on the common counts. The cases of *Green v. Railroad*, 77 N. C. 95, and *Foust v. Shoffner*, Phil. Eq. 242, are on "all fours" with the case before us. In the first case, it was agreed verbally that defendant would convey a certain tract of land to the plaintiff as soon as he would deliver to defendant an agreed number of cords of wood. Plaintiff delivered a part of the wood, and quit, and sued defendant for

the value of so much wood as he had delivered. Defendant said, "I am ready and able to give you a good title to the land as soon as you perform your part of the contract," and the court held that plaintiff could not recover. It was conceded that defendants had otherwise disposed of the land before this action was begun, and it was urged by counsel that, inasmuch as defendants were not in a position to convey the title to plaintiff at that time, therefore the plaintiff ought to recover. That argument is without force, because it ignores the fact that more than 12 months prior thereto the plaintiff, upon demand, had failed to perform its obligation then past due, and it would have been unreasonable to require defendants to hold their property in an unproductive state until it suited the pleasure of the plaintiff to make the first move. We think it unnecessary to consider the numerous other points raised at the trial and on the argument, for, assuming each and every one of them in favor of the plaintiff, with the question above settled as it is, the result would be the same. Judgment affirmed.

#### In Defendants' Appeal in Same Case.

This appeal is dependent upon the same facts as are found in the plaintiff's appeal. The defendants recovered, in the opinion of the jury, the value of the actual damages to their property, and asked for the profits which they thought would have been realized if the plaintiff had pressed its speculations with more energy, in accordance with the agreement. His honor thought these were too uncertain and too near out of sight, and in this we agree with him. Affirmed.

(116 N. C. 472)

#### BALSLEY v. BALSLEY et al.

(Supreme Court of North Carolina. May 16, 1895.)

#### SUIT TO CONSTRUE WILL—JURISDICTION—GRANT OF FURTHER RELIEF.

1. The superior court has jurisdiction of a suit by an administrator for the construction of the will when the administrator has the personal assets in hand, ready for distribution, and the will, while providing for an equal distribution of the estate, does not clearly show whether the debts of the distributees are released, or are to be included as a part of the personal assets for distribution.

2. A court of equity, having properly taken jurisdiction of a suit to construe a will, may order a valuation of the real estate, if this is necessary in order to afford complete relief, though it involve the granting of a remedy ordinarily granted in a special proceeding.

Appeal from superior court, Guilford county; Hoke, Judge.

Action by T. E. Balsley, executor, against William G. Balsley and others, for the construction of a will. From a judgment for plaintiff, defendants appeal. Affirmed.

MacRae & Day, for appellants. Dillard & King and Shepherd & Busbee, for appellee.

AVERY, J. The frequent filing of bills, under the old, and institutions of actions in the nature of bills in equity under the new, practice, by executors and trustees, against those entitled to the beneficial interests, for the purpose of obtaining a construction of wills, have led to the thorough crystallization of the leading principles governing causes of this kind.

1. Only such questions will be determined by the court as it is necessary to settle in order to protect the fiduciary in the discharge of his present duty. *Tyson v. Tyson*, 100 N. C. 360, 6 S. E. 707; *Taylor v. Bond*, Busb. Eq. 5.

2. The courts will not assume jurisdiction, except where there is a present existing question of right to be acted upon, the determination of which can now be made the subject-matter of a decree. They will not advise as to the past conduct of an executor, nor as to the future and contingent rights of legatees. *Taylor v. Bond*, supra; *Little v. Thorne*, 93 N. C. 69.

3. The trustee who seeks advice as to the disposition of property or the distribution of a fund must, as a rule, have it in his possession, so that the order of the court may be carried out. *Perkins v. Caldwell*, 77 N. C. 433.

While the advisory jurisdiction of the courts cannot be invoked to elicit an opinion on an abstract question, yet, where the court has properly taken cognizance of a case for the settlement of another controverted point, for the proper determination of which it incidentally becomes necessary to place a construction on a will, the courts, acting upon a familiar rule of equity practice, make an exception to the general rule. *Little v. Thorne*, supra. The executor had in hand the sum of \$5,727.47, arising from the sale of the personal property after paying the debts of the testator and the costs of administration. The leading purpose of the testator to make an equal division of all of his estate, real and personal, except a specific legacy of \$500, left in trust for his granddaughter, Mary B. Atkinson, is clearly expressed in the will, and must be carried out if it is in the power of the court to do so. *Lassiter v. Wood*, 63 N. C. 360; *King v. Lynch*, 74 N. C. 364; *Alexander v. Summey*, 68 N. C. 577. There was no intent expressed to treat as advancements the indebtedness of his children, nor, on the other hand, to have any such debt left out of an account of advancements or released. The defendant Charles T. Balsley, one of the sons of the testator, was indebted to the estate in the aggregate sum of \$2,885.87, with interest on various smaller sums, making up that aggregate from various dates. His creditors, who are defendants, and who appealed from the judgment of the court, contended that the indebtedness of Charles ought not to be added in order to arrive at the aggregate value of the real and personal property, and make an equal division of the same, but that, leaving

his indebtedness out of the estimated value of the whole estate, Charles was entitled to receive one-fourth. The executor was advised that the amount of this indebtedness should be added to ascertain the value of the estate, and deducted from the one-fourth thereof in determining the amount, if anything, coming to Charles. When the executor sought to distribute the trust fund arising from the sale of the personalty, and left after the payment of debts and expenses, he was confronted with some controverted questions, about which he had a right to ask the advice of the court for his own present protection. But, if the indebtedness of Charles was to be charged against him as an advancement, the executor could not determine without some authoritative valuation of the entire real estate whether, after deducting the debt from one-fourth of the aggregate sum ascertained by adding together the balance in hand arising from the sale of the personalty, the sums due from the heirs and distributees, and the estimated value of the real estate, there would be any excess on hand due to Charles. Then, if there should be any excess, it would become necessary to know what portion, if any, should be treated as exempt from his debts, and, if treated as a homestead, how the fund should be disposed of for the benefit of Charles and his creditors.

But the defendants assign as error the order that the land be sold for the purpose of making an equal distribution under the will. It is declared by the court in express terms, however, that it was made "by consent of parties"; and it is manifest, therefore, that no exception can be taken to the sale at this late day. So the whole fund is now in hand, and it remains to determine what interest Charles or such of the defendants as are his creditors have in its distribution.

We think that the motion to dismiss for want of jurisdiction was properly refused. The executor set forth facts sufficient to show that he had a right to ask the advice of the court as to the distribution of the fund already in hand, and, when it was made to appear that the advice could not be given without first ascertaining and determining the value of the real estate, the court, having, in the exercise of its equitable jurisdiction, once taken rightful cognizance, was empowered and required to afford complete relief, even though it incidentally involved the granting of a remedy ordinarily administered by the court in a special proceeding. We have seen that, where the court takes cognizance for a different purpose, it will incidentally construe a will in order to afford the relief to which a party is entitled; and so, in the case at bar, the court, finding it necessary to determine the value of the land, was authorized to have it ascertained in the way provided by law. We are relieved from the necessity of determining whether the heirs could have insisted on an actual partition of the land by commissioners instructed to ascertain the aggregate value of it, and, if it should become apparent that the debt of

Charles would amount to more than the value of a share, to divide it, as near as might be practicable, into three equal shares, to the other heirs entitled under the will. The court, by consent of all parties, ordered, in the progress of this litigation, that the land be sold; and the fund, which stands in place of it, is now subject to the order of the court, just as the residue of the proceeds of the sale of personalty has been from the filing of the complaint. The voluntary consent of all parties interested to the order of sale likewise dispenses with the necessity for considering or discussing the question whether the terms of the will are such as to give the executor, by implication, power to sell. It is immaterial, in view of the assent of the parties to the sale, whether, in the face of objection, the executor would have been deemed authorized, by implication, to sell in order to carry out the leading purpose of the testator to make all of the four devisees equal, or whether, in the way indicated, some of the devisees might have demanded actual partition. If Charles Beasley's indebtedness exceeds his share of the estate, it would seem that the court provided for the disposition of the fund in the manner pointed out as proper in *Vanstony v. Thornton*, 112 N. C. 196, 17 S. E. 566, and the cases cited by the justice who delivered that opinion. We think there was no error.

(116 N. C. 1)

PARKER v. BEASLEY et ux.

(Supreme Court of North Carolina. March 12, 1895.)

MORTGAGE—EFFECT OF TENDER—LIEN.

1. The tender by a mortgagor of the amount due upon a mortgage, after maturity, without payment into court, stops interest and costs after tender, but does not discharge the lien of the mortgage.

2. An action for possession of land on default in a mortgage, or for judgment for the debt to be discharged upon surrender of the land or its sale under order of court, to which defendant pleads a discharge of the lien by tender and refusal, and asks that the mortgage be declared satisfied, is an action for equitable relief.

Appeal from superior court, Hertford county; Armfield, Judge.

Action by A. D. Parker against J. N. Beasley and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

The defendants, J. N. Beasley and wife, Mary A. Beasley, borrowed money, and gave their promissory note for the same, payable to R. E. Beale, on January 1, 1890, and executed a mortgage, duly probated and recorded, on a certain tract of land belonging to said Mary, to said R. E. Beale, to secure the payment of their said note, with the usual power of sale in case of default in such payment; and on the 14th of April, 1891, said Beale assigned the note to the plaintiff. On the 28th of October, 1891, Beale, the mortgagee, offered said land for sale under the power and according to the provisions of said mortgage, when the plain-

tiff bid it off, and offered to pay by surrendering his note and mortgage. The mortgagee declined to make a deed, and the defendants did not pay the money. The defendants, on the 27th of October, 1891, or on the day of said sale, tendered to the plaintiff's authorized attorney the amount of principal, interest, and cost then due, which was refused by said attorney. It was found by the jury that there was no sale under the power in said mortgage, and that the tender was made as stated. On the 30th of September, 1892, the plaintiff instituted this action (1) for possession of the land; (2) for judgment against defendants for the amount of said note, "to be discharged upon the surrender of the said land or the sale thereof under an order of the court, and for costs and any other necessary relief." The defendants filed an answer, averring, among other things, that on the said 27th of October, 1891, the defendants legally tendered the amount then due the plaintiff to his attorney, which was refused. The defendants prayed: First, that plaintiff recover judgment only against the defendant J. N. Beasley, and for the amount due on October 27, 1891, the date of said tender; second, that said land be discharged from any liability for the payment of said note, and that said mortgage be declared satisfied. At the trial the plaintiff had judgment for the amount of his note, with interest and costs which were due on the said day of tender, and declaring said judgment to be a lien upon said mortgaged land, with an order that after 90 days the said land be sold to satisfy said judgment, and to pay over any balance to defendants. To this judgment the defendants excepted, "because the court declined to hold that the tender discharged the lien of the mortgage on the land," and appealed.

B. B. Winborne, for appellants. L. L. Smith, for appellee.

FAIRCLOTH, C. J. A. makes a promissory note to B. for borrowed money payable on a day certain, and, to secure it, he and his wife give B. a mortgage on land, duly registered, and the money is used in improving the mortgaged premises. After maturity of the debt, and before any sale or foreclosure proceedings begun, the mortgagor tenders to the mortgagee the amount then due, principal, interest, and costs then incurred, and the mortgagee refuses to accept the tender and surrender his note and mortgage. Does this tender discharge the lien on the mortgaged land? The above statement discloses the only question presented in the record in the present action. It does not appear that the money tendered was deposited anywhere, nor that it was kept ready for the plaintiff in case of demand, nor that it was tendered at the trial. The plaintiff instituted this action for possession

of the land, and to recover a judgment on the note, and for a decree condemning and ordering said land to be sold to satisfy his judgment. The defendants pleaded their tender, among other things, and relied on it as a discharge of the mortgage lien. At the trial the plaintiff had judgment for the principal money and interest and cost prior to the day of tender, and also an order to sell the land to satisfy the judgment. The defendant Beasley excepted, "because the court declined to hold that the tender discharged the lien of the mortgage on the land," and appealed. The effect of a legal tender in case the security had been wholly personal is not presented, and we express no opinion on that question; nor is the effect of a tender made before or at maturity (called the "law day" in case of a mortgage security) presented.

We are not aware that the question now before us has ever been directly presented to this court. In some of our sister states, either by statute or judicial ruling, the mortgage lien is held to be only a mere security or pledge, with the title remaining in the mortgagor, and that a tender kept intact discharges the lien, and in some that the debt is discharged because the condition of the mortgage contract is performed, and that the title of the mortgagor is complete without reconveyance or other equivalent act. This is the result of the harsh rule of the common law. But in those states, if the mortgagor should call on the court of chancery to remove the cloud on his title, or to work out any other object, he is required to pay the debt, on the principle that he must do equity if he asks for it. In the state of New York, after several cases much considered, it was finally settled by a divided court in *Kortright v. Cady*, 21 N. Y. 343, that a tender, although not kept good, made after the law day, at any time before foreclosure, discharges the lien. In a few other states the same doctrine prevails, but they all rest on the holding that the mortgage is a mere security or pledge, without any legal title in the mortgagee. The several decisions in such states present various phases of the question. In New York, in *Tuthill v. Morris*, 81 N. Y. 99, which was an action to restrain a sale and to have the mortgage canceled of record, on the ground that the amount of the mortgage had been duly tendered and refused, the court say: "A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage and the costs and interest, at least up to the time of the tender. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and cost subsequently accruing, and, to entitle him to this relief, he should have kept his tender good from the time it was made." And there are many similar decisions in those states.



But it is claimed that the present action is not one for equitable relief. We think this is a misapprehension. It is true that it is an action for possession, for judgment for the amount of the debt, "to be discharged upon the surrender of the said land, or the sale thereof under an order of the court, and for costs and any other necessary relief"; and the defendants, after pleading tender and refusal, pray the court "that said land be discharged from any liability for the payment of said note, and that said mortgage be declared satisfied." Here both parties are asking the court to do things which a court of law could not do. Before the constitution of 1868, neither party could get any equitable relief except by a bill in equity, but under that constitution and the Code either party can assert and obtain his equitable relief in any action at law by the other party, thus expediting business and saving costs; and the moment either party, by his pleadings, sets out and asks equitable relief, the court of equity acquires jurisdiction, clears the debt, and adjusts all equities between the parties; and this view clearly embraces the present case. In a much larger number of the states we think the rule is different from that in New York. In North Carolina the mortgagee has the legal estate, and the mortgagor is the equitable owner. Until the day of redemption is past, he may pay the money according to the proviso in the contract, and avoid the conveyance at law, and this is termed his legal right of redemption. After the day of redemption is past, he has still an equity of redemption, which is a continuance of his old estate. *Hemphill v. Ross*, 66 N. C. 477; *Coleb. Coll. Secur.* § 157, says there are few states where the mortgage is regarded as merely subsidiary to the debt, an incident to the principal, the shadow which follows and depends upon the substance. "This is not the view taken in this state of these relations, nor is it in harmony with the general course of adjudications elsewhere. The note is the personal obligation of the debtor. The mortgage is a direct appropriation of property to its security and payment." *Capehart v. Detrick*, 91 N. C. 344, 353. The mortgagee may at any time take or recover possession of the mortgaged land, unless expressly forbidden by the terms of the deed or by necessary implication. 1 *Jones, Mortg.* § 58.

With this view of the mortgagee's estate and its incidents, what is the effect of the tender relied on in this case? Does it discharge the lien? The burden of showing tender and refusal is on the party pleading it. The defendants can derive no benefit from their plea of a tender, because it is not accompanied by a payment into court of the amount admitted to be due. *State v. Briggs*, 65 N. C. 159. We have also omitted to notice that a plea of tender is incomplete unless accompanied by a payment of the sum ten-

dered into court. *Terrell v. Walker*, Id. 91. It was insisted that in the opinion of Pearson, C. J., in *Capeheart v. Biggs*, 77 N. C. 264, by the expression, "The plaintiff might invalidate a sale made under the power by proof that before the sale, or even on the day of sale, he tendered the balance due with the expenses incurred," we must assume that he meant a tender kept good by payment into court, especially, as in *Cope v. Bryson*, 1 Winst. 112, he had already said that defendant must plead "tender and refusal and 'always ready,' and pay the money into court, and take a rule on the plaintiff to take it or proceed further at his peril." In *Shields v. Lozeau*, 34 N. J. Law, 496, it is held: "But an unaccepted tender of the mortgage money, made after the day prescribed in the mortgage, will not affect the lien of the mortgage on the land. It is neither performance of the condition nor payment or satisfaction of the debt. Its only effect will be to stop the running of interest, and to subject the mortgagee to the costs of a redemption by bill in equity." In *Bissell v. Heyward*, 96 U. S. 580, it is stated that, "to have the effect of stopping interest or costs, a tender must be kept good; and it ceases to have that effect when the money is used by the debtor for other purposes." A plea of tender not accompanied by proft in curia is bad. *Soper v. Jones*, 56 Md. 503. A tender after default does not discharge the lien of a mortgage, although sufficient in amount. When a tender is made after the day, it should be kept good. *Crain v. McGoon* (Ill.) 18 Am. Law Reg. 178; *Merritt v. Lambert*, 7 Paige, 344; *Maynard v. Hunt*, 5 Pick. 240; *Matthews v. Lindsay*, 20 Fla. 978. A tender, to prevent the running of interest, must be continuing. Using the money after refusal by the creditor to receive it destroys this attribute of a legal tender. *Gray v. Angier*, 62 Ga. 596. In tender, where the money is brought into court, and deposited and left with the plaintiff, he is entitled to cost only. *Shiver v. Johnson*, 62 Ala. 37. A tender of payment, to be effectual, must be kept good, and be ready at any time. To get the benefit of a tender, the money must be placed in the custody of the court, so that it may be awarded to the party to whom it rightfully belongs. *Frank v. Pickens*, 69 Ala. 369. The general rule is that in a plea of tender it must be accompanied with an averment that the defendant was and still is ready to pay it, and that the money is produced in court. 2 *Greenl. Ev.* pt. 4, 589. The payment of money into court is an admission of indebtedness to the amount paid in, and, whatever may be the result of the trial, the money belongs to the plaintiff, and the party paying it in loses all right to it. 25 Am. & Eng. Enc. Law, 943. It is seldom that a case of absolute refusal after tender is made out, for it is generally attended with circumstances that explain the refusal.

Upon the weight of current authorities, and upon general reasoning and a due regard for fair dealing, we are of opinion that the defendants' plea of tender was not available, except to stop interest and save them costs after the tender, which was accorded to them at the trial. To decide otherwise might be to let the defendants keep their money, discharge the security, and the plaintiff get nothing from any quarter. This would be monstrous. The law contemplates the payment of just debts. We see no error in the judgment below. Affirmed.

CLARK, J. (dissenting). The defendants, whose land was advertised for sale under a mortgage, tendered the creditor's attorney "all that was due and all costs." The attorney refused to take this, unless the mortgagor would in addition pay his fee. This not being done, he sold the land; the plaintiff bought, and brings this action for ejectment. The question presented is whether this tender discharged the lien, not the debt; for, if it did not discharge the mortgage, a purchaser at a sale thus made under it would acquire a good title, and mortgagors in such cases would be at the mercy of the exactions of the creditor or his counsel. This not only would subject mortgagors to a liability to be thus squeezed rather than bear the annoyance and additional cost of a sale under the mortgage with payment of the commission to the trustee for selling,—of itself often a considerable burden,—but frequently the exaction would be submitted to, rather than lose the opportunity of a private sale to a party who might buy the land if disincumbered. If a tender by the mortgagor of the full amount due will not discharge the lien, but the acceptance thereof by the mortgagee is necessary to have that effect, then the mortgagee, by declining to receive the payment, can (as in this case) add to the lien, by his own wrongful act, the costs of the sale and the commission for selling, unless he is minded to waive an actual sale by receiving payment of the sum the commissions would amount to in addition to the sum justly due. As the parties can stipulate for the rate of commission for selling, this would simply repeal the usury law, and give the mortgagee a safe and sure mode of collecting his illegal rate of interest.

It is true that in the present case the purchaser at the sale was the holder of the mortgage, and, recognizing that he could not recover in ejectment under a purchase at a sale made under these circumstances, he changed front on the trial, and asked for a decree of foreclosure, instead of a judgment for possession. But the principle involved is the same, and the single question presented is whether a tender of the full amount due on the mortgage, with all costs, is a discharge of the lien. The hardship which would result from holding that it would not is such as must be apparent to a court of equity which looks to all possibilities of oppression.

There are no direct precedents in this state, but the overwhelming weight of authority elsewhere is that such tender in full would discharge the lien, leaving, of course, the debt still valid. The carefully written American & English Encyclopedia, which puts into its text the prevailing and better doctrine, citing the minority decisions in the note, thus states the generally accepted doctrine: "A tender of the full amount of a debt secured by a mortgage or pledge discharges the lien of the mortgage or pledge. According to the current of authority, the lien is extinguished, though tender is not made until after default. It is not necessary, in order to effect a release, that the tender should be kept good or that the money should be paid into court." 25 Am. & Eng. Enc. Law, 927, 929. This is sustained in the notes by citation of a great number of authorities, especially from courts of such standing as those of New York, Michigan, Wisconsin, Massachusetts, and others, citing also the very few decisions to the contrary. To the same purport is section 893, 1 Jones Mortg. (5th Ed.), which says, citing authorities: "The rule in several states is that a tender of the amount due on a mortgage after the day fixed for payment is a discharge of the lien just as much as payment is, and in the same way that a tender at common law, made upon the day named in the condition, has this effect. The lien of the mortgage is thereby ipso facto discharged, and the holder of the mortgage can only look to the personal responsibility of the person liable for the mortgage debt. To have this effect, it is not even necessary that the money should be brought into court, or that it should be shown that the tender has ever since been kept good." It is not necessary here to cite the authorities which are there quoted to sustain the text, but in *Kortright v. Cady*, 21 N. Y. 343, will be found an unusually able and full opinion showing that this was the doctrine of the common law, and that it is fully sustained by authority and reason. Not only is this doctrine supported by the weight of precedent and considerations of equity and public policy, but it is the actual contract between the parties. This, in the usual form, provides: "If the said amount shall be paid, then this mortgage shall be null and void; otherwise, it shall remain in full force and effect." When the mortgagee as in this case tenders the "full amount due with all cost," he has in equity done all that he can do, and the mortgage lien becomes null and void by the terms of the contract. By its very condition this is so. It is otherwise as to the debt itself. There is no condition as to that. That is absolutely due, and remains due till the money is accepted. The tender can only, at most, stop the running of the interest. There is no hardship in this, as there would be in continuing in force a mortgage or other lien after tender made, with the effect of hampering any other disposition of the property or

forcing the mortgagor to pay the commission and cost of a sale to prevent the property going into the hands of a purchaser who would acquire a good title at such sale if the tender does not discharge the lien. Of course, ingenious reasons can be given by counsel, based upon subtle distinctions, to the contrary, and some decisions can be found also to sustain that view; but when every cent due, principal and interest and costs, is tendered the mortgagee, he ought not in good conscience to be allowed, against the very terms of his contract, to maintain his lien, nevertheless, in full force, with the opportunity this gives of exacting (as was demanded in this case) additional sums to buy that release which he is entitled to have upon tender of the full amount due.

So much of the judgment as adjudges recovery against the debtor for the principal money, with interest and costs up to the time of the tender, should be affirmed. Neither party excepted to this. But so much of the judgment as directed a foreclosure and sale, notwithstanding the full tender made, should be reversed. By such tender the condition of the mortgage was fulfilled as fully as the mortgagor was permitted by the mortgagee to do so, and the lien was discharged by the terms of the mortgage.

MONTGOMERY, J., concurs in the dissenting opinion.

(116 N. C. 940)

LOGAN v. NORTH CAROLINA R. CO.  
(Supreme Court of North Carolina. May 17, 1895.)

LEASE OF RAILROAD—LIABILITY FOR NEGLIGENCE  
—FELLOW SERVANTS.

1. A railroad company cannot escape its responsibility for negligence by leasing its road to another company, unless its charter or a subsequent act of the legislature specially exempts it from liability in such case.

2. Where a section boss has full power to hire, command, and discharge those working under him, he is not a fellow servant.

3. In an action against one railroad company as lessor of another for injuries sustained by plaintiff, a section hand in the employ of the lessee, by reason of the negligence of the section boss of the latter, a complaint which alleges the fact of incorporation of both companies, the making of the lease, the fact and nature of plaintiff's employment, and that in removing a hand car from the track, in response to the orders of his boss, the giving of which at that time was negligence, he was struck and injured by a passing train, states a cause of action.

Appeal from superior court, Guilford county; Green, Judge.

Action by Gilbert Logan against the North Carolina Railroad Company, as lessor of the Richmond & Danville Railroad Company, for personal injury. From a judgment for defendant on demurrer, plaintiff appeals. Reversed.

Complaint: "(1) That the defendant, the North Carolina Railroad Company, is, and was at and before the time hereinafter

named, a corporation duly chartered and organized under the laws of North Carolina, and is now, and has been continuously for more than 20 years past, the sole owner of the railroad extending from Goldsboro, in this state, through Greensboro, Johnstown, High Point, to Charlotte, in this state, including the railroad bed and track laid thereon, between the points aforesaid, with all the rights, franchises, and privileges thereto belonging, with the rights to run freight and passenger cars thereon, and with the power to rent and lease the same to other companies or corporations at its pleasure, to be used for the purposes of railroading. (2) That on or about the 12th day of September, 1871, and prior to the 8th day of October, 1893, the said North Carolina Railroad leased to the Richmond and Danville Railroad Company, a corporation duly chartered and organized under the laws of the state of Virginia, for the period of 30 years then next ensuing, its said railroad from Goldsboro to Charlotte, including said roadbed and track, to be used by the said Richmond and Danville Railroad Company for the purpose of transporting passengers and freight by means of its engines and cars upon and along the said railroad track from and between these points aforesaid; and the said Richmond and Danville Railroad Company, at the time of the injury to the plaintiff, hereinafter stated, was in the possession of the said road under its said lease, and running its freight and passenger trains thereon at its pleasure, by permission of the said defendant, the North Carolina Railroad Company. (3) That the plaintiff, at and before the injuries and wrongs hereinafter mentioned, was employed by the said Richmond and Danville Railroad Company as a section hand on the section from Johnstown to Thomasville, on the line of the said defendant's railway, at and for a certain hire and reward agreed upon by the parties in that behalf. That the plaintiff was hired and employed by one Capt. Walter Suell, who was the agent and servant of the said Richmond and Danville Railroad Company, the said Suell being the section boss for said section, with full power and authority of the Richmond and Danville Railroad Company to hire and discharge hands and servants on said section, and who was the supervisor of the plaintiff in that behalf, and whose orders and commands in the lines of said service, as the agent, foreman, and boss of the said Richmond and Danville Railroad Company, the said plaintiff was lawfully bound to obey. (4) That on or about the 7th day of October, 1893, the said Suell, as such section boss, foreman, and agent of the said Richmond and Danville Railroad Company, ordered and commanded the plaintiff and others of the section hands to accompany him on a hand car over a part of the said defendant's railway, for the purpose of repairing the roadbed of the defendant at a

point near Jamestown, being on the said Suell's section; and while passing over said road on the said hand car, as aforesaid, the said Richmond and Danville Railroad Company, by its agent, servant, and section boss, said Suell, not regarding its duty in that behalf, and not exercising due care, carelessly and negligently required the plaintiff and other section hands upon said hand car to propel the same into a cut on said defendant's road, with high embankments on either side, as the train hereinafter mentioned was about due to pass that point; and that while passing through said cut as aforesaid it was observed that a train of the Richmond and Danville Railroad Company was approaching from the direction in which they were going, and within about three hundred feet from them, and thereupon the said Suell, section boss, ordered the hand car to be stopped, and ordered the plaintiff and other section hands to remove the said hand car from the track, over against the left embankment, and carelessly and negligently ordered plaintiff and other section hands to lift said car, and hold it up, while the said train was passing, which command they obeyed. That as soon as the said hand car was stopped, the plaintiff and other section hands began to remove said car to the right side of the roadbed, there being more room on said side; whereupon said Suell, section boss as aforesaid, carelessly and negligently commanded plaintiff and the other section hands to remove the same to the left side, as hereinbefore stated. The plaintiff not having time to think, as the train was approaching so rapidly, believed the command of said section boss was a proper one, and from a sense of duty obeyed it, and in obedience to the command held it up on the side of said embankment, as directed and commanded by the said Suell, and that, while holding the said hand car as aforesaid, the said train, although in full view of the hand car and plaintiff for a distance of several hundred feet, and with sufficient time to have been stopped, negligently and carelessly and at full speed ran through said cut, struck the said hand car with great force and violence, and carried it upon and against the plaintiff, whereby he was greatly hurt and injured in his body and limbs, and was confined to his house and bed several months, and has never been able since to labor or work, and still suffers from the effects of the wounds, injuries, and bruises received as aforesaid, and is permanently disabled, to his damage to the amount of five thousand dollars. Wherefore the plaintiff prays judgment in the sum of five thousand dollars, and for the costs of this action, and for such other and further relief as the court may deem proper."

Demurrer: "The defendant above named demurs to the complaint of the plaintiff herein, and says that the same doth not

state facts sufficient to constitute a cause of action, for that: (1) It is alleged that the defendant corporation had legally leased all of its property, real and personal, rights and franchises, to the Richmond and Danville Railroad Company, and that the Richmond and Danville Railroad Company was in the legal possession of the same at the time of the injury complained of, and that the North Carolina Railroad Company was not in such possession. (2) For that the negligence for which the plaintiff brings his action is directly alleged to be the negligence of the servants and employees of the Richmond and Danville Railroad Company, and not the North Carolina Railroad Company, directly or indirectly. Therefore defendant asks that the action be dismissed, and that it recover costs," etc.

The demurrer was sustained, and the plaintiff appealed.

L. M. Scott and Shaw & Scales, for appellant. F. H. Busbee and Shepherd, Manning & Foushee, for appellee.

EVERY, J. It is settled law in this state that railway companies are private, as distinguished from public corporations. *Hughes v. Commissioners*, 107 N. C. 598, 12 S. E. 465; *Durham & N. R. Co. v. North Carolina R. Co.*, 108 N. C. 304, 12 S. E. 983. But when the power of eminent domain is delegated for the purpose of enabling these companies to discharge duties for the public benefit, they occupy a different relation to the state and the people from that of the ordinary private corporations, the powers of which are given and exercised exclusively for the profit or advantage of their stockholders, and are therefore called quasi public, though they fall within the classification of private corporations. Hence it has been declared that these companies have no more authority to sell, separate from the franchise, any real estate belonging to them, and dedicated to strictly corporate purposes, than a judgment creditor of a county has to subject the land on which the public buildings of the county are located. *Gooch v. McGee*, 83 N. C. 64; *Hughes v. Commissioners*, supra; *Coe v. Railroad Co.*, 10 Ohio St. 372; *Railroad Co. v. Colwell*, 39 Pa. St. 337; *Foster v. Fowler*, 60 Pa. St. 27. Indeed, in *Gooch v. McGee*, supra, the clearest intimation is given, after approving the principle announced in the cases just cited, that, but for the fact that the statute had dispensed with the necessity for doing so, this court would have overruled *Stata v. Rives*, 5 Ired. 297. There is a consensus of legal opinion everywhere that quasi public corporations cannot sell themselves, and that their creditors cannot subject at execution sale, except as incident to the franchise, any property which is necessary for corporate purposes. If they cannot denude themselves of the means of discharging their duties to the public, can they, by a

lease of the franchise and appurtenant property, rid themselves of responsibility for the performance of the duties which are imposed as inseparable from privileges granted them by the legislature? The question of the authority of the lessor company to "farm out" its franchise and property to the lessee is no longer an open one. *State v. Richmond & D. Railroad Co.*, 72 N. C. 634. The plaintiff, after alleging that the North Carolina Railroad Company has leased its road to the Richmond & Danville Railroad Company, will not be heard to insist that we shall refuse to take notice of the adjudications of this court in reference to the validity of the lease, unless the charters should be exhibited.

The defendant's counsel contend that, the authority to lease being conceded, its exercise by necessary implication absolved the lessor company from all liability during the term for injuries caused by the negligence of the lessee in operating it. Is such an implication necessarily involved in the grant of power to lease? Or must it appear that the state has in express terms released the lessor from the duties and obligations which devolved upon it in its very creation, and which constituted the consideration for clothing it with nominal corporate powers? Upon this question the authorities are conflicting, and, as it is presented for the first time here, it is our privilege and our duty to be governed, not by the number of cases cited on the one side or the other, but rather by the soundness of the reasoning upon which they rest. Beach, in his work on Private Corporations (section 306) says: "A railway company executing a lease to another company of the exclusive use of its track and rolling stock for 99 years, which is confirmed by the legislature, will be liable for the destruction of property by fire caused by the neglect on the part of the lessee company to keep its track clear of all inflammable matter, notwithstanding the legislature may have conferred on such lessee corporation all of the powers of the lessor. There being no clause of exemption in such act of the legislature, the liability of the lessor will remain. \* \* \*

The original obligation to answer for negligence in the operation of the road can only be discharged by a legislative enactment, consenting to and authorizing the lease, with an exemption granted to the lessor company." After conferring upon a corporation the right of eminent domain, with many other special privileges, which the legislature is empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe as well as speedy transportation for themselves and their property, the state cannot be held to have abdicated its right to protect the patrons of the road, who are under its care, by the strained construction of a naked power to lease. Such a power does not carry with it the authority to the lessor to absolve itself, and transfer

its duties and obligations to another, whether able or unable to respond in damages for its wrongs or defaults. *National Bank v. Atlanta & C. A. L. R. Co.*, 25 S. C. 220; *Harmon v. Railroad Co.*, 28 S. C. 401, 5 S. E. 835; *Naglee v. Railway Co.*, 83 Va. 707, 3 S. E. 369; *Acker v. Railroad Co.*, 84 Va. 648, 5 S. E. 688; *Railroad Co. v. Mayes*, 49 Ga. 355; *Balsley v. Railroad Co.*, 119 Ill. 68, 8 N. E. 859; *Singleton v. Railroad Co.*, 21 Am. & Eng. R. Cas. 226; 1 Spel. Priv. Corp. § 135. "The lessor company," says Spelling, *supra*, "remains liable for the performance of public duties to private parties for the nondelivery of goods received by it for delivery, and for all acts done by the lessee in the operation of the road, notwithstanding the lease is authorized by the lessor's charter." As we have intimated, the decisions of the courts of different states, and sometimes those of the same states, are conflicting, and we do not pretend to be governed by the greater number, but the greater weight of the reasons given to sustain them. No matter how many leases and subleases may be made, the law attaches to the actual exercise of the privilege of carrying passengers and freight the compensatory obligation to the public to use ordinary care for the safety both of persons and property so transported. Spel. Priv. Corp. § 134. On the other hand, the carrier, who simply substitutes, with the consent of the state, another in his place, cannot establish his own right of exemption from responsibility for the wrongs of the substitute, unless he can show not only explicit authority to lease the property, but to rid himself of such responsibility. *Singleton v. Railroad Co.*, *supra*. Where the legislature gives its express sanction to the release of the lessor company from liability, there can be no question that it is exempt. *Braslin v. Railroad Co.*, 145 Mass. 64, 13 N. E. 65.

Of the two or three reasons assigned for holding that the lessor company is liable for the torts of a lessee, where it has legislative authority to demise its road, but there is no express provision for its own exemption, we prefer to rest our ruling upon the ground that the original grant of extraordinary privileges still carries with it a correlative obligation to perform the duties which were in contemplation of the state and the corporation when the charter was enacted. The legislature is warranted in granting such exclusive privileges only in consideration of services to be rendered to the public. Const. N. C. art. 1, § 7. While the compensatory obligation to use ordinary care in providing for the safety of persons and property committed to its care as a carrier inheres in and attaches to the exercise of the corporate rights by the lessee, we think that, without the express sanction of the legislature, the lessor is not relieved by any implication arising out of the general power to lease, but still remains subject to its original liability. *Railroad Co. v. Peyton*, 106 Ill. 534. When the state exercises its

supreme and exclusive power in delegating to a corporation the right upon the payment of just compensation to take it for public purposes, the company holds its interest in the land solely for corporate purposes, and subject to the right of the sovereign, if it fail to discharge its public functions, to institute proper proceedings, and have it dissolved. In case of dissolution, it seems that the property and franchise may be sold for the benefit of creditors, and devoted to the same, or diverted to some other public purpose, and that there is a bare possibility of reverter. *Gooch v. McGee*, supra; *Bass v. Water-Power Co.*, 111 N. C. 446, 16 S. E. 402; *Von Glahn v. De Rosset*, 81 N. C. 467. Where the interest of the lessor company in the land condemned is limited to the right to use for corporate purposes, and its franchise, which frequently expires in a term of years, is subject to forfeiture, in case of misuser or nonuser of its powers, we fail to trace any such analogy between it and its lessee as exists between a landlord, who is owner of the fee, and his lessee for years. Yet, upon this supposed analogy, many of the courts have held that the liability of the railway company that demises its road, like that of a landlord, extends no further than the obligation to use ordinary care in keeping the track, roadbed, right of way, station houses, and other permanent structures in such condition that the safety of the public will not be imperiled by them, while the lessee is solely answerable for injuries caused by negligence in running trains, or the use of defective machinery. A part of the original obligation of the lessor company to the public was to furnish such trains and other appliances as would be necessary to provide for the safety of the passengers as well as the employes who should travel on its cars, and we see no reason why that duty should not exist, like that to look after the roadbed, till the legislature, for the sovereign, declares the lessor absolved from it.

Resting our ruling upon the broader ground of the obligation to the public, which is inseparable from the grant and the exercise of the corporate privileges, except by the express consent of the legislature, we see no force in the view of the subject which seeks to limit the scope of the lessor's duty to such as pertain to land. Under our statute, which this court, in *Gooch v. McGee*, supra, say is in affirmance of the common-law principle, the land held for corporate purposes is an incident to the franchise, and held only for the purpose of enjoying the privileges granted and performing the duties imposed. It seems but a narrow view of the subject to say that the duties attach to the limited interest in the land, and not to the franchise, to which the roadbed is a mere incident. There are, however, still other courts, in which it is held that, while the liability of the lessor arises out of the original duty imposed by the charter, and that the power to lease raises no im-

plication that it can rid itself of its responsibility for injury to others, whether due to the bad condition of the roadbed, right of way, or other permanent structures, or to the careless running of trains or defective machinery, the lessees are nevertheless solely answerable for injuries to their own employes and servants. Looking to the fundamental principle upon which we rely to sustain our position, we see no sufficient reason for drawing any such line of distinction. While we know that there are courts which maintain and others that deny the correctness of this doctrine, yet, if we apply the test—which we hold to be the true one—that the liability of the lessor grows out of the duty imposed with the privileges in the first instance, the same reason is found to exist for holding it liable to servants of the lessee for injuries sustained by them as for those inflicted on passengers. *Spel. Priv. Corp.* § 135. A part of the original duty imposed by the charter was to compensate servants in damages for any injury they might sustain, except such as should be due to the negligence of their fellow servants. The employe is deemed in law to contract ordinarily to incur such risks as arise from the carelessness of the other servants of the company; but where the lessor company would be liable, if it had remained in charge of the road, to a person acting as its own servant, we see no reason why it should not be answerable to him when employed by the lessee. Its implied obligation, in the first instance,—to come back to the touchstone,—was to compensate its own servants for injuries due to any cause other than the carelessness of their fellows, and the same rule must apply in its relation with the servants of the lessee. If the lessee would be liable if sued jointly with the lessor company, then the demurrer cannot be sustained.

That brings us to the question whether the section boss, Snell, who, as alleged in the complaint, "had full power and authority from the lessee company to hire and discharge hands, \* \* \* and whose orders and commands the plaintiff was bound to obey," is to be deemed a fellow, when, by his failure to stop the hand car in time, and by his carelessness in directing the manner of its removal from the track in front of an approaching train, he caused the plaintiff to be injured. The demurrer admits the truth of the allegations of the complaint, and we think the facts bring this case within the principle announced in *Patton v. Railroad Co.*, 96 N. C. 455, 1 S. E. 863. In that case the section master, who was empowered, just as in this, to command, discharge, and employ laborers, ordered the laborer to jump from the moving train. The order to the plaintiff was to jump off the hand car in a cut, assist in removing it from the track, and to attempt to hold it against the bank, and out of the way of a passing train. Being unable to keep it out of the way of the train, the car was

stricken and thrown violently against him, so that he sustained serious injury. Under the ruling in Patton's Case, there would be no question about the liability of the lessee company, if it had been sued; and holding, as we do, that the lessor is liable to the same extent as the lessee company, we conclude that there was error in sustaining the demurrer. Error.

#### In re TERMS OF JUDGES.

(Supreme Court of North Carolina. May 11, 1894.)

#### JUDGES—ELECTION TO VACANCIES—TERMS.

Const. art. 4, § 25, provides that vacancies in the offices of justices of the supreme and superior courts shall be filled by the appointment by the governor, and that the appointees shall hold office until the next regular election of members of the general assembly, when elections shall be held to fill such offices. Section 21 provides how the justices of such courts shall be elected, and that they shall hold office for eight years. *Held*, that under the construction placed on section 25 by the legislature, and the acquiescence therein by the people in filling vacancies, and the constitutional provisions evidencing the intention that only a portion of the justices shall vacate their offices at the same time, a justice elected in case of a vacancy holds office only during the unexpired term of his predecessor.

State of North Carolina, Executive Department.

March 29, 1894.

To the Honorable Chief Justice and Associate Justices of the Supreme Court, Raleigh, N. C.

Sirs: There exists a difference of opinion in the minds of the citizens of the state in regard to the term of office of a judge elected by virtue of the provisions of section 25, art. 4, of the constitution. The attorney general, in an opinion filed at my request in this office, has advised me that every judge elected under that section is elected for a full term of eight years. A considerable number of able members of the legal profession differ from him in his construction, and contend that a judge so elected is only elected for the unexpired term of his predecessor in office. It is all important that the question should be determined by the highest court in the state before the election of judges shall take place in 1894. The importance of having this matter determined will be apparent from section 2689 of the Code, which is as follows: "When the election shall be finished, the registrars and judges of election, in the presence of such of the electors as may choose to attend, shall open the boxes and count the ballots, reading aloud the names of the persons who shall appear on each ticket; and if there shall be two or more tickets rolled up together, or any ticket shall contain the names of more persons than such elector has a right to vote for, or shall have a device upon it, in either of these cases such tickets shall not be numbered in taking the ballots, but shall

be void, and the said counting of votes shall be continued without adjournment until completed and the result thereof declared." I am informed by the attorney general that this section has been construed by the supreme court in the case of Deloatch v. Rogers, 86 N. C. 357, to mean that, if a ticket contains the names of more persons than the elector has a right to vote for, "it is not only inoperative as to the person improperly voted for, but as to all others for whom the elector may vote. The entire ballot for all is vitiated, and must be rejected from the count." This section has not been modified or repealed, and is a part of our present election law. By virtue of its provisions the whole judicial ticket may be void if it should contain more names than the elector has a right to vote for. It will contain more names than the elector has a right to vote for if upon it is printed or written the names of a candidate for the office of judge when the term of such office will not have expired by January 1, 1895. It is manifest that this result will occur if the attorney general's opinion contains a correct construction of section 25, art. 4, of the constitution, and the electors of the state vote for judges upon a ticket printed or written in accordance with the opposite construction. In view of the importance of determining the doubt prevailing upon the subject, I respectfully request you to indicate what is your construction of the constitutional provisions relating thereto.

I have the honor to be, very respectfully, yours,

[Signed] ELIAS CARR, Governor.

Letter of Chief Justice Shepherd and Associate Justices Avery and Burwell.

Raleigh, N. C., April 3, 1894.

To the Governor:

Your communication of the 29th ultimo, requesting an opinion respecting the term of office of the judges elected under the provisions of section 25, art. 4, of the constitution, has been received and duly considered by us. We beg to assure your excellency that we appreciate the importance of the question you have submitted for our consideration, and that we would at once give to it the thorough investigation which its solution would require if we could feel that, in expressing an opinion upon the subject, we were not overstepping the bounds which a proper sense of propriety prescribes for our action. As you are aware, Justices Clark and MacRae, of this court, and Judges Armfield, Bynum, Shuford, Whitaker, and Boykin, of the superior court, have rights of property in offices which would be affected by a judicial determination of the question which you ask us to answer; and we find our perplexity increased by the fact that these gentlemen do not join your excellency in requesting us to examine into the matter and express an opinion thereon. If we could

be assured that such is their desire, we should feel less embarrassed in coming to a conclusion as to what action we should take in this emergency. We desire to state that Justices Clark and MacRae have deemed it proper that they should abstain from taking any part whatever in this correspondence.

We are yours, very respectfully,

[Signed] JAS. E. SHEPHERD,  
Chief Justice.

[Signed] A. C. AVERY,  
Associate Justice.

[Signed] ARMISTEAD BURWELL,  
Associate Justice.

The associate justices of the supreme court and the judges of the superior court whose tenure of office was affected by the question involved joined in a request that the matter should be left to the decision of Chief Justice Shepherd and Associate Justices Avery and Burwell, and the following reply to the governor contains the opinion of the judges:

Raleigh, N. C., May 11, 1894.

Hon. Elias Carr, Governor of North Carolina.

Dear Sir: The communication from our associates and the judges of the superior court which has been forwarded by your excellency to us relieves us of embarrassment in complying with your request, since it is in the nature of a submission of the controversy in reference to their terms of office without a formal action.

The doctrine of stare decisis applies with equal force to constructions placed upon constitutions and upon statutes. Where courts of last resort have placed an interpretation upon either, which adjusts and settles the rights of citizens to offices or any other property, nothing short of the most palpable proof that such precedents are productive of wrong and injustice will warrant a material modification of the principle so settled. Courts are extremely reluctant likewise to disturb or modify any construction that has been given by the legislature to statutes or provisions of constitutions since their enactment. Where business relations have been heretofore adjusted or rights to offices have been recognized as settled by the legislative sanction so given to a particular construction of doubtful language, courts are even more averse to disturb or overrule a principle which has been accepted and acted upon by the public, because it had the approval of the law-makers whose power to enact or modify statutes is limited only by the constitution, and whose interpretation of the organic law is entitled to such profound respect that it will be disturbed by the courts only on the weightiest considerations. The importance to be attached to the opinion of this co-ordinate department of the government is greatly enhanced by the fact that the controverted question which we are called upon to decide, though not one in which we have any direct

interest, may, nevertheless, naturally suggest to the public the possibility that it relates so closely to our own positions as to make it difficult to eliminate personal consequences from its consideration. It is of the first importance, not only that justice should be fairly and properly administered, but that its administration should command the confidence of every honest, enlightened, and law-abiding citizen.

We are confronted at the threshold of the investigation by the fact that the legal adviser of your excellency has, at your request, submitted a well-considered and strong argument upon the one side, while some others of the ablest and most learned members of the legal profession have favored us with powerful presentations of the opposing view. When the scales are so nearly evenly balanced, we deem it our duty to settle the preponderance by casting the legislative view, which is of peculiar weight in this case, into the scale where it belongs. Another consideration which influences us to act upon this view is the fact that, after applying all of the rules devised to aid us in ascertaining the meaning of a constitutional provision, it must be admitted that the science of law is less exact in its application to construction to be placed upon words than to any other subject, since such is the imperfection of human language that lawmakers often fail to express their meaning in unequivocal terms, and the interpretation of doubtful expressions of their purpose almost always leads to conflict even among the most learned jurists.

The act of 1876-77 (Code, § 2736) provides how any vacancy either in the offices of justices of the supreme court or judges of the superior court, among others, shall be filled, when it occurs more than 30 days before a general election. If it did not appear *ex vi termini* that the word "vacancy" was used in the sense of an unexpired term, the repetition of the same word in the very next section, which preceded the provision in reference to the judges in the original act (section 42, c. 275, Laws 1876-77), and followed when both were re-enacted in the Code (section 2737), tends to show that it was the legislative purpose to fill the vacant place in both instances for the unexpired term. A reference to the history of our own courts will show that this was the view of the law which was put into practical operation when vacancies occurred after the passage of the act of 1876-77, both by the legislature and the executive and judicial officers of the state. Justice Dillard was elected in August, 1878, a justice of the supreme court for a term of eight years, the full term of his predecessor having expired. Justice Ruffin was appointed on the 11th February, 1881, to fill the vacancy caused by his resignation; and the legislature, during the same year (chapter 327, § 1), provided in express terms for the election of a



justice to fill the vacancy. After the election of Ruffin, in 1882, he, in turn, resigned; and Justice Merrimon was appointed on the 29th of September, 1883, to fill the consequent vacancy. In 1884, Justice Merrimon was elected to fill such vacancy, but, instead of holding for a term of eight years, was re-elected for a full term in 1886. Judge McKoy was elected a judge of the superior court in 1882 for a full term of eight years, but he died in the fall of 1885, and Judge Boykin was appointed to fill the vacancy. Boykin was elected in 1886 to fill the unexpired term of Judge McKoy, which came to an end in 1890; whereupon he was again elected by the people at the very time when the term of his predecessor would have closed but for his death. In the same way Judge Gilmer, of the superior court, was appointed in 1879 to fill the unexpired term of Judge Kerr, which began in 1874; was elected in 1880, and again for a full term in 1882, eight years after the election of his predecessor. It thus appears that the general assembly gave expression to its construction of the constitutional amendment in 1877, just after it took effect (on the 1st of January of that year); and both justices of the supreme court and judges of the superior court have been acting, when the question has arisen, upon the idea that the legislative view was correct, while the executive officers, whose duty it has been to send out election blanks and assist in ascertaining the result, and the judges of election and canvassers in the county, have never failed to perform their allotted parts in supervising the re-election of an incumbent who had been first elected before the expiration of the term of his predecessor. The more recent cases in which a specific term has been mentioned in the commissions of judicial officers have never been called to the attention of the public till now, nor have they been properly considered for executive construction, since we cannot conceive how the tenure which depends upon the meaning of the constitution can be affected one way or the other by the action of your excellency or one of your predecessors in unnecessarily incorporating the length of a term in a commission.

While we rest our opinion upon the duty and propriety of adhering to this settled legislative construction, acquiesced in until a very recent period by the people acting in public and private capacities, we deem it not improper to call attention to other clauses in the constitution and other legislation indirectly bearing upon and harmonizing with our views. In this connection, as amended in 1875, in reference to the length of the terms of the judicial officers of either court, is found section 21, art. 4, which provides that "justices of the supreme court shall be elected by the qualified voters of the state, as is provided for the election of members of the general assembly. They shall hold their offices for eight

years. The judges of the superior courts, elected at the first election under this amendment, shall be elected in like manner as is provided for justices of the supreme court, and shall hold their offices for eight years." Construed literally, and without transposition, this section would fix the terms of only those judges of the superior court first elected thereafter at eight years, and provide for their election by the people of the whole state instead of the voters of the district, leaving us to look elsewhere in the instrument for any provision which fixes the terms of those who should be chosen in after years. The language of section 21, art. 4, of the constitution of 1868 (Batt. Revisal, p. 48) was very greatly altered as to the tenure of office of superior court judges. That section provided that "the judges of the superior courts [all, not simply those chosen at the next election] shall be elected in like manner \* \* \* and shall hold their offices for eight years." To say the least, it was very remarkable if this change of phraseology was accidental. If we interpret the amended section according to the ordinary rules of construction, giving to the words, as they are arranged, their natural and obvious meaning, we would be constrained to look elsewhere for some necessary implication which fixed the terms of all the judges chosen after the election in August, 1868, other than those elected in 1878. Section 33, art. 4, of the amended constitution provides that the alterations then made (in 1875) "shall not have the effect to vacate any office or term of office now existing." Construing that with other sections of the same article, such as section 10, which required that the state should be divided into nine judicial districts, "for each of which a judge should be chosen," and sections 11, 16, 22, and 29, we may fairly infer that existing terms of office were not to be disturbed. The status of such judges was at that time briefly as follows: Six judges had been elected in 1874, under the constitution of 1868, which fixed their terms of office at eight years, extending till 1882, or till the qualification of their successors, January 1, 1883; while section 33, art. 4, of the amended constitution, provided that no such term should be vacated. Though the amendment adopted in 1875 had reduced the aggregate number of superior court judges from twelve to nine, by dispensing with three of the second class elected under the constitution of 1868 for long terms, there was no express provision fixing the terms of those elected in 1874; and the inference arose that the terms were intended to be fixed as previously provided, thus taking us back by way of reference to ascertain the length of time to the older provisions of the organic law, which prescribed the tenure in connection with the provision for classification as a part of a system. It will be remembered that lots were cast in

1868, as provided by the convention, to determine which of the judges of the superior courts then elected should belong to the class whose terms would expire in 1874, and which to the class whose terms would expire in 1878.

There are many circumstances that point to the legislative construction that these two classes of judges were to be continued, and the terms fixed in that way at eight years, just as it had previously been more plainly provided in the constitution of 1868. When the general assembly determined (Laws 1885, c. 60) to again increase the number to 12, it was strange, if an undesigned coincidence, that the terms of the new judges of the Third, Fourth, and Eighth districts were so arranged as to begin contemporaneously with those elected for the old Seventh, Eighth, and Ninth, or the new Ninth, Tenth, and Twelfth, and that thus the whole 12 were again divided into two classes, so that one-half of the whole number would necessarily stand for election every four years, if all should serve for full terms. If there was no general legislative idea that, by a fair implication from all of the provisions of the organic law, the two classes were to be preserved, and that laws were to be enacted in view of that governing principle, it is not only remarkable that the act of 1885 should have operated as it did, but more so that the constitutional amendment should add two justices to the supreme court whose term would begin on January 1, 1889, two years after the election of the chief justice and the other two associates; so that if the terms, whether filled by one or two incumbents, should be fixed at eight years, we would have two of the officers of that tribunal whose term would expire on what is known as the "presidential years," and three on the "off years." These coincidences would seem to be explained by attributing to the legislature the purpose to interpret the amended constitution, like that of 1868, as providing for two classes of superior court judges, and to extend the classification to the supreme court, and not to leave all liable to be removed under the influence of sudden excitement. It should be noted, too, that the act of 1885 declared that the state should be divided into 12 judicial districts, for each of which a judge and solicitor should be chosen, "in the manner now prescribed by law." What law? The act of 1876-77, which had already been re-enacted in the Code, and was now again recognized by the legislature. These considerations lend additional strength, if, indeed, any were necessary, to our conclusion that it was the plain purpose of the legislature to construe section 25 of article 4 of the constitution so as to insure the election of justices and judges of the supreme and superior courts for full terms only at regularly recurring intervals of eight years. Such being the view we have adopted after ma-

ture deliberation, we deem it unnecessary to enter into an elaborate discussion of the meaning of the language used in section 25, art. 4, of the constitution. While we are inclined, according to our interpretation of the terms employed in that section, to so construe their actual meaning as to harmonize with our view of the legislative construction, we prefer to concede that the very able argument of the attorney general has raised a doubt in our minds as to the meaning of the words, considered from the action of other branches of the government. Conceding, then, that the particular language leaves the intention of the framers of the constitution uncertain, we prefer to rest our opinion upon the idea that our doubts should be resolved in favor of the legislative construction, with the universal acquiescence in it by the people, as also upon the ground that in the effort to fix the terms we are compelled to consider, as in *pari materia*, other provisions of the constitution, and bring them into accord with the section relating more specifically to the question before us.

It is not improper to add that it is considered a safe and sound rule of construction that, when "the duration of a term of office which is filled by popular election is in doubt or uncertainty, the interpretation is to be followed which limits it to the shortest time, and returns to the people at the earliest period the power and authority to refill it."

[Signed] JAS. E. SHEPHERD,  
Chief Justice.

[Signed] A. C. AVERY,  
Associate Justice.

[Signed] ARMISTEAD BURWELL,  
Associate Justice.

(116 N. C. 429)

ELIZABETHTON SHOE CO. v. HUGHES.  
(Supreme Court of North Carolina. May 14, 1895.)

SUIT AGAINST SHERIFF—INSOLVENT ESTATE—PROCEEDS OF SALE.

1. Plaintiff alleged that, as a creditor of a firm which had made an assignment, he had begun an action by attachment to have the assignment set aside for fraud; that the defendant, as sheriff, levied the attachment; that a compromise was effected, whereby the goods were to remain in defendant's possession, subject to the attachment lien, and were to be sold by the assignee, as agent for defendant, and the proceeds applied on plaintiff's claim; that defendant sold goods, and paid plaintiff a certain amount, but refused to turn over other proceeds of sales; and that he had transferred the same, with the stock of goods, to the assignor firm. *Held*, that neither the assignor firm nor the assignee were necessary parties, they being mere agents of defendant.

2. The fact that the attachment suit was still pending was no defense, as defendant was not a party thereto.

3. It was not necessary for plaintiff to allege that E., K. & B. were not entitled to the property as their exemption. That fact was matter of defense.

4. It was not necessary to allege that defend-

ant was a party to the compromise agreement, where he has accepted the trust by taking the property into his possession.

5. The facts alleged state a cause of action against defendant.

Appeal from superior court, Orange county; Hoke, Judge.

Action by Elizabethton Shoe Company against John K. Hughes for damages. From a judgment overruling his demurrer to the complaint, defendant appeals. Affirmed.

J. W. Graham and P. C. Graham, for appellant. Shepherd, Manning & Foushee and C. D. Turner, for appellee.

FUCHES, J. This action comes before us upon complaint and demurrer. It appears that certain parties doing business under the firm name of Ellen, Koplon & Bro., in the month of June, 1893, made a deed of assignment for the benefit of their creditors, in which they preferred Lena Ellen, wife of Isaac Ellen (one of the partners), to a large amount; that some time thereafter plaintiffs commenced an action to set aside the deed of assignment for fraud, in which they had the goods named in said deed of assignment attached, and the members of the firm Ellen, Koplon & Bro. arrested; that defendant, being the sheriff of Orange county, acted as the officer in making these arrests and in serving said attachments. Under this state of affairs, the parties, by their attorneys, came to terms of compromise, in which it was agreed that the defendant should be discharged from custody, and that no sale should be made under said attachments, and that plaintiffs would accept 33½ cents on the dollar in satisfaction of their debts, which they say, thus reduced, amounted to \$1,051.60. And in consideration of these concessions on the part of plaintiffs it was agreed on the part of defendants (Ellen, Koplon & Bro.) that the lien of the attachment should continue, and that T. A. Faucett, the assignee named in the deed of assignment, should continue to sell said goods as the agent of the defendant Hughes, accounting to Hughes for the goods sold, and the defendant was to apply the money thus raised to the payment of plaintiffs' claims, as reduced by the terms of said compromise. That under this arrangement, defendants (the firm of Ellen, Koplon & Bro.), Faucett, and the defendant sold goods, and defendant paid plaintiffs \$200, reducing their claims to the sum of \$851.60. Plaintiffs further allege that under this arrangement the goods belonging to the firm of Ellen, Koplon & Bro. to the amount of \$3,158.08 went into the possession of the defendant, and, in addition to the goods above mentioned, on January 1, 1894, the firm of Ellen, Koplon & Bro. moved goods they had in Rockingham to Hillsboro to the amount of \$1,500, and turned them over to the defendant Hughes, to be sold by him, and applied to the payment of plaintiffs' claim; and that defendant accepted them for that purpose, and put them in the store with the

other goods. Plaintiffs further allege that on the 27th of January, 1894, all these goods were burned and destroyed, except \$1,100 worth. And they further allege that, besides the \$200 which defendant paid to them, under the terms of the compromise, he collected \$700, which should be paid to them; but that he refuses to pay this to them, or to sell the \$1,100 worth of goods left from the fire, and pay their debt out of this; and, instead of doing so, he has turned them over to the members of the firm of Ellen, Koplon & Bro.; wherefore they ask for judgment, etc. To this complaint the defendant demurs—First. Upon the ground that there is a defect in the parties,—that the members of the firm of Ellen, Koplon & Bro. and T. A. Faucett should have been made parties. Second. That the actions referred to in said agreement (Exhibit B) are still pending. Third. That the complaint does not state facts sufficient to constitute a cause of action. (1) That it was not shown that it was the duty of defendant to insure the goods; (2) that complaint does not show that the members of the firm of Ellen, Koplon & Bro. were not entitled to the \$1,100 as their exemptions; (3) that defendant was not a party to the agreement (the compromise and assignment above mentioned). We do not think the demurrer can be sustained. We do not think the members of the firm of Ellen, Koplon & Bro. or Faucett are necessary parties. The goods were not in their hands, except as the agents and employes of defendant. He was to control the matter, to receive the money, and to pay it to plaintiffs. Indeed, it seems from the complaint that the goods were in the possession of the defendant. And in considering this appeal we are bound by the allegations of the complaint, whether they are in fact true or not, as the legal effect of the defendant's demurrer is to admit them to be true. That it cannot be sustained upon the second ground assigned—First. For the reason that defendant is not a party to the "actions referred to" in the complaint. *Woody v. Jordan*, 69 N. C. 189. Second. That this defense could only be taken advantage of by a plea in abatement, and not by demurrer. *Woody v. Jordan*, *supra*. That it cannot be sustained upon the third ground, as it seems clear to us that plaintiffs have set up a cause of action. They allege that the firm of Ellen, Koplon & Bro. owed them \$1,051.60; that this firm put \$4,500 worth of property in the hands of the defendant to pay them; that defendant accepted this property under this trust, and paid them \$200, reducing their debt to \$851.60; and that, although there has been a loss by fire, about which there might be some question as to defendant's liability, besides this he has \$700 in money collected and \$1,100 worth of the goods saved from the fire. In other words, he has \$1,800 or \$2,000, out of which he should pay plaintiffs the \$851.60 due them. But it is said in the demurrer that plaintiffs do not allege that the members of

the firm of Ellen, Koplon & Bro. are not entitled to this fund as their personal property exemption, and plaintiffs are not entitled to recover on that account. We do not think it was necessary that plaintiffs should allege this in their complaint, and whatever might be the result if defendant had answered and set up this defense is not now before us for our determination. But we do say that it is not such a defense as a trustee can make by way of a demurrer against an action by his cestui que trust for withholding funds in his hands as such trustee; that it was not necessary that defendant should have signed the instrument of July, 1893, making him the trustee, and placing the goods in his hands. His signature at most would have only amounted to an acceptance of the trust; and this was afterwards signified by his accepting the trust, and acting under it, as he did. We leave out of consideration the matter of insurance. The complaint is good without. There is no error in the judgment appealed from. Affirmed.

(116 N. C. 503)

**SUTTON v. PHILLIPS (three cases).**

(Supreme Court of North Carolina. April 23, 1895.)

**FINES AND PENALTIES—PROCEEDS—SELLING ARTICLES BY UNLAWFUL MEASURE.**

1. Code 1883, §§ 3841, 3842, which provides that private parties may recover penalties of any person selling and delivering provisions by unauthorized weights and measures, is not in conflict with Const. 1875, art. 9, § 5, which provides that the net proceeds of all penalties and forfeitures shall go to the school fund. Faircloth, C. J., and Avery, J., dissenting.

2. In an action to recover under Code 1883, §§ 3841, 3842, providing for a penalty for selling by unauthorized weights and measures, and for selling by other measure than the standard, a finding for plaintiff on the second ground is error where the article sold was meat.

3. Under chapter 100, Acts 1893, there is a violation of the statute only when the defendant has used weights and measures after refusing to permit the standard keeper, who has visited him for that purpose, to seal or stamp them.

Appeals from superior court, Lenoir county; Boykin, Judge.

Three actions by James O. Sutton against John R. Phillips to recover two penalties for selling by weights and measures not tried by the standard, and for selling meat to plaintiff by less measure than the standard. Defendant appeals. Modified.

R. O. Burton, for appellant. N. J. Rouse, for appellee.

CLARK, J. While the courts have the power and it is their duty, in proper cases, to declare an act of the legislature unconstitutional, it is a well-recognized principle that the courts will not declare that this co-ordinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people. For several reasons, it is

not clear that the act in question, which was not only re-enacted since the constitution of 1875 by the Code of 1883 (see sections 3841, 3842), but which has been recognized as valid and amended three times by the general assembly, first in 1889 (chapter 404), and again by the general assembly of 1893 (chapters 100, 207), is unconstitutional and invalid. Among these reasons are:

1. This court has heretofore recognized that acts like this, giving the penalty prescribed for a violation of the statute to any one (as to some designated person) who shall sue for the same, are constitutional. Ashe, J., for the court, in *Katzenstein v. Railroad Co.*, 84 N. C. 638, expressly passes upon the point, and holds that such acts are not in contravention of article 9, § 5, of the constitution. In *Hodge v. Railroad*, 108 N. C. 24, 12 S. E. 1041. Merrimon, C. J., elucidates the point; and in his concurring opinion, on pages 30, 31, 32, 108 N. C., and page 104, 12 S. E., gives strong reasons for adhering to the former opinion of the court as rendered by Ashe, J. The constitution of Missouri (article 11, § 8) contains a clause almost identical with that of this state; and the supreme court of that state has uniformly held that it was not an inhibition upon the legislature to give the penalties to any person whom the act imposing the penalties might provide, and that the object of the constitutional provision was not to prohibit qui tam actions in future, but simply to provide that all penalties inuring to the state should go to the school fund. In view of these authorities in our state and elsewhere upholding the constitutionality of such acts which had been customarily passed, time out of mind, it cannot be said that this act is plainly and clearly unconstitutional. The doubt, if any, must be resolved in favor of the general assembly. In addition to these cases, directly in point, acts of the legislature giving the penalty, in whole or in part, to the person suing for the same, have been recognized as valid in numerous cases since the amended constitution of 1875; thus, in effect, approving the direct decisions: *Branch v. Railroad*, 77 N. C. 347; *Keeter v. Railroad*, 86 N. C. 346; *Whitehead v. Railroad*, 87 N. C. 255; *Branch v. Railroad*, 88 N. C. 570; *Middleton v. Railroad*, 95 N. C. 167; *McGowan v. Railroad*, Id. 417; *McGwigan v. Railroad*, Id. 428; *Hines v. Railroad Co.*, Id. 434; *Williams v. Hodges*, 101 N. C. 300, 7 S. E. 786; *Cole v. Laws*, 104 N. C. 651, 10 S. E. 172; and there are more than twice as many more. All of these were erroneously decided, and must be overruled, if the plaintiffs in them were now, by a new construction of the constitution, held not to have had a cause of action,—a defect which must have been noticed in this court, without exception below, if such defect had existed. Indeed, the case of *Katzenstein v. Railroad*, in which this court expressly held that the amendment to the constitution was not a restriction upon the legislature, prohibiting qui tam, or popular actions, as they are sometimes termed, has been cited as authority in no less than 12 cases.

The judicial construction of this provision has been uniform and frequently repeated. The legislative construction has been no less so. In the reply of the court to the governor as to the "Judicial Term of Office," 114 N. C. 923, 21 S. E. 963, on page 927, 114 N. C., and page 963, 21 S. E., the court says: "We rest our opinion of the construction of the constitutional provision upon the duty and propriety of adhering to the settled legislative construction, acquiesced in until a very recent period by the people acting in public and private capacities." By the same reasoning, the construction of this constitutional provision has had 10 times over "a settled legislative construction," which should be adhered to. Scarcely a single legislature since the convention of 1875 has passed which did not recognize the power and duty of the legislature in this particular by enacting or amending statutes conferring the whole or a part of penalties upon persons suing for the same. This has been acted on without question in that department of the government. So universally has it been "acquiesced in by the people in public and private capacities" that only once is it known to have been questioned by the pleadings in all the actions brought to collect penalties (*Katzenstein v. Railroad*, *supra*); and then, by an exceptionally able court, —Smith, Ashe, and Ruffin,—the legislative construction was unanimously sustained, and has been repeatedly and uniformly recognized since as the law in numerous cases, many of them above cited. It has thus 20 years' uniform construction by both the legislative and judicial departments, and should be deemed settled, if anything can be.

2. From time immemorial, in the English law, it has been found that *qui tam* actions —actions in which the penalty goes in whole or in part to the person suing for the same —were an efficient, and, indeed, sometimes an indispensable, means of enforcing the law in many cases, as for the breach or neglect of duty by officers and corporations; and parliament in England, and legislative bodies in this country, have freely enacted statutes for the enforcement of laws by such actions. There has been no agitation for the repeal of such statutes; and, if there had been a radical departure intended by the amendment of 1875 by which the general assembly would have been deprived of its power to authorize *qui tam* actions, such inhibition would have been clear and unmistakable, and would have been placed in the chapter relating to the legislative department, among the restrictions upon the exercise of legislative power. Const. art. 2, §§ 10, 11, 12, 14. Instead of that, this provision is found in article 9, upon education, and in the section transferring to the school fund certain sources of revenue, and among others is incidentally mentioned "also the clear proceeds of all forfeitures and penalties." It would be a strange construction that this incidental reference in the article on education was a reversal of the policy of

hundreds of years, and a clear, distinct inhibition upon the legislature against permitting *qui tam* actions any longer, and an enactment that hereafter the state alone should recover penalties in civil actions. On the contrary, as already held by our court, and also by the Missouri court, upon an almost identical constitutional provision, the purport and true meaning of this clause of the constitution is not to vest the sole right to collect penalties in the state, but to vest in the school fund the clear proceeds of all penalties which by authority of law should be collected for the benefit of the state. It is best to stand *super vias antiquas*.

3. If the constitutional provision were clear that the general assembly was prohibited from any longer permitting *qui tam* actions or the collection of penalties by any one except the state, public policy could not be considered. But, when such restriction is not clearly shown, considerations of public policy may be invoked, on the ground that there was no great recognized evil or public agitation which called for so radical a departure as depriving the lawmaking power of its immemorial discretion to authorize the recovery of penalties by private persons, as it has done in section 3842 of the Code, or by official persons, as in section 3841 of the Code, as well as in divers and sundry other statutes. Not only would this restriction upon the legislature virtually repeal the penalties prescribed for breaches of duty in these and similar cases, but it would virtually repeal all statutes providing penalties for delay in shipping freight, and other penalties for breach of duty by corporations, since penalties will be rarely sued for if there is no benefit to accrue to the party bringing the action. It would, indeed, be a virtual repeal of this long recognized and efficient mode of enforcing the law, and would leave its enforcement in effect solely to the criminal side of the docket, with its official prosecutors, and the benefit to the defendant of the preponderance of challenges, the protection of the doctrine of reasonable doubt, and the other advantages with which the law favors a defendant on trial for crime. Such change, not being called for by public policy, and such restriction upon the legislature being against the experience and the public policy of centuries, if made, should appear clearly and unmistakably, and not by inference from a mere provision assigning sundry funds for the support of education. The act of 1889 (chapter 199, § 36) requires solicitors to prosecute and collect penalties and forfeitures entered in their courts, upon judgments rendered. It does not extend to those cases where no judgment is rendered, but an action is simply authorized to be brought for a penalty. Code, § 3842, defines (as does section 1090) two distinct violations of the law,—the first for buying, selling, or bartering by any weight or measure which has not been stamped or sealed as required by

section 3841; and, secondly, for selling and delivering by less measure than the standard. For each offense a penalty of \$40 is prescribed, and the same act may be a violation of both provisions or of one only. A party could sell by unstamped measure or weights, and violate the first clause, and yet not sell by measure less than the standard, in which case he would not be liable to the second penalty. In the present case the defendant is not liable to the second penalty, but on a different ground, which is that the second penalty is restricted to articles sold and delivered by measure less than the standard (the word "weight," which appears in the first clause, being omitted); and the defendant is not liable to the second penalty, because meat is an article which is not sold by measure. An English case, under a similar statute, and exactly in point, is *Hughes v. Humphreys*, 3 El. & Bl. 954. If it be objected that the jury has so found, inspection of the second issue shows that it does not come up to the statute, which imposes the penalty on any one who shall "sell and deliver"; and the issue and response thereto do not find that there was any delivery, which is an essential to constitute the penalty. As to the first clause, we concur with the learned counsel for the defendant that the words "sealed and stamped as aforesaid" refer to section 3841, as amended by chapter 100, Acts 1893, and that there is a violation of the statute only when the defendant has bought, sold, or bartered by weights or measures, which he did not "allow and permit" the standard keeper, who visited him for that purpose, to seal or stamp. But the jury find, in response to the first issue, that the defendant sold meat to the plaintiff by "weights that had not been examined and adjusted by the standard keeper, as required by the statute." These words "as required by the statute," in the verdict, have the same reference to the amended section 3841 as the words "as aforesaid," in the statute, and can only mean that the defendant, not having complied, "as required," with the duty of "allowing and permitting" his weights and measures to be stamped and sealed, did sell meat by them. Upon the verdict the plaintiff was entitled to recover the \$40 penalty in each case upon the offense stated in the first clause of section 3842, but it was error to render judgment against him, for reasons above stated, for any penalty in regard to the second clause of said section. The costs of the appeal will be divided between the parties. Modified and affirmed.

FAIRCLOTH, C. J. (dissenting). I agree that in England the subject of penalties is controlled by the legislative branch of the government, because there is no constitutional restriction. I agree that in North Carolina, prior to 1868, the subject was entirely under the control of the legislature,

and that the early statutes on the subject have been allowed to continue on our statute books, by inadvertence, I think, as now appears in Code, § 3842, and others. After the late war, however, when the state was confronted with new conditions, when the subject of general education and a general system of public instruction became an important question of state policy, the convention of 1868-69 adopted a constitution with a provision (article 9, § 4) which declared that "the net proceeds that may accrue to the state from sales of estrays or from fines, penalties and forfeitures \* \* \* shall be sacredly preserved as a school fund, \* \* \* and for no other purposes whatsoever." Again, the constitutional convention of 1875, amending the state constitution in several respects, after providing for a general and uniform system of public schools, and setting apart the sources of means for maintaining the same, declared, in article 9, § 5, "that all monies, \* \* \* also the net proceeds from the sales of estrays, also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the state, \* \* \* shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of the state: provided that the amount collected in each county shall be annually reported to the superintendent of public instruction." Again, the legislature (Laws 1881, c. 200, § 14) enacted, in the identical words of the constitution of 1875, that the "net proceeds from sales of estrays, also the clear proceeds of all penalties and forfeitures, and of all fines, \* \* \* shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties as established in pursuance of the constitution: provided the amount collected in each county shall be reported annually to the state superintendent of public instruction," which statute was re-enacted into the Code in 1883 (section 2544).

Thus, we have, on the one hand, the constitutional provisions of 1868 and 1875, and the act of assembly of 1881 (chapter 200, § 14, Code, § 2544), declaring in plain terms that the "clear" and "net" (synonymous terms) proceeds of fines, forfeitures, penalties, etc., shall be faithfully applied to maintain public schools, and, on the other hand, Act 1741, c. 32, § 1 (Code, § 3842), giving the entire penalty to any person suing therefor, and so for other penalties; and the question is, which shall control? The constitution does not impose penalties, but only directs the application of the net proceeds thereof when collected. It leaves with the legislature the power to impose penalties, to provide the machinery for collecting them, the designation of suitable persons to collect them, and the right to make reasonable compensation to the collectors for services and

expenses. The state has made the county board of education a corporate body, with power to sue and be sued, to recover school property, real and personal, and to see that the school law is enforced. I should regret to know that the state is compelled to appeal to the selfish motives of common informers to have its laws enforced, and would prefer that it (the state) would select its own suitable agents to perform this labor with reasonable compensation; and I see no reason why the county board of education, in a case like the present, may not make the collection and place the net proceeds to the school fund, and so on with other penalties, etc. For illustration, the act of 1889 (chapter 199, § 36) requires the solicitors of the several judicial districts to prosecute all penalties and forfeited recognizances entered in their respective courts, and collect by execution, if necessary, and allows them to receive as compensation for their services a sum to be fixed by the court, not less than 5 per cent. on the amount collected; and this act is amendatory of Code, § 2544, requiring the net collection to be applied to the school fund, as above stated. Will it be suggested that the solicitors, county boards of education, and such others as the legislature has or may designate as collectors of all penalties, are not patriotic enough to perform their sworn duties in this behalf with reasonable compensation? By this method the school fund is increased, but if any person who may choose to sue is allowed to recover the whole penalty to his own use, as is attempted in this case, then the school fund suffers, and Const. art. 9, § 5, is a "dead letter." It is seldom that we find an express and positive restraint upon legislative power in the constitution, but, when we see a positive direction therein, it carries with it a necessary implication against everything contrary to it, which would frustrate or disappoint the purpose of that provision. I must assume that these constitutional provisions and the act of 1881 (chapter 200) were enacted after due deliberation, and not incidentally or by mere accident. In two cases this question has been discussed by this court. First, *Katzenstein v. Railroad*, 84 N. C. 688. In that case the court took a middle ground, by distinguishing between those penalties with an express provision that any person could sue and recover to his own use and those without any such provision; holding that the latter only belonged to the school fund. I respectfully submit that this was a *petitio principii*, as the constitution says, "All penalties," etc., which must include all or none, subject to the deduction which the legislature may deem a reasonable allowance for services and expenses of collection. Second, *Hodges v. Railroad*, 108 N. C. 24, 12 S. E. 104. In this case the same question was discussed by a divided court, but it was left as an open question, as it was not necessary to decide it in that case. With

the highest regard for the decisions of the court as constituted when *Katzenstein's Case*, supra, was decided, and knowing that it is important that the law should be fixed and steady, still I feel that the organic law must be preserved according to its true intent, and that the law should be "reasonable and right"; that it cannot be settled until it is settled right; and that, if an error is committed by this court, it should be corrected, and the sooner the better, before it is followed by a list of decided cases, spreading in so many ways that to eradicate the error would do more harm than good. I am of opinion that the judgment below should be reversed, and the action as now constituted dismissed.

AVERY, J., also dissents.

(116 N. C. 430)

STATE ex rel. BURRELL v. HUGHES et al.  
(Supreme Court of North Carolina. May 14, 1895.)

SUIT FOR PENALTY—JOINDER OF ACTIONS—PARTY PLAINTIFF—VARIANCE—SUMMONS AND COMPLAINT.

1. A motion to dismiss for want of jurisdiction, or because the complaint does not state a cause of action, is not such a demurrer or *tenuis* as will permit an appeal from its refusal.

2. Where a summons was issued in the name of plaintiff, "Dennis Burrell," and the amended complaint declared in the name of the "state, on the relation of Dennis Burrell," the discrepancy is not material.

3. The person suing for a penalty for failure to discharge an official duty is the proper party plaintiff, and not the state, unless it is so required by the statute.

4. A person suing one defendant for penalties for failure to discharge official duties may unite several such causes of action, so as to give jurisdiction to the superior court.

Appeal from superior court, Orange county; Hoke, Judge.

Action by the state, on the relation of Dennis Burrell, against John K. Hughes and others, to recover a penalty of \$100 alleged to be due by reason of the failure of defendant sheriff to execute process in a criminal action, assigning four separate and distinct forfeitures. Demurrer to complaint sustained, and plaintiff appeals. Reversed.

The plaintiff made affidavit that by reason of poverty he was unable to give bond or make deposit for costs for prosecution of suit. This was supported as to his poverty, and the belief that he had a good cause of action, by the affidavit of George W. Day; and C. D. Turner, a practicing attorney, certifies that he has carefully examined the facts and law in the case, and is of opinion that plaintiff has a good cause of action. Thereupon the following order was made by the clerk of the superior court: "This cause coming on to be heard, it is ordered that the petitioner, Dennis Burrell, be allowed to sue in forma pauperis, and that C. D. Turner be assigned as counsel for said petitioner. This October 12, 1893." On



October 16, 1894, a summons was issued against the defendant and sureties in the name of Dennis Burrell against John K. Hughes et al., and the complaint was subsequently filed in the name of "state, on relation of Dennis Burrell, against Hughes et al.": "State of North Carolina, on relation of Dennis Burrell, v. Hughes et al. Amended Complaint. The plaintiff, complaining, alleges: (1) That defendant Hughes was elected sheriff \* \* \* In November, 1892, and qualified in December, 1892, after giving bonds required by law, which were accepted and approved by the proper authority. (2) That one of the bonds was a process bond payable to the state of N. C. in the sum of \$5,000, with the defendants (naming them) as sureties, conditioned to well and truly execute and due return make of all process to him directed, and in all other things well and truly and faithfully execute the office of sheriff during his continuance therein. (3) That defendant has not well and truly executed and due return made of all process to him directed, in the following particulars: (4) First. At March term, 1893, of this court, there was pending and for trial a criminal action wherein John Crisp and the plaintiff Dennis Burrell were defendants, and about March 11, 1893, the said defendants procured a subpoena to be issued commanding defendant Hughes in due form to summon Claud Hughes, Joseph Smith, and Charles Vincent to appear at said March term, and give evidence in said criminal action on the part of defendants therein. Said subpoena was placed in the hands of said Hughes on or about March 11, 1893, with request to execute same. (5) That defendant failed to serve said subpoena upon Charles Vincent, and made no return as to Vincent, contrary to the statute, etc., whereby he has forfeited to any one who may sue for the same the sum of one hundred dollars. (6) That defendant returned on said subpoena, 'Served on all but Charles Vincent, fee 90c.:' and the plaintiff is informed, and believes, and so alleges, that the return is false in fact, in that the subpoena was served in part through the mail, and by notice sent by parties unknown, and not personally served upon each of said witnesses so commanded to be summoned as required by law, contrary to the statute, etc., whereby defendant has forfeited a sum of one hundred dollars to any one who will sue for the same. (7) That plaintiff is informed and believes that, in addition to the foregoing forfeiture approved as aforesaid, the said return as to Vincent is an insufficient return, within the condition of said bond, in that the said sheriff did not well and truly execute and due return make of said subpoena. (8) That the defendants in the above-mentioned criminal action on or about March 13, 1893, procured another subpoena in due form to be issued, commanding defendant sheriff to summon J. A. Smith and J. W. Pickett to appear at

said March term, 1893, to give evidence in said criminal action in behalf of the defendants therein, and the subpoena was placed in defendant sheriff's hands with request to serve same on or about March 13, 1893. (9) That defendant positively failed and refused to serve said subpoena, and the same has been neither served nor returned to the present day, contrary to the statute, etc. Whereby said sheriff has forfeited, to any one who will sue for the same, the sum of one hundred dollars for his failure to execute and due return make of said subpoena for J. A. Smith. That he has forfeited to any one who will sue for the same the sum of one hundred dollars, by reason of his failure to execute and due return make of said subpoena for J. W. Pickett. Wherefore plaintiff prays judgment against defendant and sureties for the sum of five thousand dollars, the penalty of the process bond, to be discharged upon the payment of four hundred dollars, amount of the penalties accrued upon said process bond by reason of the forfeitures aforesaid."

The defendants moved to dismiss the action, and also demurred to the amended complaint: "(1) That the summons in the action issued on the 16th of October, 1893, is in the name of Dennis Burrell, and the amended complaint is an attempt to state an action in the name of the state of North Carolina on the relation of Dennis Burrell on the official bond of John K. Hughes as sheriff, no leave of court being asked or given to amend said summons. (2) That the superior court has not jurisdiction of a suit to recover the penalty of one hundred dollars either for failure to execute process or a false return, and such jurisdiction cannot be conferred by an attempt to unite, in one action, suits for different penalties which are separate and distinct actions, when there is only return necessary to be made of a subpoena. (3) That the complaint does not state facts sufficient to constitute a cause of action, as it does not refer to any statute under which a penalty is imposed, nor does it show any fine or amercement imposed on the sheriff for which the sureties on his official bond have become liable. (4) That under the constitution (article 9, § 5) the clear proceeds of all penalties shall belong to the several counties of the state, and no action can be maintained for such penalties unless the county or treasurer of the public school fund shall be made party plaintiff to such action. (5) That complaint does not state facts sufficient to constitute a cause of action, in that there is no allegation of any injury to plaintiff, and from an inspection of the subpoena issued and the record and witness tickets in the case of State v. Dennis Burrell and John Crisp it appears that the witnesses were subpoenaed and attended court and were examined for defendants; that in the subpoena issued March 11, 1893, are the names of Claud Hughes, Joseph Smith, Charles Vincent, and



Joseph W. Pickett, and the return is 'served on all but Charles Vincent, fee 90 cents, John K. Hughes, Sheriff'; that whether the personal service or as allowed by section 1355 of the Code is immaterial, and it is asked that the said return be amended to show that Charles Vincent did not reside in the county of Orange, but in Alamance, which is the reason why the said subpoena was not served on him by adding to said return, 'who is not to be found in my county.' (6) That all the matters and things alleged in this action in regard to the subpoenas issued on March 13, 1893, and the failure of Hughes to serve the same, are immaterial, as it is shown that the witnesses were summoned under the subpoena set forth in the action now pending in Orange superior court, wherein the said Burrell and Crisp are plaintiffs, and Hughes, D. M. Laws, and John McCracken are defendants, and it was the duty of the sheriff to execute only one subpoena on a witness. (7) That said J. A. Smith and J. W. Pickett were, as appears by inspection of the papers, duly summoned to attend March term, 1893, as witnesses for the defendants in the case of *State v. Burrell and Crisp*, and there is no allegation in the complaint that they did not attend, and the facts stated do not show any failure of the sheriff to serve any paper which it was his duty to execute. (8) That even if any such subpoena issued as alleged, dated March 13, 1893, it was unnecessary, as said Smith and Pickett were duly summoned as witnesses, and the defendants in the case of *State v. Burrell and Crisp* examined the said witnesses. (9) That the facts stated in the amended complaint do not show a refusing or neglecting to return any precept, notice, or process to the sheriff tendered or delivered, which it was his duty to execute, or that plaintiff was injured by the neglect, misconduct, or misbehavior complained of. (10) That if there had been a failure to return the subpoena alleged to have been issued on March 13, 1893, the only liability incurred would have been \$100 of which this court has no jurisdiction. (11) That no proper order has been made allowing suit to be brought in forma pauperis. (12) That, even if the summons in this action is amended to make the state a party plaintiff in this action, it cannot be maintained, and there is no right to sue on the official bond of the sheriff, and it is not the duty of the sheriff to execute three subpoenas or more than one on any witness in the same case. Wherefore defendants demand judgment that this action be dismissed," etc. It was adjudged that the demurrer be sustained, and the action dismissed, and the plaintiff appealed.

C. D. Turner, for appellant. J. W. Graham and P. C. Graham, for appellees.

FAIRCLOTH, C. J. The plaintiff instituted this action on defendant's official bond

for four penalties in \$100 each, for failing to serve process. The summons was issued in the name of the plaintiff "Dennis Burrell," and the amended complaint declared in the name of the "state, on relation of Dennis Burrell," the plaintiff. The defendant moved to dismiss the action, and demurred because of the discrepancy in the summons and amended complaint, and for want of jurisdiction in the superior court. A motion to dismiss for want of jurisdiction, or because the complaint does not state a cause of action, is not such a demurrer ore tenus as will permit an appeal from its refusal. *Joyner v. Roberts*, 112 N. C. 111, 16 S. E. 917. The demurrer not only raises issues upon matters alleged in the complaint, but sets forth other matters, which can only be presented by answer, and therefore cannot now be considered. The discrepancy in the summons and the amended complaint is not a material matter, and has been permitted. *Jackson v. Maulsby*, 73 N. C. 174; *Warrenton v. Arrington*, 101 N. C. 112, 7 S. E. 652. The person suing for a penalty is the proper party plaintiff, and not the state, unless so expressed in the statute. *Middleton v. Railroad Co.*, 95 N. C. 169; *Sutton v. Phillips* (at this term) 21 S. E. 968. A party suing for penalties against the same defendant may unite several causes of action in the same complaint, and, if they exceed \$200, the superior court will have jurisdiction. *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890. Our conclusion is that his honor, in sustaining the demurrer, committed error. Reversed.

(116 N. C. 582)

#### STATE ex rel. COOK v. MEARES.

(Supreme Court of North Carolina. May 16, 1895.)

##### ELECTION OF OFFICERS.

Plaintiff was elected by the legislature on March 9th, to fill an office created by an act passed on March 8th, containing the provision that it should be "in force from and after its ratification," and which was not signed by the president of the senate and speaker of the house until March 12th. *Held*, that the election was void.

Appeal from superior court, New Hanover county; Hoke, Judge.

Action in the nature of quo warranto upon the relation of C. A. Cook against O. P. Meares to test defendant's right to the office of judge of the circuit criminal court. From a judgment for defendant, plaintiff appeals. Affirmed.

D. L. Russell, L. C. Edwards, and T. P. Devereux, for appellant. Shepherd & Busbee, for appellee.

FURCHES, J. This is an action in the nature of quo warranto for the office of judge of the circuit criminal court, composed of the county of New Hanover and others. It appears that the general assembly, on the 8th of March, 1895, completed

the passage of an act, through both of its houses, establishing this "circuit criminal court," but this act was not signed and ratified by the president of the senate and speaker of the house until the 12th of March, 1895; that in this act the legislature declared there should be one judge for this criminal district, to be elected by the legislature; that, in pursuance of this legislation, it proceeded on the 9th of March to elect the plaintiff judge of said court, which vote was reported and confirmed on the 11th of March; and on the 13th of March the governor appointed the defendant judge of said criminal court, and he is now occupying the office, and holding the courts. Every question involved in this case is decided in the case of *Ewart v. Jones* (at this term) 21 S. E. 787, except one; and that is that plaintiff was elected three days before the act was signed by the president of the senate and the speaker of the house. There is no doubt of the plaintiff's being elected, and it is contended that the legislative will, so clearly expressed, should not be defeated by a mere technicality. It is also said in support of plaintiff's claim that the act of the 12th of March was only a part of the expression of the legislative will; that it is in *pari materia* with the acts of legislation commenced on the 9th, and completed on the 11th, in reporting and declaring the vote for plaintiff; and that they should be read and construed together. And they say there are precedents in our own legislative history to support plaintiff's claim; that the legislature of 1876 passed and ratified an act establishing a criminal court for the county of Wake on the 10th day of March, and on the same day elected George V. Strong to fill the office that day created; that on the 5th day of March, 1891, the legislature passed and ratified an act establishing the court of railroad commissioners, and on the same day proceeded to elect the officers to fill the same. And they contend that it is not known whether these acts were signed by the speaker and the president of the senate before or after said elections. And plaintiff further contends that in March, 1887, the legislature passed an act proposing an amendment to the constitution, increasing the number of associate justices of the supreme court from two to four, which amendment was to be submitted to the people in November following, for their ratification or rejection, and provided that said vote should be reported to the state board of canvassers on the second Thursday thereafter, and if, upon a canvass, it should be found that a majority of the people voted for said amendment, the governor should so declare by proclamation, and that he should attach his certificate to the act to that effect, which should be deposited in the office of the secretary of state; that it was also provided in said act that at the same election, in November, there should be an election held for

two justices to fill the offices "to be created" by said amendment, if it should be adopted; that an election was so held for two justices, the constitutional amendment was adopted, and the justices so elected qualified, and took charge of their offices. And it is contended that these justices were elected when the vote was cast, in November, like the plaintiff was on the 9th of March; and that the constitutional amendment did not take effect until the vote was counted and ascertained by the canvassing board, and the governor's proclamation issued proclaiming its adoption; and that there was no office to fill at the election in November, 1888. While, on the other hand, defendant says that the act of the legislature on the 9th electing the plaintiff, and the act passed on the 8th, but not ratified until the 12th, were separate and distinct acts of legislation, and cannot be considered and construed together; that the rule of *pari materia* does not apply; that when plaintiff was elected, on the 9th, there was no such office; that its passing the legislature, on the 8th, amounted to nothing until it was signed by the president of the senate and the speaker of the house, on the 12th of March. Defendant further says that this court, in *Scarborough v. Robinson*, 81 N. C. 409, has decided this; and the case of *Rhodes v. Hampton*, 101 N. C. 629, 8 S. E. 219, decides that a man cannot be elected to an office when there is no office at the time of the election; and therefore, admitting that plaintiff received votes enough to elect him, that he was not elected, for the reason that the office was not created for three days thereafter.

The only point before the court in *Scarborough v. Robinson* was as to whether the court could compel Robinson, then lieutenant governor and president of the senate, and Mooring, speaker of the house of representatives, to sign a school bill passed by the legislature, or not, after the legislature had adjourned; and, although this was the only question before the court for its judgment, the court proceeded to a lengthy discussion of legislative powers, in the course of which it announced the opinion that an act passed by the legislature was not a law until it was signed by the presiding officers. We find very respectable authority to the contrary; and, without passing on this dicta (because it is not necessary we should do so in giving our judgment in this case), we say that it announces a very grave proposition. If what is held in that opinion be true, the presiding officers of the legislature are clothed with a veto power greater than that vested in the president of the United States or in any governor in any state of the Union, because, where there has been a veto power vested in the executive, there is also provision made to pass the act over his veto, which is not unfrequently done. Here there is no such power. The courts will not

compel them to sign the act, and there is no means provided by which the legislature can pass it over their refusal to sign. But, as we have said, we do not pass upon this question. In the case of *Rhodes v. Hampton*, supra, the point as to whether a party could be elected to an office which did not exist at the time of the election was presented, and the court held that he could not. And we admit that it was the intention of the legislature to elect the plaintiff to the office he is claiming in this action. We admit that the point made by defendant is a technical question. We admit that the journals show that George V. Strong was elected on the day the bill establishing the court was ratified. We admit that the journals show that the railroad commissioners, in 1891, were elected the day the bill was ratified. And we admit the two additional justices were elected at the November election in 1888, and that the amendment creating the offices to which they were elected did not go into effect until some time afterwards, when the governor so proclaimed. But these all took place when there was harmonious action between the legislative and executive departments of the government. None of them have been tested in the courts; so they cannot be considered precedents to control our action. But in the case of Judge Strong, and in the case of the railroad commission, as it was all done on the same day, we must presume that it was rightly done; that is, that the act was ratified before the election took place. And in the case of the justices of the supreme court their election was provided for in the same act that provided for the amendment; and this may make the difference between their case and that under consideration. We have said we put out of our consideration in this case the case of *Scarborough v. Robinson*, because this act, creating a criminal court, was signed, and is now the law. So the question presented in *Scarborough v. Robinson* is not presented here; and we put our judgment on this act, now the law, which provides that "it shall be in effect from and after its ratification," which is in effect saying that it shall not be in effect before that time, and this is the 12th day of March, 1895, and upon the opinion in *Rhodes v. Hampton*, supra, which holds that a party cannot be elected to an office that does not exist at the time of the election. It is better that the intention of the legislature should be defeated for a time than that we should violate the law. We find no error in the judgment appealed from, and the same is affirmed.

CLARK, J. (concurring). It is settled that the legislature had the power to fill the office created under this act. *Ewart v. Jones* (at this term) 21 S. E. 787. The statute, which is duly and regularly enacted, provides that it should be "in force from and after its ratification." This took place March 12,

1895. Neither on that day nor at any time since has the legislature elected any one to fill the office. The statute provides, further, that in event of a vacancy the governor should appoint till the next session of the general assembly, which shall then elect to fill the unexpired term. Under this authority the governor could appoint the defendant, who is now discharging the duties of the office. The legislature held a ballot, and selected the plaintiff relator to fill the position on 9th of March, 1895. But at that time, by the very terms of the act, it was not in force, and could not take effect till ratified, which was three days thereafter. There was then no office which could be filled on March 9th. The attempted election to an office which was not yet in existence was without warrant of law, and was practically a merely informal expression of preference upon the part of members. The failure to elect after the act took effect, and the attempted election at a time prior thereto, were, it may be supposed, an inadvertence. To fill an office, there must be one already created. If the term of the office is to begin in the future (as in this case, on April 1st), it is competent for the legislature or other appointing power to fill it, provided that there has then been such an office created, but not at a time when there is no such office in existence. By the terms of the statute, the act not taking effect till after its ratification, it is not necessary for us to consider the nature and effect of a ratification. The act itself selects that date as the beginning of the life of this statute. Prior thereto it was to be dead,—of no effect; and after that date it was to live, breathe, and be effective. By its terms, it could not be retrospective and validate a prior election. And as a wise judge has said, "We cannot be wiser than the law." We cannot hold that this office was in existence prior to the time when the act creating it took effect. The attempt to fill an office before it is in existence, however inadvertent the attempt, is simply a nullity. *Rhodes v. Hampton*, 101 N. C. 629, 8 S. E. 219. The courts have no prerogative to step in and cure inadvertences and nonaction on the part of the legislature. This would be unwarrantable assumption and interference by this co-ordinate department, and would lead to far greater evils in cases of supposed or alleged inadvertences and omissions hereafter than the postponement for a few months of legislative action in filling this position.

It has been held in *Scarborough v. Robinson*, 81 N. C. 409 (Smith, C. J.), that a bill has no validity till duly ratified, which is "an essential prerequisite to the existence of the statute, \* \* \* which is incomplete and inoperative without it"; and in *State v. Patterson*, 98 N. C. 660, 4 S. E. 350, that a bill "perfected and passed is not a statute till ratified." But even conceding, if we could,

that the bill became a law on its third reading in the house on March 8th (it having passed the senate previously), or that the ratification, when made, could refer back and make the act valid at the date of such last reading (a doctrine which has no authority to support it), this would not help the relator, for, if the act dated back to the 8th of March, it still provides that it was to have no effect till the ratification, which was March 12th. In *Com. v. Fowler*, 10 Mass. 290, 304 (Parsons, C. J.), an act creating a new county provided that it should take effect on a future day named. Before that day the proper appointing power appointed an officer to fill one of the positions (judge of probate) created by the act. The appointment was adjudged void, although a custom of making appointments in such cases was shown. In that case were cited *Bac. Abr. "Statute,"* (c.), and *Rex v. Gall*, *Ld. Raym.* 371, *Plowd.* 79, which sustain the proposition that an act which is to take effect at a future day has no force till that time. To like purport are our own decisions, for it was held in *State v. Bond*, 49 N. C. 9, that where a statute creating a criminal offense was to take effect at a future day, the specified act, if committed after the passage of the act, but before the day it was to take effect, was not indictable under the act. And as to civil matters it was held (*Dick, J.*) in *Merwin v. Ballard*, 66 N. C. 398, that if "the act, in express terms, is declared to be in force from and after its ratification, it had no operation previous to that day. A statute must be construed as intended to regulate the future conduct and rights of persons, and not to apply to past transactions. \* \* \* A contrary intention must be expressed by the statute." If the present statute, in addition to creating the office of judge of a criminal court, had made certain acts indictable, it is clear that such acts, if committed on March 9th, before the ratification on March 12th, would not be punishable. Till the day named for the act to go into effect, no rights nor liabilities can accrue under it. 23 Am. & Eng. Enc. Law, 218. In *Rhodes v. Hampton*, *supra*, it was held (*Smith, C. J.*) that the election of a person to an office which did not then exist "was a nullity, for the obvious and sufficient reason that there was then no such office to be filled." To somewhat similar purport are *Kimberlin v. State*, 130 Ind. 120, 29 N. E. 773, which holds that the election of a person to an office held at a time which was not authorized by law is void; and *Brewer v. Davis*, 9 *Humph.* 208, which holds that an election on a different day from that provided by an act erecting a new county is void; and *Sawyer v. Haydon*, 1 *Nev.* 75, which holds that an election not authorized by law is a nullity. The above are the few precedents bearing on the point, as the instances have been rare, and they are all against the plaintiff. To say that the legis-

lature had power to elect, and did elect, is but begging the question. If the election was made without authority of law (the point in issue), it was no election at all.

AVERY, J. (concurring). I concur in the conclusion reached by the court, but not entirely in the reasons upon which it is made to rest. While much of the discussion in *Scarborough v. Robinson*, 81 N. C. 409, was entirely obiter, the court construed a clause of the constitution (article 2, § 23) as making ratification an essential prerequisite to the validity of an act of the legislature; and the decision of the question involved depended upon that construction. The purpose of the plaintiff in bringing that action was either to have a declaration from the court that the bill should, in view of the facts shown, have been deemed to have the force and effect of an act passed and ratified in the ordinary way, or that the presiding officer should be required to sign. It seems to me that the court did not transcend the proper limit of logical argument in discussing and passing upon the questions whether it was competent for the defendant to still impart vitality to an inchoate act, or whether, if the compulsory power of the court could not be invoked for such a purpose, it could, nevertheless, declare that, under the peculiar circumstances, the unsigned bill should be deemed a complete legislative enactment.

(44 S. C. 22)

BROCK et al. v. O'DELL et al.

(Supreme Court of South Carolina. April 15, 1895.)

COMPETENCY OF WITNESS — TRANSACTIONS WITH DECEDENT — INTEREST — REFORMATION OF DEED — MISTAKE OF LAW.

1. The son of a grantor in a deed may testify as to remarks made by the grantor at the time of executing the deed, which was to another son of the grantor, and as to directions by the grantor to the person drawing the deed, without infringing Code, § 400, forbidding one to testify as to a transaction or communication between himself and a decedent.

2. On an issue as to whether there was a mistake on the part of the scrivener in drawing a deed under direction of the grantor therein to the grantor's son, another son is not rendered incompetent to testify by the fact that he claimed under a similar deed from the father.

3. Where the parties to a deed intended that a fee simple should be conveyed, but the word "heirs" was omitted, so that only a life estate was conveyed, a reformation of the deed will be decreed, though the omission arose from a mistake of law. *McIver, C. J.*, dissenting.

Appeal from common pleas circuit court of Pickens county; Wallace, Judge.

Action by Caroline Brock and others against W. T. O'Dell and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Ansel & Hollingsworth, for appellants. J. P. Caxey, T. C. Robinson, Cothran & Robinson, and J. E. Boggs, for respondents.

POPE, J. Stephen Clayton conveyed by deed 400 acres of land situate in Pickens county, in this state, to his son Alfred T. Clayton. The said Alfred T. Clayton conveyed the said land in fee simple to one William T. O'Dell in 1882, who is now in possession of the same, and thereafter, in 1884, departed this life. The said Stephen Clayton departed this life, intestate, on the — day of June, 1879; and his heirs at law, the plaintiffs and all the defendants, except W. T. O'Dell, now seek by this action to recover the possession, and thereafter for a partition, according to law, of the said 400 acres of land. The defendant contests their right to recover said lands from him, claiming to hold the same in fee simple. The contention has arisen from the absence in the deed from Stephen Clayton to Alfred Clayton of the word "heirs." It is admitted that the word "heirs" does not appear in the deed, but the defendant claims to avoid the effect of such omission of the word "heirs" by showing that it was the intention of both grantor and grantee in said deed that such word "heirs" should have been inserted, but that, through a mistake of the scrivener employed by the parties in preparing the deed, such word was omitted. The case came on for trial before his honor, Judge Wallace, and a jury, at the fall term, 1893, of the court of common pleas for Pickens county, and resulted in a verdict for the defendant W. T. O'Dell, which ripened into a judgment, after which the heirs at law of Stephen Clayton, deceased, appealed therefrom; and it is the grounds of this appeal we are now to consider. For the purposes of our consideration of them, they may be treated under these heads: First. Was it error in the circuit judge to allow the witness W. W. Clayton to testify as to what passed between Stephen Clayton, grantee, and J. B. Clayton, the scrivener, at the time the former signed the deed to and for Alfred T. Clayton, the grantee? In this form different phases of difficulty in the admission of this testimony are suggested by the appellants: (a) The deed was introduced, and spoke for itself. (b) The witness was heir at law of Stephen Clayton, and not competent, under section 400 of our Code. (c) The testimony of this witness tended to vary and add to a solemn deed. (d) The testimony was not competent as stating the conversation between Stephen Clayton and J. B. Clayton, because such conversation was addressed to the witness as well as J. B. Clayton. (e) The witness ought not to have been allowed to testify, as he held a deed from Stephen Clayton, liable to the same difficulty as existed in that of Stephen to Alfred Clayton.

The testimony of the witness W. W. Clayton, he being the only witness offered by the defendant O'Dell to testify in regard to the alleged mistake of Stephen Clayton, the grantor, and Alfred Clayton, the grantee, in the deed around which both sets of claim-

ants here revolve in their contention, is of great importance; for, if his testimony is not competent, the defendant O'Dell has lost his defense. The crucial test in determining the competency of testimony, under section 400 of the Code, is, was the transaction or communication between a person now deceased and the witness? If it was, he is not competent to testify as to such transaction or communication. If it was not, he is competent. The facts brought before Judge Wallace in this connection, and upon which his ruling was sought, were these: Stephen Clayton had placed his four sons, J. B. Clayton, Alfred T. Clayton, W. W. Clayton, and Moses D. Clayton, respectively, in possession of a tract of his (Stephen's) land, some four or five years before August 22, 1854; and he had given to each of his daughters a slave or slaves after their respective marriages. On the 22d August, 1854, his son J. B. Clayton presented a will to Stephen Clayton to sign; whereupon Stephen Clayton, protesting that the will could be set aside by astute lawyers, thereby defeating the intention of the testator, declined to sign such will, declaring that he intended to give his sons his land and his daughters his negro slaves, and directed his son J. B. Clayton to write out a deed for his son Alfred T. Clayton for the 400 acres of which he was then in possession. The son J. B. Clayton wrote out the deed, which Stephen Clayton signed in the presence of G. W. Taylor and John Campbell, both of whom are now dead. On the same occasion, Stephen Clayton signed a deed to the witness W. W. Clayton, for his land, which is in the same form as that to Alfred T. Clayton. Now, when it is remembered that, under the testimony here offered, it was J. B. Clayton who produced the will which he requested his father, Stephen Clayton, to sign, and no connection is shown to have existed between J. B. Clayton and W. W. Clayton touching the will, and the remarks of Stephen Clayton whereby he gave his reasons for refusing to sign the will were made to J. B. Clayton, in the presence of W. W. Clayton, we cannot see where there was any communication or transaction of Stephen with W. W. Clayton that falls under section 400 of the Code.

As to the question involved in the subdivision a, it is manifest that, if it contains sound law, no mistake of fraud, or accident, in a deed could ever be corrected unless some paper writing contemporaneously made was exhibited as the basis therefor. Such is not the law.

Subdivision b has been disposed of in the preceding remarks.

As to subdivision c, it may be said that it is unfortunate that the witnesses to the deed are both dead, but it will hardly be contended that the rights of W. T. O'Dell or any other party are to be affected by this providential dispensation in case other testimony in their stead can be applied. Stephen Clayton died

in 1879, and this action was not commenced until the 27th day of April, 1892, a period of 13 years, but only 8 years after Alfred T. Clayton's death. While the plaintiffs had a right to bring their action when they did, on the other hand the defendant is not to be blamed for their delay. Any defenses he may have, founded in law and supported by facts, are not to be prejudiced by plaintiffs' delay. No doubt, he would have hailed with delight the information that these two witnesses were both alive, and within reach of his summons for them to testify.

As to subdivision d, it may be said that our preliminary remarks are an answer thereto.

Lastly, as to subdivision e, we do not see how the competency of W. W. Clayton is to be tested by the fact that he had a deed from his father similar in its terms to that of Alfred T. Clayton. Such a fact might go to his credibility, but does not affect his competency. Besides, in this case, the appellants cannot complain as to this deed of W. W. Clayton. It was introduced in testimony, but his honor ruled that it could not be used to re-enforce the deed to Alfred T. Clayton, and no appeal is taken from this ruling.

The remaining grounds of appeal, the sixth, seventh, and eighth, have given us real concern; and we will, in their discussion, take them up seriatim, and will reproduce the text of each.

Sixth: "Because his honor, the circuit judge, erred in refusing to charge the jury the fourth request of the plaintiffs, which was as follows: 'Assuming that all the testimony in regard to the execution of the deed from Stephen Clayton to A. T. Clayton, and of the intention of Stephen Clayton by the deed in question to convey the fee to A. T. Clayton, is true, the failure to insert the word "heirs" in the deed, which was necessary to convey the fee, was done in ignorance of the law, and was not, as claimed by the defendant O'Dell a mistake of law.'" The circuit judge, in declining to make this request, used this language: "Now, I cannot charge you that. I cannot charge you that this is ignorance of the law, but whether the testimony makes it out you must say." We have frequently held that the charge of the circuit judge should be construed as a whole. In his charge to the jury in this cause, he had, in a previous part of his charge, said: "The allegation of the plaintiffs is that it [the title] did not pass out of Stephen Clayton by that deed, but that Alfred Clayton had a life estate in it, and at his death it reverted to Stephen Clayton. It is contended by defendants that Stephen Clayton intended that that deed should operate as if the word 'heirs' was there; and that that was the understanding of the parties; and that, by a mistake of law, that word was omitted; and that it can be supplied now by this court, and, if you do supply it, that the title passes from Stephen Clayton to Alfred Clayton and to Mr. W. T. O'Dell; and that Mr. O'Dell has it now; and that, therefore,

the plaintiff cannot recover. Now, the defendants say it [word "heirs"] was omitted by a mistake of law. You remember testimony was put up on that subject as to the circumstances attending the parties at the time of the execution of the instrument, and all that; all of the time intending to show that it was a mistake of law that that word 'heirs' was not inserted in that deed. Ignorance of law and mistake of law are very different. The same rule as to ignorance of the law in criminal cases applies as well in civil actions. He is bound notwithstanding his ignorance. He is sometimes bound when he makes a mistake of law, but not always; and right there comes the clear-cut distinction between ignorance of the law and the mistake from which the court of equity will relieve him. Now, the courts have decided that a man may take up a statute, and study it, and then make a mistake. It is the same way with a written instrument. If a man takes a deed or a will, and reads it, and studies it, and acts upon it,—assumes responsibilities on what it means,—and it turns out that his construction is erroneous, he is bound still, although it is a mistake of law. Now, on the other hand, where two parties attempt to effectuate an agreement, the agreement is understood between them, and they undertake to put it 'n writing, and it turns out that all of the requirements of law are not complied with, and those facts are made to appear to a jury, they would be relieved on account of that mistake. Now, in the instance supposed, it is a lawful undertaking, and they undertook to carry it out, and to put the terms of the agreement in writing; but it turns out that they have not done so, and, when the facts are brought to the attention of the jury and a judge in chancery, they will be relieved of that difficulty. \* \* \* Now, was that word 'heirs' omitted from that deed by ignorance of law? If it was, the deed must stand according to its import as written. If that word 'heirs' was left out there through ignorance of the law, or through an erroneous conclusion on the part of Stephen Clayton and Alfred Clayton as to what the law was, then that deed would cease to operate at the death of Alfred Clayton, and the fee would pass to Stephen Clayton and the heirs intended in this action. If there was an understanding between Stephen Clayton and Alfred Clayton that Alfred Clayton was to have a fee-simple [title] to that land, and a draftsman was brought in, and it was put in writing, each meaning that he should have it [the fee-simple title], and the proper word was omitted by mistake, then that mistake could be corrected, and the finding would be in favor of Mr. O'Dell. Now, gentlemen, all of these legal principles that I have given you, you will consider, and apply the facts that you have heard to these legal principles I have given you."

Reduced to its analysis, the request of the plaintiffs we are now considering imputes error to the circuit judge for not having given

to the jury his opinion of the sufficiency of the testimony. This course on the part of the circuit judge would have been an unconstitutional invasion of the powers of the jury. If the plaintiffs had desired a charge from the trial judge upon a hypothetical state of facts, they should have so framed their request. We are obliged, as was the circuit judge, to treat it in the form presented by the plaintiffs in their request to charge. We do not mean that such request should be treated literally, but its form and substance should be regarded. We must overrule this exception.

The seventh ground of appeal is as follows: "Because his honor, the circuit judge, erred in refusing to charge the fifth request of the plaintiffs, which is as follows: 'That in this state the distinction between ignorance of law is sharply and distinctly drawn. Ignorance of law is passive, does not reason, does not know. Mistake of law presumes to know when in fact it does not. Ignorance of the use of apt and proper terms, as for instance the word "heirs" to convey in fee, is not a mistake.'" The quotation from the general charge of the circuit judge evidences his exceeding care that the jury should understand the terms "ignorance of law" and "mistake of law." The science of metaphysics undertakes to discuss ignorance as a term, and to ascribe to it certain qualities, as being passive, void of reasoning, and also of knowledge. We doubt, however, that a circuit judge can be said to have failed in his duty to the jury in this instance by steering clear of these abstractions, and preferring to be guided in his charge to the jury of practical business men by those illustrations of ignorance of law that would be readily apprehended by them; and the plaintiffs, having elected to group these metaphysical subtleties with a sound proposition of law, as that embodied in the last sentence of the request, must take the consequences of their temerity. Under the rule, this court cannot undertake to divide what was submitted by the appellants to the judge as an entirety. This exception must be overruled.

Appellants, in their last ground of appeal, the eighth, allege "that all the testimony upon the question whether it was a mistake or ignorance of law in omitting the use of the word 'heirs' was offered by the defendants. Assuming, as the fourth request does, that this testimony was true and undisputed, it was the duty of the circuit judge to say to the jury that such testimony defines the term 'ignorance of law,' and it was error to leave to the jury the decision of this technical and controlling questions of law." The testimony of W. W. Clayton was as follows: "At the time the deed was to be signed, Bayless [J. Bayless Clayton] had a will there, and he wanted my father to sign the will; and he said that he would not do it; that he would not make a will; that, if he did so, some of them might get dissatis-

fied about it, and that lawyers would break it; that wills were very often broke, and that what he wanted to give his children he wanted them to have it; that he allowed to give his property away, so that he would have nothing at his death to have a sale on; and that he would make the deeds to his children before his death, and then nothing could be taken away from his children after his death, and that there would not be any sale after his death for a division of his property; and he would make deeds of gifts, so that the lawyers could not take it away from them. And he did sign the deed then." The deed in question is in the handwriting of J. Bayless Clayton. It was further testified that Stephen Clayton declared that it was his purpose to give his lands to his sons, and his negro slaves to his daughters; that he never gave his sons any of his negro slaves, but did give some to each of his daughters. The matter which was the subject of defendant's effort in his proof, and the law he sought to apply thereto, was this: That it was the understanding of Stephen Clayton and A. T. Clayton that he could convey by deed an absolute estate in the lands over which this contention is now made to the said A. T. Clayton. It was not contended that there was any ignorance of the law that a deed to convey a fee-simple title to lands should use the word "heirs"; nor was it contended that A. T. Clayton inferred, as a conclusion of his own mind from the terms actually used in the deed made to him by his father, Stephen Clayton, that by such a deed, by the terms therein employed, his title thereunder was one in fee simple. In reading the charge of the circuit judge, it is very evident that he brought himself in his charge to the jury to dissect this proposition of law, of which his language proved very plainly he had a very clear perception. The principle upon which courts enforce a reformation of an instrument is that, preceding the execution of the instrument, and as the inducement to its execution, the parties to the same had an understanding, an agreement, a contract; and, in the effort to reduce the evidence in writing of that contract, a mutual mistake was made, by which mistake, so made, the understanding, the agreement, the contract, of the parties in relation to the subject-matter thereof was not carried into effect. There is no ignorance of law in such a contingency. The parties knew what they wished to have done, and had agreed that it should be done. The mistake occurred in the preparation of the instrument which was intended to embody that agreement, understanding, contract. It is perfectly competent in law that this mistake may be established by parol proof, as well as by contemporaneous writings. It is necessary that the proof of the mistake should be clearly made out by the testimony adduced. In the language of Judge Wallace to the jury on this point:

"You can see very well, gentlemen, that the proof must be very clear to authorize a jury to correct a solemn instrument. There is no doubt about that. It is not light, flimsy, doubtful proof, but the jury must be satisfied by clear, competent testimony that a mistake has not only been made, but is of the nature against which a court of equity would relieve." It is observed that no exception is taken to that part of the charge which is devoted by the circuit judge to explaining and laying down the law on this subject. The appellants have contented themselves to rest their attack upon the judge's charge to the matters set out in their requests to charge. We might stop here, but we will briefly notice some authorities on this subject.

Mr. Pomeroy, in his work on Equity Jurisprudence (section 843), thus states this principle of law: "The first instance I shall mention is closely connected with the doctrine stated in the last paragraph but one. It was there shown that, if an agreement was what it was intended to be, equity would not interfere with it, because the parties had mistaken its legal import and effect. If, on the other hand, after making an agreement, in the process of reducing it to a written form, the instrument, by means of a mistake in law, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement or by cancellation or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract actually made, but the mistake of law prevents the real contract from being embodied in the written instrument. In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing. Among the ordinary examples of such errors are those as to the legal effect of a description of the subject-matter, and as to the import of technical words and phrases; but the rule is not confined to these instances." The learned author cites a number of authorities in support of these propositions, among which is the case of *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174, 1 Pet. 1, when Mr. Justice Washington, in delivering the opinion of the supreme court of the United States, said: "There are certain principles of equity applicable to this question, which, as general principles, we held to be uncontrovertible. The first is that when an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, pre-

viously entered into, but which, by the mistake of the draftsman, either as to fact or law, does not fulfill, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. The reason is obvious. The execution of agreements fairly and legally entered into is one of the peculiar branches of equity jurisdiction; and if the instrument which is intended to execute the agreement be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted as if the parties had refused altogether to comply with their engagement; and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party fully to perform his agreement according to the terms of it, and to the manifest intention of the parties. So, if the mistake exist, not in the instrument which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will, in general, grant relief according to the nature of the case in which it is sought."

The two cases from our own reports, *Lowndes v. Chisholm*, 2 McCord, Eq. 455, and *Lawrence v. Beaubien*, 2 Bailey, 623, are authorities of no uncertain character on this question, especially after a most learned review of the authorities bearing upon this subject, and also because afterwards, in *Hopkins' Ex'rs v. Mazyck*, 1 Hill (S. C.) 250, the court reaffirmed these cases, in which latter case Chancellor Johnson, as the organ of the court, speaking of the two cases just cited, said: "We concur with the chancellor that the trust deed executed by Paul Ravenel Mazyck is good, and must stand, and, therefore, that the decree of the circuit court should be affirmed; and that would be sufficient for the case itself, but the observations of the chancellor are calculated to shake the rule in *Lawrence v. Beaubien* and *Lowndes v. Chisholm*, and the court thought it necessary to use the occasion to express their adherence to it. *Lawrence v. Beaubien* was decided upon much consideration, and, the more I have reflected upon it since, the more I am confirmed in its correctness; and I feel persuaded that all doubts about it proceed from misapprehension of the principle on which it is founded. There is, as I understand it, a very obvious distinction between ignorance and mistake of law. Ignorance cannot be proved (who can enter into the heart of man, and ascertain how much knowledge dwells there?), and for that reason the courts cannot relieve against it, but not so as to a mistake of law. That is sometimes susceptible of proof. \* \* \* Mistakes as to matters of fact have always been regarded as retrievable upon clear, full, and irrefraga-



ble proof; and mistakes in law ought to be upon the same footing, when the proof is equally certain." Now, what were the doctrines of the cases of *Lowndes v. Chisholm*, supra, and *Lawrence v. Beaubien*, supra? In the first it was announced: "But it is well established that relief is given in cases where the mistake has been one clearly of law; and the authorities relied on put the matter beyond all doubt, if, indeed, it could be doubted at this day." In the latter, Chancellor Johnson, as the organ of the court, says: "The question there arises whether this contract can be enforced against him; or, to put it abstractly, whether one is bound by a contract entered into under a mistaken deduction of law from facts which were known to him, by which he acquired nothing, and the party contracted with parted with no right nor suffered any loss." It had been in the case cited urged that to uphold the right to correct a mistake in law controverted the maxim, "*Ignorantia juris non excusat*." Replying to this suggestion, the learned chancellor said: "The propriety and necessity of its application, as the means of enforcing the obligation of contracts, is to my mind an utter perversion of the use for which it was designed, for that is sufficiently attained by the rules of equal obligation, framed for the express purpose. Amongst these, that which has been the strongest analogy to that contained in the maxim is that which provides that no one shall aver against his own deed; but that is founded on a very different principle. The uncertainty of contracts, and the temptation to perjury, incident to the substitution of facts depending on slippery memory for those reduced to writing, are the foundations of this rule; and it would seem to furnish itself a sufficient security against all abuses without the aid of '*ignorantia juris non excusat*.' And yet this rule, while it is imperative in the interpretation of contracts, is made to promote the great ends of justice by letting in proof that the most solemn contract was obtained by fraud or duress or other corrupt and illegal means; and I am utterly unable to conceive of any solid foundation for the exclusion of proof that the consideration was founded in a mistake of law. All the difficulty and confusion which have grown out of the application of the maxim appear to me to have originated in confounding the terms '*ignorance*' and '*mistake*.' The former is passive, and does not presume to reason; and, unless we were permitted to dive into the secret recesses of the heart, its presence is incapable of proof. But the latter presumes to know when it does not, and supplies palpable evidence of its existence. Hence it is well remarked by Lord Rosslyn in *Fletcher v. Tollet*, 5 Ves. 14, that '*ignorance is not mistake*.'"

It has been supposed that the cases of *Keitt v. Andrews*, 4 Rich. Eq. 349, *Cunningham v. Cunningham*, 20 S. C. 317, and

*Roundtree v. Roundtree*, 26 S. C. 430, 2 S. E. 474, have seriously interfered with the cases previously decided by the court of last resort in this state, and have thus caused one state's decisions to be at variance not only with themselves, but as well with other American states. We will examine these cases to see if this be true. Fundamental to the inquiry of what is decided in any given case must always be the ascertainment of what the court was called upon to decide, for it is only when the decision is responsive to the case that it is entitled to be regarded as an authority binding on others; it being no part of the duty, under the law, of courts to formulate law. Under the theory of the states of this union of states, the duty of formulating the law belongs to another co-ordinate branch of government so far as state laws are concerned. In *Keitt v. Andrews*, supra, the facts were these, substantially: The will of Daniel Hess gave his property to his daughter and grandchildren. At the time of his death he had only two grandchildren. Years afterwards, in accordance with a settlement sheet prepared by the ordinary of Orangeburg county, without any distinction as to the manner in which such settlement sheet should be made by the personal representatives of the said Daniel Hess, deceased, the said ordinary, under his construction of the will that all five grandchildren were entitled to a share thereof, prepared receipts for an equal share therein of each of said grandchildren, which receipts were signed by each grandchild, and his or her share was duly paid over. Ten years afterwards in one case, and eight years afterwards in the other, two grandchildren, who were in esse at the death of the testator's death, filed bills in equity seeking thereunder to cancel the settlements, and have the whole estate paid to them; thus excluding the other three grandchildren. The court refused to do so on the grounds that while it was true that the two complainants, under our law, were entitled to the whole estate, yet (1) that inasmuch as the executor and legatee honestly misconstrued the will, and had a settlement in full, based upon such misconception, the settlement will not be opened merely because of such misconception; and (2) the parties desiring the opening of the settlement, on the grounds of mistake or error, had waited too long in this instance. Parties desiring such a course must make haste in their application to the courts therefor. Long acquiescence amounts to a personal ratification. One of the discharges of the executor was under seal, while the other, though in writing, was not under seal. "The ground," says the chancellor, "on which complainants claim to be relieved, is simply ignorance of the law; or, in other words, ignorance of the true legal construction of the will. \* \* \* But ignorance of the law does not entitle one to open a settlement formally

and solemnly made. \* \* \* Is there any authority which goes so far as to say that a party is entitled to relief from a mistake of law, where there is no fraud, misrepresentation, management, or undue influence, and where the mistake was simply his own erroneous construction of a will or deed? In this case the parties seeking relief had the will before them. They were familiar with its provisions. The defendants did not seek in any way to impose their construction of it upon the complainant. It does not appear that they expressed any opinion as to its proper construction. If the parties now complaining, possessed of all the facts, as they were, and with the will before them, had applied to the proper sources of information, and had sought legal counsel, they would have been advised as to the true construction of the will. \* \* \* Their not pursuing this course was laches on their part, against the consequences of which the court is not bound to protect them. \* \* \* A misconstruction, like that made out in this case, is rather an error of the judgment than a mistake of the law or fact. *The simple misconstruction of a will or deed, when there is no fraud or circumvention, cannot be regarded, in any point of view, as coming within the scope and authority of those cases where mistakes of law, in contradistinction to ignorance of law, have been considered as affording grounds for relief.*" These last words, which we have italicized, show plainly enough that the learned chancellor, whose circuit decree was adopted by the court of appeals without any words of explanation or comment, recognized the existence of the very distinction that Judge Wallace made in his charge to the jury,—that not all mistakes of law are retrievable in a court of equity, and that there is a distinction between mistakes of law and ignorance of law. If the chancellor or court of appeals had deemed, after a careful review of the law, that the cases of Lowndes v. Chisholm and Lawrence v. Beaubien, supra, were at variance with their conclusion here reached, they would have said so, and the whole case is entirely free from any reference to the result. The case of Cunningham v. Cunningham, supra, is where Miss Cunningham, with her father's will before herself and brothers, executed interchangeable deeds to some of the real estate controlled by the provisions of their father's will. Years afterwards her devisee sought to have such deeds reformed, so that the purpose of the will in question might be preserved, on the ground that his testatrix, Miss Cunningham, had misconstrued those provisions of her father's will. But the court, on the authority of Kelt v. Andrews, supra, denied this application for a reformation. Judge Fraser, of the circuit bench, sitting in the place of Chief Justice Simpson, who was disqualified to preside, because of having been counsel to one of the parties while at the bar, in delivering the opinion

of this court, did say: "The case before the court does not call for any attempt to define the rule by which relief can be granted on account of mistake of law. \* \* \* In this state, however, the distinction has been sharply drawn between ignorance of law and mistake of law, in Lawrence v. Beaubien, 2 Bailey, 623, and Lowndes v. Chisholm, 2 McCord, Eq. 455; the court holding that in cases of mistake the court could give relief, and that it would be refused in cases of mere ignorance, the principal reason given being that mistake could be proved, and that ignorance could not. As the parties can now testify in their own behalf, *it may be doubtful if the reason can be longer sufficient to justify the distinction.*" (Italics ours.) In Hopkins' Ex'rs v. Mazyck, the court of appeals, in affirming the circuit decree, takes occasion to put its judgment on another ground, and to reaffirm the doctrine in Lawrence v. Beaubien and Lowndes v. Chisholm, on which the chancellor had cast some doubts in the circuit decree. The court, however, has never held that even a mistake of law stands in all cases on the same footing as a mistake of fact; and nowhere have any liabilities been laid down capable of general application. And then the learned judge quotes the language of Chancellor Dargan used in Kelt v. Andrews, supra, that already appears herein, as to the fact that misconstruction of wills or deeds, where there is no fraud or circumvention, does not fall within the scope of the law regulating mistakes of law by which such mistakes can be corrected. He then says in this view this court concurs, and holds that "even if there is a difference as to ignorance of law and mistake of law, and it should be regarded as in fact true that Pamela Cunningham had formed an opinion, either from her own construction of this will or in consequence of erroneous advice of others, this is no ground on which this court can relieve her devisee from the effect of those solemn deeds executed in 1875."

It will be seen that all that this court has done is to express a doubt as to whether the distinction between mistake of law and ignorance of law still subsists, now that parties are allowed to testify on their own behalf; and in no form is it asserted that there are not mistakes in law from which equity will relieve. It may be doubted if the fact that parties can now testify in their own behalf is a very potent reason for the doubt expressed by the learned judge.

As to the case of Roundtree v. Roundtree, supra: In this case the testator had made his will some time before his death. During his last illness, his son James died, and for prudential reasons the news of his death was kept from the sick father, who, however, learned this fact just before his death, but no alteration of his will was made. By the terms of this will the children of James were unprovided for. This at first seemed not to

have been known by the testator's other children, and accordingly, when testator's general estate was distributed, the children of James were given a child's share between them. After a life estate terminated, and thereby released a tract of land for division among testator's children, the question was sprung that James' children were not entitled to a share. This was stoutly contested by them, and they insisted that they were entitled to have the will reformed so that they might receive their father's (James') share. The circuit court sustained their contention, but this court, on appeal, held that this was error. Chief Justice McIver, in delivering the opinion of the court, among other things, said: "Again, it is urged that the children of James W. Roundtree should be let in on the ground of mistake. It is not necessary for us to consider whether the court of equity has jurisdiction to correct mistakes in wills, and, if so, in what cases, for we do not think any mistake was presented. It is true that James W. Roundtree was alive at the time of the execution of the will, and was one of the objects of the intended bounty of the testator, but it does not necessarily follow that his children were; certainly not that they were equal objects of his bounty. \* \* \* The circuit judge seems to assume—but upon what evidence, if any, the record does not disclose—that the testator was kept in ignorance of his (James') death until so near his own that it was probably impossible to alter his will. Now, even accepting the assumption as well founded, it certainly does not show a case of mistake, but rather that of misfortune or omission. Can any one venture to say what the testator desired to do with the interest he had intended for his dead son, and which he could not take by reason of his death? If the court should undertake to do so, would not that be a clear case of undertaking to make, instead of construing, the will of the testator?" The present chief justice then proceeds to suggest that the provision of the act of 1789 might have reached the case of the testator, and he may have concluded that under this act the children of James W. would not take under the provision in the will made for the said James W. And then he says: "But, even if this were so, this already was not such a mistake of law as the court would relieve from (if, indeed, there is now any case in which relief would be granted upon that ground. *Cunningham v. Cunningham*, 20 S. C. 317); for it was nothing more than an erroneous construction of a statute (*Pratt v. McGhee*, 17 S. C. 423), which certainly affords no ground of relief." Again we observe the expression of a doubt as to the existence of any mistake in law which is relievable; but with this expression of doubt, parenthetically expressed at that, it is evident the chief justice did not desire to be understood as so ruling.

In *Munro v. Long*, 35 S. C. 354, 14 S. E. 824, it is said the distinction between ignorance of law and mistake of law is "wide and shadowy." And in *Smith v. Winn*, 38 S. C. 102, 17 S. E. 717, 751, Chief Justice McIver, in speaking of the mistake made in the construction of a will, says: "It is very obvious from the cases of *Keitt v. Andrews*, supra, and *Cunningham v. Cunningham*, that such a so-called 'mistake' would not be sufficient." And in this same case, in the dissenting opinion of Justice Pope, it is said: "While it is true that this court cannot view with approval any appeal that is based upon an error of fact or of law in the construction of a will when there is no fraud or circumvention which parties to a controversy or their privies may have made, \* \* \*."

It must be evident in looking to the text of these decisions that it is nowhere decided that there are not some mistakes of law which the court of equity will relieve. Furthermore, all the cases from our own state courts since *Lawrence v. Beaubien*, supra, have dealt with mistakes made by parties in the construction of wills. They not one of them pretend to cover a case similar to the case now on appeal. Here, in the case at bar, the contention is directly confined to this: When a grantor and grantee have made an agreement as to a conveyance of land, and a mistake of the scrivener converts the deed executed to carry out the previous agreement from one fee simple to one conveying only a life estate, and these facts are made clearly to appear, is it relievable, so that when the heirs at law of the grantor seek to take away the land from the grantee, because of the terms in their grantor's deed, the grantee may show this mistake? We think it is in this case.

Before closing this discussion, we would desire to call attention to the cases of deeds in fee simple absolute on their faces, now, when the grantees come into a court of equity, and allege and prove that notwithstanding, by the terms of the deed, an estate in fee simple is granted to the grantee, yet such an instrument was made really to secure the grantee in the loan of money to the grantor by a pledge of the land named in the deed. This is allowed. It may be said that this is done because it is competent to prove the consideration of a deed. This is true, but it is not, after all, because there was an agreement between the parties for the loan of money, and not an absolute sale of land, and therefore the deed prepared as a conveyance should have been a mortgage.

So far as the effort of the appellants is concerned where they seek to inject the question as to this being a voluntary deed, and therefore not reformatable, we have looked in vain in the "case" to find any place where these appellants raised such a question before the circuit judge, and it is too late to ask that this question be considered by this court.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J. (dissenting). Being unable to concur in the conclusion reached by Mr. Justice POPE, I propose to state briefly, without elaborating the argument, the grounds of my dissent.

It seems to me that the first and third grounds of appeal properly impute error to the circuit judge in receiving parol evidence to vary the terms of the deed from Stephen Clayton to his son A. T. Clayton. The manifest object of this testimony was to correct an alleged mistake in that deed by supplying the word "heirs," not found in the deed, so as to convert that conveyance from a deed conveying a life estate only into a deed conveying the fee. There is no doubt that, as a general rule, parol evidence is not competent to vary the terms of a deed or other written instrument; but to this general rule certain exceptions are recognized. As is said in 2 Pom. Eq. Jur. § 858: "It is an elementary doctrine that parol evidence is not, in general, admissible between the parties to vary a written instrument. \* \* \* It is equally well settled that mistake, fraud, surprise, and accident furnish exceptions to this otherwise universal doctrine." Here the defendant is seeking the benefit of this exception to the general rule of evidence for the purpose of obtaining equitable relief from an alleged mistake in the terms of the deed, under which he claims to hold the land in controversy; and, before he can obtain the benefit of this exception to the general rule of evidence, it must appear that the case in which such exception is sought to be applied is a case in which he would be entitled to the equitable relief demanded. I do not think this is such a case, for the following reasons:

1. The deed sought to be reformed is a purely voluntary conveyance. It so appears upon its face, and there is no testimony to the contrary, and therefore it is not such an instrument as a court of equity would undertake to reform. In 15 Am. & Eng. Enc. Law, 678, the rule is laid down in the following language: "It is a well-settled principle of equity that a deed that is purely voluntary, resting on no consideration whatever, cannot be reformed for mistake,"—and quite a number of cases are cited in the notes to sustain that proposition. Amongst the cases there cited is one very much like the case now under consideration. That is the case of *Powell v. Morisey*, 98 N. C. 426, originally reported in 4 S. E. 185. In that case a grandfather had conveyed the land in question to his grandson by a deed, the terms of which passed only the life estate, and the grandson claimed that the word "heirs" was omitted through the inadvertence of the draftsman. Held, that the deed, being voluntary, could not be reformed. To the same effect, see 1 Story, Eq. Jur. § 176; 2 Story, Eq. Jur. § 793a. The doctrine thus laid down in that valuable encyclopedia,

besides being sustained by the authorities there cited, has also the support of reason; for, as I understand it, the theory upon which a court of equity proceeds in affording relief from a mistake is that there was a precedent agreement, the terms of which are imperfectly or inaccurately incorporated in the written instrument sought to be reformed; and equity, looking behind such written instrument, will require the specific performance of such precedent agreement by reforming the written instrument in accordance with the terms of such agreement. In other words, a court of equity, in both cases, proceeds upon the same principle; and the rule is undoubtedly well settled that a court of equity will not decree the specific performance of a purely voluntary agreement, even though under seal. See the sections above cited from 1 Story, Eq. Jur. 3; 2 Pom. Eq. Jur. §§ 1293, 1405; Fry, Spec. Perf. § 64; 22 Am. & Eng. Enc. Law, 1030.

2. In the second place, I do not think that the mistake, if there was one, was such as to warrant the interposition of a court of equity. If there was any mistake at all, it was in supposing that the deed as drawn would convey the fee, for there is not the slightest evidence tending to show that the word "heirs" was omitted through inadvertence or accident. To use the language of Wardlaw, Ch., in *Dennis v. Dennis*, 4 Rich. Eq. 307, a case which in principle is very much like the case now before the court: "In the case before us the parties were probably ignorant of the effect of the terms of limitation employed by them, but there is no proof of mistake. No word was inserted in the deed, nor omitted from it, not intentionally inserted or omitted." And we might add, in the language used by the same chancellor in his circuit decree in that case, which was affirmed by the court of appeals: "It is probable that all concerned in the concoction and execution of the deed mistook the legal effect of the words of limitation employed, but it was a mistake arising altogether from overweening conceit of themselves, or rash neglect in advising with the skillful. Those who will ignorantly and rashly employ technical terms of the law must submit to the consequence of having the terms technically construed. If relief be afforded in this case, the court must undertake to correct all the miscarriages of audacious ignorance in conveyancing." To the same effect, see *Ryan v. Goodwyn*, McMul. Eq. 451, where the court declined to afford relief in a case where, although the manifest intention was to convey property to a married woman's sole and separate use, so as to protect it from the creditors of her improvident husband, yet, under the terms used in the deeds, she was invested with such an estate as that her husband's marital rights attached, and the property was held liable for the claims of his creditors. So in case of *Westbrook v. Harbeson*, 2 McCord, Eq. 112, where a married woman

joined with her husband in the conveyance of her estate of inheritance, and undoubtedly intended to release her inheritance, but, through the ignorance of the magistrate, she only released her right of dower, the court declined to give relief. See, also, the case of *Keitt v. Andrews*, 4 Rich. Eq. 347, recognized and followed in *Munro v. Long*, 35 S. C. 354, 14 S. E. 824, where the court declined to give relief from an alleged mistake in the construction of a will. See, also, the famous case of *Hunt v. Rousmanier's Adm'rs*, 1 Pet. 1. In that case a borrower of money proposed to secure the lender by either of three modes,—a mortgage on his vessel, a bill of sale of the vessel, or an irrevocable power to sell. The lender selected the latter, and, although there was no doubt of the intention of both parties to have the loan adequately secured, yet the court declined to give relief when the security proved unavailing by reason of the death of the borrower before the maturity of the debt, which, as matter of law, operated as a revocation of the power of sale, although it was contended that the lender acted under a mistaken belief that the power of sale was irrevocable, and that he should be relieved from the consequences of such mistake. In that case it was undoubtedly the intention of the parties, the one to give, and the other to obtain, adequate security for the repayment of the money loaned; yet, as the mistake was due to an erroneous construction of the legal effect of the instrument, which was adopted to carry out the intention, relief was denied, although the lender acted under the advice of counsel, which proved to be erroneous, that the power to sell was irrevocable. So in this case, even if it should be conceded that the evidence was sufficient to show that the parties intended a deed which would convey a fee simple, yet, as their mistake was in putting an erroneous construction upon the legal effect of the deed which was in fact executed, relief must be denied, upon the same ground as in the case last cited. As is said in 2 Pom. Eq. Jur. § 843: "The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knew, or had an opportunity to know, the contents of an agreement or other instrument, cannot defeat its performance or obtain its cancellation or reformation, because he mistook the legal meaning and effect of the whole or any of its provisions."

Again, I think the circuit judge erred in leaving the question to the jury whether the testimony in the case showed ignorance of law or a mistake of law, and in refusing to charge as requested by plaintiffs' fourth and

fifth request, and hence that the sixth, seventh, and eighth grounds of appeal should be sustained. The defense of mistake was an equitable defense, and the issue thereby presented was an issue to be tried by the court, and not by the jury; for while it is entirely true that an equitable defense may be pleaded to an action at law, either jointly with other legal defenses or separately, yet care must be taken to have the issues thus presented tried by their appropriate tribunals. *Adickes v. Lowry*, 12 S. C. 97. From what has been already said, it seems to me that the judge erred in refusing plaintiffs' fourth and fifth requests.

I think, therefore, that the judgment of the circuit court should be reversed, and the case remanded for a new trial.

(95 Ga. 15)

### WHATLEY v. BLOCK.

(Supreme Court of Georgia. Nov. 12, 1894.)

INJURY TO EMPLOYE—UNGUARDED ELEVATOR SHAFT.

Irrespective of the question whether the plaintiff might or might not, by the exercise of ordinary care, have avoided falling into the elevator shaft, inasmuch as the evidence failed to show that there was any negligence on the part of the defendant, the judgment of nonsuit was right.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Henry Whatley against Frank E. Block. Judgment for defendant, and plaintiff brings error. **Affirmed.**

R. J. Jordan, for plaintiff in error. P. L. Mynatt & Son, for defendant in error.

**SIMMONS, C. J.** This was an action by a servant against a master for personal injuries received in the course of his employment. The declaration alleged various acts of negligence on the part of the master. As this is not a case against a railroad company, the general law governing master and servant applies, and the presumptions are all in favor of the master, and the burden of overcoming them by evidence is upon the plaintiff. In this class of cases the master is not liable to the servant for the negligence of a coservant unless it be shown that the master employed such coservant with knowledge that he was careless or incompetent, or retained him in the service after his unfitness was discovered. No allegation that the master was at fault in this respect is made in the declaration. We have carefully read the evidence in the record, and, in our opinion, the plaintiff totally failed to establish by his evidence any of the allegations of negligence made in the declaration. There was some evidence of negligence on the part of a coemployee in moving the elevator without notice to the plaintiff, but this, we have shown, is not imputable to the master. As to the absence of a railing around the hole in the floor

through which the elevator passed, there was no evidence that such a railing was necessary in order to perform the work with safety. No general rule or custom in regard to placing such railings around other elevators of the same class was shown, so as to charge the master with notice that it was proper and necessary to do so. "A custom with reference to the adoption of certain safeguards in a given business must be so general that it is presumed that the defendant had knowledge of it, in order to make him liable for neglecting to provide the same." 14 Am. & Eng. Enc. Law, pp. 903, 904. Besides, if the absence of a railing rendered the work dangerous, the servant knew it as well as the master; and it is an established principle of law that the servant takes upon himself the hazard of all known dangers connected with the service. Of course, if by want of ordinary care he fell into the hole, knowing it was there, he could not recover. The evidence failed to show that the master was guilty of negligence in not promulgating rules for the government or running of the elevator. It was not shown that such rules were necessary, or, if necessary, what were the proper rules for this purpose; nor was it shown that there was a general custom on the part of other persons owning elevators to promulgate rules for their government. After a careful consideration of the case, we are forced to the conclusion that the court was right in awarding a nonsuit. Judgment affirmed.

ATKINSON, J., not presiding.

(95 Ga. 38)

**GRAHAM v. MARKS et al.**

(Supreme Court of Georgia. Nov. 12, 1894.)

**ACTION AGAINST JOINT DEFENDANTS—SUFFICIENCY OF SERVICE—DISMISSAL OF ACTION.**

Where an action was brought against two persons upon a promissory note executed by them as joint makers, and one only of them was served, a motion by the latter to dismiss the action for want of service upon the other ought to have been sustained, it not appearing, and the plaintiff not offering to show in resistance to the motion, that the defendant not served was dead or beyond the jurisdiction of the court, and there being no return of non est inventus as to him.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by S. Marks & Co. against Eliza J. Graham and C. M. Davis and another. There was a judgment against said Eliza J. Graham, and she sued out a writ of certiorari to the superior court, which was dismissed, and she brings error. Reversed.

Geo. A. Carter, for plaintiff in error. M. Foote, Jr., for defendants in error.

SIMMONS, C. J. It appears from the record that Mrs. Eliza J. Graham, the plaintiff in error, and one C. M. Davis executed a joint

promissory note, payable to M. Foote, Jr., attorney for Brown Bros. The note was indorsed by Foote and by one L. E. Davis, and was negotiated to Marks & Co., and they brought suit upon it in a justice's court against the joint makers and against Foote, attorney for Brown Bros. At the appearance term, the defendant Mrs. Graham filed several pleas, which it is unnecessary now to notice, and at the trial term she moved to dismiss the case on the ground that she was a joint maker with C. M. Davis, and that he had not been served. This motion was overruled, and, after dismissing the pleas filed by Mrs. Graham, the court rendered judgment against her and against M. Foote, attorney for Brown Bros., for the amount of the note. Mrs. Graham sued out a writ of certiorari to the superior court, and, on the hearing in that court, the certiorari was dismissed and the judgment of the magistrate affirmed, and to this ruling she excepted.

Where two persons execute a joint contract and are sued thereon, and one of them is not served, and it does not appear that the defendant not served is dead or beyond the jurisdiction of the court, and there is no return of non est inventus as to him, the court, upon a motion made at the proper time, should dismiss the action. Code, §§ 3350, 3414; *Booher v. Worrill*, 43 Ga. 587. There being no service as to one of the joint makers sued in this case, and the plaintiff not having shown or attempted to show that the one not served was dead or beyond the jurisdiction of the court, and there being no return of non est inventus as to him, the court below erred in dismissing the certiorari.

As to the indorsers, it was optional with the plaintiffs to sue either or both of them in this action, or to leave them both out of the action, if they saw proper to do so. The indorsers being simply indorsers, and not joint makers, it was not necessary to join them in the action. Judgment reversed.

(94 Ga. 729)

**O'BRYAN et al. v. HARDWICK et al.**

(Supreme Court of Georgia. July 30, 1894.)

**INJUNCTION—TO RESTRAIN EXECUTION SALE.**

There was no abuse of discretion in the judgment revoking the restraining order and denying the injunction prayed for.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Petition by O'Bryan Bros. and others against C. L. Hardwick & Co. and others for an injunction and other relief. An injunction was denied, and petitioners bring error. Affirmed.

The following is the official report:

O'Bryan Bros., Manier & Co., and Ross & Co., by their petition, alleged: J. L. Ledford owes O'Bryan Bros. \$612.31 on a mortgage *fi. fa.*, with interest, secured by mortgage on the lands hereinafter described. Ledford

owes Manler & Co. \$338.48, with interest, on a mortgage *fi. fa.* secured in the same way; and he owes Ross & Co. \$411.55, with interest, on a mortgage *fi. fa.* secured in the same way. Ledford and Ridley, as makers, and R. H. Baker, as indorser, owe O'Bryan Bros. \$69.46 as principal, with interest and costs, on a judgment in favor of O'Bryan Bros. against Ledford and Ridley, rendered April 19, 1893; the judgment not being against Baker as indorser, but he was indorser on the note upon which the judgment is based, which note was given as part purchase money for the land hereinafter described, and taken up from C. L. Hardwick & Co. On September 3, 1888, R. H. Baker sold to Ledford and Ridley certain lands, describing them, for \$2,000,—\$500 due January 1, 1889, and notes for \$500 due January 1, 1890, \$500 due January 1, 1891, and \$500 due January 1, 1892. Ledford and Ridley took possession, and, with the farming business, carried on a general mercantile business for a time, when Ledford bought Ridley out, both in the land and store. Baker indorsed the three notes in blank, and either sold them or pledged them to Hardwick & Co. Hardwick & Co. held the two last notes as owners, or controlled them in some way. Petitioners sold Ledford goods for the general mercantile business above mentioned, and on May 20, 1890, Ledford executed to them mortgages of equal date and dignity with each other on said land, to secure his indebtedness to them; the balance of said debt being the amount set out above as due them. On January 12, 1891, the note next to the last one being in possession of Hardwick & Co., and due, and they wanting their money, and petitioners having rights secondary to these purchase-money notes, and wishing to help Ledford to prevent suits, advanced to Ledford the amount now held by them as a judgment for the purchase money above set out, paying the money to Hardwick & Co. On May 18, 1891, Ledford transferred in writing to Weatherly and Leonard, traveling salesmen, agents, and representatives of two of petitioners, and representing by request the other, the bond for titles to said land made to Ledford and Ridley by Baker as further security to petitioners for their debts; but, while the date of the transfer as appears from said indorsement is May 18, 1890, petitioners believe it was dated back, at Ledford's instance, perhaps just one year; the exact reason for his wanting it dated back being not now remembered. Matters stood thus until January 1, 1892, when the last note of Ledford and Ridley for \$500 fell due, held by Hardwick & Co., and, they wanting the money due them, and Ledford not paying, they began, in connection with Weatherly and Leonard, to look into matters closely, and they ascertained for the first time that Baker had no title to the land, but the title was in his wife; and, Ledford and Ridley being both

insolvent, and the debts held by Hardwick & Co. and petitioners both being in jeopardy, unless they could get the land papers in such shape that they could divest her title, Weatherly and Leonard, representing petitioners, and F. T. Hardwick, acting for Hardwick & Co., examined the purchase-money notes, with the indorsements and the bond for titles held by Weatherly and Leonard, transferred to them by Ledford, and the amount of debts due petitioners secured by the mortgages and bond for titles, and determined to try to get the title from Mrs. Baker, so as to get the land certainly fastened; and when obtained it was distinctly understood and agreed that it was for the benefit of petitioners and Hardwick & Co., the purchase-money debt being the first money paid from the lands. It was discussed in whose name the deed from her should be taken; Hardwick suggesting Weatherly might take it, and each agreeing the other might take it; and finally Weatherly handed Hardwick the bond for titles, who said he would take it to Mrs. Baker, and get the title made to him for the protection of all, and did obtain the deed, and some days afterwards returned the bond, with the statement he had the deed as agreed, from Mrs. Baker. The deed was made on January 1, 1892, to Hardwick, and, while it is a plain deed upon its face, it was made with the express understanding between Weatherly, Leonard, and Hardwick, in trust for them all, that Hardwick held the title both for petitioners and Hardwick & Co. In reality, Baker, in making the sale, acted as agent for his wife, and in the execution of the bond for titles, and she knew it, and ratified it affirmatively, or else, by her silence, acquiesced in it, and took the benefits accruing from the payments made by petitioners and Ledford, using the proceeds of goods furnished by petitioners; and she cannot, in equity and good conscience thus do. Hardwick & Co., with knowledge of all these facts to F. T. Hardwick, a member of the firm, brought a proceeding to the October term, 1893, of the superior court of Whitfield county, setting up that on the date of the execution of the deed by Mrs. Baker to Hardwick she executed it to procure Hardwick & Co. that day to purchase said promissory note, and pay the money therefor, when in fact the deed recites on its face that it was made for a consideration of \$2,000, the amount of the original purchase money, and Hardwick & Co. had been the owner of the note by absolute purchase more than a year before the date of the deed. Hardwick & Co., in said petition, prayed judgment against Mrs. Baker, and a specific lien upon the land; that it be sold as her property, and, after paying their debt, the balance be paid to her; when in fact she is not known as maker or indorser of their debt (unless by ratification of the act of her husband, as above set forth), and the deed was pro-

cured from her for petitioners and Hardwick & Co. The counsel of petitioners had frequent conference with F. T. Hardwick and his counsel about how to bring the land to sale under their respective liens, and proposed to join as plaintiffs or defendants in any proceeding that might be necessary to get a proper decree to protect all parties in their rights, and supposed it was agreeable, until they learned of the proceedings above mentioned, and then petitioners' attorneys went to Baker, and asked, without cost to Mrs. Baker, whose agent he was, that they be allowed to file her answer and set up the facts, making petitioners parties to the case, and get a decree that would protect all parties; and, while Baker did not agree, as his wife's agent, that said counsel might do so, the latter thought it was agreeable, and partially prepared an answer, and expected to finish and file the same during the term to which the same was returnable, but during the absence of such counsel from said term under leave of the court Baker sent for Starr, an attorney, and had him prepare an answer admitting all the allegations in the petition of Hardwick & Co., and filed a consent that a decree might be taken at the first term, and accordingly a decree was taken against her for the debt of Ledford and Ridley as makers and Baker as indorser, for the judgment previously recovered by Hardwick & Co. against said parties, together with counsel fees, and directing the land to be sold as her property, and, when the debt of Hardwick & Co. is paid, the balance to be paid over to her. Execution has issued on this claim, which has been levied on the land as hers, and the land is advertised for sale. If the sale is made, petitioners will be without remedy for their money. Ledford is wholly insolvent, and so are Baker and Mrs. Baker. Hardwick & Co., or F. T. Hardwick, and Baker, Mrs. Baker, and Ledford are in collusion to defeat the rights of petitioners, either in the interest of Mrs. Baker or Ledford. The land is worth all the debts controlled by petitioners and Hardwick & Co., and petitioners make no point now, and never did, that when sold Hardwick & Co. would get their money first; but, if the land is allowed to sell under this execution, petitioners can get nothing, which would be an unconscionable fraud on them. Ridley, long prior to the execution of the mortgage and deed, parted with his interest to Ledford. Petitioners prayed that the sale sought to be made under the execution be enjoined, and the decree be annulled; that the title to the land be decreed in Ledford, and the land sold, and the proceeds paid first to the purchase money, then to the mortgage liens of petitioners, and the excess, if any, to Ledford; that, if petitioners are mistaken in these prayers, F. T. Hardwick be decreed their trustee under the deed made to him by Mrs. Baker, and as such protect their interests, as he has those of Hardwick & Co., and,

if he refuse to do so, that petitioners have judgment against him and Mrs. Baker, and a decree against the land as her property; that she be required to ratify as a whole the sale of her land by her husband, and not only as a part, and be required, with Baker, to make good the bonds for title to Ledford; for general relief, etc. By amendment, petitioners addressed questions to Baker and his wife, in substance as follows: Did Baker sell Mrs. Baker's land to Ledford and Ridley, in 1888, with or without her consent and knowledge, or was it with her consent and knowledge, and in good faith, both intending that Baker's act should be carried out, and the bond be complied with? How much money has been paid to Baker or Mrs. Baker or both on the land, and did not Mrs. Baker know the money was being paid by Ledford, and did she not say to Baker that it was all right, and that she would carry out his contract, and make a deed in compliance with his bond at the proper time, or words to that effect? Did not Baker know he had no title to the land, and was not the title in Mrs. Baker's father, or his estate, at the time of the sale to Ledford and Ridley? As whose agent was Baker acting at the time, and was it with or without the knowledge of his principal? Did Mrs. Baker ever claim any interest in the land, after the sale to Ledford and Ridley, further than holding the title to secure the purchase money? Does she now claim any interest in it, or its proceeds if sold, and, if so, upon what grounds? Have either Mr. or Mrs. Baker, or any one for them, since 1888, returned the land for taxation, and, if not, why? Did Mrs. Baker, on January 1, 1892, sell Hardwick & Co. one of the notes given by Ledford and Ridley for the land, and, to get them to purchase it, make a deed to Hardwick to secure him in that purchase, or any transaction of that sort, on that day? When the deed was executed by Mrs. Baker to Hardwick, why was the consideration named \$2,000? Was not that the price Baker, acting as her agent, had sold the land for, and was not the deed made for that expressed consideration, to be in line with and in harmony with the bond for titles, and to comply with the bond?

Hardwick & Co. and F. T. Hardwick answered, in brief: All the information they have about plaintiffs' mortgages or debts is derived from hearsay. They never felt any interest in inspecting or inquiring into plaintiffs' mortgage *fi. fas.*, or the debts on which they were made. It has never been pretended by plaintiffs or their agents that those mortgages or *fi. fas.* could in any way come into competition with respondents' claim against Ledford and Ridley, as a lien on the land, but the contrary was always conceded by Weatherly and Leonard and is conceded by plaintiffs. It is not true that Baker indorsed and delivered to respondents three of the purchase-money notes of Ledford and Ridley. Respondents never had title to any



of these notes except those falling due January, 1891, and 1892. Hardwick & Co., about June, 1890, acquired possession of the note due January, 1891, in a transaction with one R. P. Baker, as collateral security for money borrowed from their bank by R. P. Baker; and about the same time acquired the note due in January, 1892, from R. H. Baker, as collateral security for money loaned by them to him. Some time afterwards, and before January 1, 1891, respondents learned that Weatherly and Leonard were interested in having these two notes paid off, and they were advised that respondents held the notes, and would expect and require them to be paid as they fell due. At that time Weatherly, Leonard, and Ledford appeared to be working together in relation to these notes, and all of them informed respondents that the notes would be paid as they matured. Weatherly and Leonard both told F. T. Hardwick then, and repeatedly afterwards, that if Ledford did not pay the notes they would, and that they would be obliged to pay them if Ledford did not, in order to protect themselves, or the firms they represented, on debts due by Ledford. In December, 1890, Ledford came into respondents' bank, and notified them that he had turned over to Weatherly and Leonard some produce, and that Weatherly and Leonard would pay the note due January 1, 1891; and about January 12, 1891, two payments were made on this note, one by Weatherly and the other by Leonard, being in full of the note, which was delivered to Weatherly and Leonard. When this note was paid by Weatherly and Leonard they asked that the sums so paid be entered on a slip, and this slip be pinned to the note, saying they wished to keep this note alive, as it was better secured than some other claims they owned, and that the proceeds of the produce would be credited on those other claims. As Ledford had told respondents to expect payment out of his produce, they demurred to this course, and finally consented to it solely upon the promise of Weatherly and Leonard that, if any contest ever came up, this note should not rank with, or have the same lien on the land as, the note due January, 1892; respondents' object being to make the latter note more secure. This agreement has been referred to and acquiesced in several times since, and stands now undisputed, so far as respondents know. Inasmuch as all the purchase-money notes had then been paid except that maturing January 1, 1892, which respondents held to secure money borrowed by R. H. Baker, and in consideration of and relying upon the repeated assurances of Weatherly and Leonard that they were obliged to and would pay the notes promptly if Ledford did not, respondents, on May 11, 1891, bought the full title to the note due in January, 1892, outright from R. H. Baker, giving him credit therefor on his indebtedness to them. But this purchase was made

in consideration also of Baker's express promise that the title to the land should be deeded to respondents to secure the payment of this note, and not to secure anything else, whenever respondents should call for it. In the summer of 1891 respondents learned from Weatherly that he had advised Ledford to apply to a loan association for a loan on the land sufficient to pay all of Ledford's debts, but that the loan might not be obtained on account of the title to the land not being in Baker. This was the first notice respondents ever had as to any defect in Baker's title, and caused them to institute an investigation, resulting in finding that the title was in Mrs. Baker. They concluded to try to get Baker to induce his wife to deed the land to them (respondents) to secure this note, and told Weatherly of this determination, to which he made no objection, and had no right to make any; and they asked him to lend them the bond as a guide in drawing a deed, for the proper description of the land, for Mrs. Baker to sign. A deed was accordingly drawn to F. T. Hardwick, and D. K. McKamy took the deed, and went with Baker to the latter's house, to get it signed; but Mrs. Baker refused to sign it, without giving any reason. In a few days respondents returned the bond for titles to Weatherly. This was the first and only time they ever examined or saw it. This was in the summer of 1891, and there was then no written assignment thereof indorsed thereon as alleged in the petition, as now remembered. Respondents also told Weatherly of her refusal to sign, freely and fully communicating these matters to Weatherly and Leonard, because of the interest they expressed and seemed to feel in the payment of the note, not doubting that those whose business it was for the note to be paid, and who had repeatedly promised to pay it if Ledford did not, would be glad to see it safely secured, so, if they should have to pay it, according to their promise, they would have security for their reimbursement to the extent of such payment; and so they seemed to regard it at that time. Respondents deny that in any of the interviews with Weatherly and Leonard, or either of them, anything was said by respondents, or either of them, that could be understood that the deed respondents were going to try to get from Mrs. Baker was for any other purpose than solely to secure respondents' said last note, and they deny that there was any contract or understanding to the contrary. On January 1, 1892, F. T. Hardwick asked Weatherly to pay this note. He declined to make any direct response, remarking that he would see about the matter later in the day, and a little later on the same day came back, and said he had already invested in Ledford all the money he could, and that his attorney had advised him not to pay any more. Hardwick insisted he should pay the note, reminding him of his

promise to do so, which he did not deny, but simply said he could not invest more money in Ledford. Hardwick then said to him that he must try to secure the bank, and then told McKamy, in the presence of Weatherly, to draw up a deed to the land, and try to get Mrs. Baker to sign it, to secure the note due the bank. Weatherly said nothing, and walked out. McKamy then drew up the deed, and took it, the same day, to Mrs. Baker, and she executed it for the sole purpose of securing the note due to Hardwick & Co. The deed was on its face an absolute and unconditional deed to F. T. Hardwick, but was in fact made solely to secure the note held by Hardwick & Co., and was so understood by all the parties. It is not true that, when the note fell due, respondents, in connection with Weatherly and Leonard, then began to look into matters, and then found that the title to the land was in Mrs. Baker, but these facts were known to the parties in the summer of 1891. It is untrue that when the note fell due respondents, Weatherly, and Leonard consulted as to how they might divest the title in Mrs. Baker for the common benefit and security of petitioners' debt and respondents' note. And it is not true that Weatherly and Leonard examined the papers, and determined to try to get the title from Mrs. Baker, so as to get the land certainly fastened, nor that, when obtained, it was agreed that it was for the benefit of petitioners Hardwick & Co. No such thing ever occurred, nor were such understandings had at any time. It is not true that Weatherly handed the bond for titles to Hardwick on January 1, 1892, nor was there any discussion in whose name the deed from Mrs. Baker should be taken; nor did Hardwick say he would take it to Mrs. Baker, and get the title made to him for the protection of all, and did take it, and obtain a deed, and some days afterwards return the bond, with the statement he had the deed as agreed from Mrs. Baker. When Hardwick applied to Weatherly for the bond for title in the summer of 1891, to get the description of the land, he told Weatherly, if Weatherly and Leonard would take up the note, or secure it in writing, he would advise Mrs. Baker to make the deed to them, if it was satisfactory to Ledford, and Baker's bond should be surrendered to him, so that the adjustment would be satisfactory to all parties. Weatherly declined to do this, but delivered the bond to Hardwick for the purpose for which Hardwick wanted it, without objection or intimating any desire that the deed should be taken to secure any claim save that of Hardwick & Co. What Hardwick thus said to Weatherly was said by him solely on his own motion, to get the bank's debt into a safe condition. The reason given by Weatherly for declining to assume the debt in writing was that he and Leonard would not want to give their own

written obligation, as the debts they controlled belonged to the houses they represented. When Hardwick applied to Weatherly, in the summer of 1891, to get the bond for titles, he told Weatherly why he wanted it, and Weatherly made no objection, but appeared to be perfectly willing, because, as respondents suppose, he felt at least morally bound by his promise to pay the note if Ledford and Ridley, and in executing the respondents' right to priority of payment out of the land. Neither petitioners nor their agents ever did anything towards procuring the deed from Mrs. Baker. Respondents never heard of the claims now set up by Weatherly and Leonard until they found them in the petition. Respondents do not admit that Baker, in making the sale to Bedford and Ridley, and in executing the bond for titles, acted as agent for his wife. All they know on this point is what appears on the papers, which indicated that he executed the bond in his individual right and name, and that the notes were made payable to him in his own right. They do not know what passed between Baker and his wife, nor that she ever got any of the benefit of the purchase money. On the contrary, they know that Baker used at least the two last notes in his individual business, as before stated. When respondents originally took said two notes as collateral security, and when they purchased outright the last note, they believed that the title to the land was in Baker, and the land bound for the payment of the notes as purchase money. They deny any ratification by Mrs. Baker of the sale by Baker, and deny that her deed to Hardwick ought to be affected by any such pretended ratification. The allegations of petitioners as to conferences between counsel, etc., are irrelevant. It is true that counsel for petitioners had interviews with Hardwick and respondents' counsel as to the proceedings each would or could adopt, but it was never pretended by petitioners' counsel in those interviews that petitioners had any rights under the deed of Mrs. Baker to Hardwick. The only proceeding in the way of bringing the land to sale, as proposed by plaintiffs' counsel, was they wanted Hardwick to execute a deed to Ledford and Ridley, have it recorded, and then have the land sold under the judgment of Hardwick & Co. against Ledford and Ridley, as the property of Ledford and Ridley; and, if petitioners' counsel proposed that petitioners should join with respondents as plaintiffs or defendants in any original suit to bring the land to sale, respondents have no knowledge or information of it. The proposition of petitioners' counsel for Hardwick to file a deed and sell, as above mentioned, was rejected by respondents; respondents' counsel telling plaintiffs' counsel that respondents would stand upon their own separate right under the deed from Mrs. Baker. Respondents de-

ny all fraud or collusion with any one in the bringing of their suit against Mrs. Baker, and insist that it was their right to have their decree at the first term, as it was with the express consent of Mrs. Baker, the sole defendant. If petitioners or their counsel intended to make any application to the court for petitioners to be made parties to the case between respondents and Mrs. Baker, respondents never heard of it before the decree was rendered; nor did they ever have any notice of such intention until the petition in this case was filed.

The answers of Baker and Mrs. Baker were as follows, in brief: When Baker sold the land to Ledford and Ridley, the legal title to the land was in Dr. Foute, Mrs. Baker's father, who died since the sale, in May, 1890, without making any will. But he had repeatedly declared his intention and desire that Mrs. Baker should have the land, and after his death his heirs at law, by agreement, wound up the estate without administration, and all of them except one, who had been fully advanced by her father, deeded their interest in the land to Mrs. Baker. Knowing that Dr. Foute intended the land for Mrs. Baker, Baker, as head of the family, assumed the right to sell the land as he did sell it, without asking or receiving from her any special authority to do so. But he always talked freely to her about his business matters, told her before the sale that he thought it best to sell the land, and after the sale told her of the sale, and she made no objection. There was no fraudulent conspiracy between them or with Hardwick & Co. or any one to defraud petitioners or any other person. Baker acted in good faith. Baker used all of the notes given by Ledford and Ridley for the purchase money of the land, and all the money paid by them to him, in his private business, and has never paid his wife any part thereof, nor invested any part in any way for her use and benefit, except the benefit she may have received as the wife of Baker, in the way of support and maintenance from him as a member of his family. The notes falling due January 1, 1891, and January 1, 1892, were originally indorsed and pledged by Baker to Hardwick & Co. as collateral security for money borrowed. About May, 1891, the note due January 1, 1892, was sold by Baker to Hardwick & Co. in payment of Baker's debt to them for borrowed money, and turned over to them absolutely, they giving him credit therefor on his indebtedness to them. As part of the consideration to induce them to purchase this note, Baker promised that a deed should be made of the land to secure to them the payment of the note whenever thereafter required by them. In June, 1891, a deed was presented to Mrs. Baker, to be executed by her to secure the payment of this note, but she declined to sign it at that time. On or about January 1, 1892, when the note fell due, she executed a deed to F.

T. Hardwick, which, though absolute in form, was really given to secure the payment of this note, and not to secure any claim of petitioners, or anything else. Baker induced her to sign this deed, and she consented to do so solely for the purpose of carrying out the promise above mentioned, made by him to Hardwick & Co. Baker had never heard of any request or expectation by Weatherly and Leonard that they or the petitioners should have any sort of interest under the deed, and no one asked Mrs. Baker to make the deed to secure any claim except the note of Hardwick & Co., and she never thought of or intended the deed as security to any one except Hardwick & Co. Mrs. Baker now claims that she should be paid out of the proceeds of the sale of the land about \$64, with interest, on two claims she holds against Ledford, but she only claims that this be paid to her after the judgment of Hardwick & Co. and the judgment held by one of petitioners for \$69, for a small balance on the purchase money, are paid. All the balance of her interest under the decree in favor of Hardwick & Co. against her she has transferred to Ledford. Neither Baker nor Mrs. Baker have given in the land for taxes since the sale, because, Ledford and Ridley being in possession of the land under the purchase, it was Baker's understanding that they were bound to pay the taxes. Mrs. Baker made no defense to the suit brought by Hardwick & Co. against her, because she did not think it right to do so, and she admitted the facts as charged in that suit, because she regarded the claim as substantially true, and because she had no just and honest defense against the relief as sought by Hardwick & Co.; and, having no defense that she was willing to make, she consented to the decree being rendered at the first term, because she believed it lawful and right to do so, and without any intention to wrong or hurt petitioners in this suit, or any other person. She does not know why the consideration of the deed made to F. T. Hardwick was expressed therein as \$2,000. She had nothing to do with the drawing up of the deed, and was not consulted about it. It was presented to her ready drawn, and she signed it as it was, without anything being said about the consideration expressed therein. She received no money or other valuable consideration for making the deed.

The evidence introduced on the hearing was conflicting upon the material questions in the case, and especially upon the question as to whether Hardwick, in taking the deed from Mrs. Baker, acted under an agreement or upon an understanding that he would do so to protect petitioners as well as Hardwick & Co. The judge presiding ordered that a temporary restraining order previously granted be revoked; that the execution issued from the decree of Hardwick & Co. against Mrs. Baker proceed, and that the land be sold; and that the surplus from the sale, if any, above

what it took to pay off the Hardwick & Co. execution, he held up to await the further direction of the court. To the granting of this order and refusing the injunction prayed for petitioners excepted.

Jones & Martin, for plaintiffs in error. R. J. & J. McCamy and McCutchen & Shumate, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 772)

### CRAWFORD v. STATE.

(Supreme Court of Georgia. Oct. 15, 1894.)

#### CARRYING CONCEALED WEAPONS—EVIDENCE—INSTRUCTIONS.

1. The written request to charge the jury not being in its terms adapted to the facts in evidence, or even to the statement of the accused, but being more comprehensive than either, there was no error in denying the same.

2. Under the statute prohibiting the carrying of a pistol concealed about the person (Code, § 4527), so carrying a broken and inefficient pistol, even though it be carried for the purpose and with the intent of having it repaired, is an offense; certainly so if, while on his way to or from the shop, the individual superadds to his original purpose and intention a resolution to produce the pistol suddenly and use it in making a hostile demonstration against one whom he happens to encounter while he has the pistol concealed.

(Syllabus by the Court.)

Error from city court of Macon; John P. Ross, Judge.

Burrel Crawford was convicted of carrying a concealed weapon, and brings error. Affirmed.

J. W. Preston, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., and Harrison & Peebles, for the State.

LUMPKIN, J. 1. The court was requested to charge the jury as follows: "Every carrying of concealed weapons by a person is not a crime. There are certain exceptions which excuse one having a weapon concealed upon his person. One is when an officer is in discharge of his duty. Another is in time of war, and when martial law has been declared. Another is when a person carries a broken pistol to a shop to have it repaired, and one who carries a pistol simply for transportation. These, and such like, are not carrying concealed weapons, and are not criminal violations of the statute." There was nothing either in the evidence or in the statement of the accused to the effect that he was an officer in the discharge of his duty, or that a war was in progress, or that martial law had been declared. We, therefore, would not feel authorized to reverse the trial judge for refusing to give in charge a request referring to such irrelevant matters, even if the request was in other respects legal and pertinent. Besides, even by his own statement, the accused made a very weak case of carrying a broken pistol to a shop to have it repaired, or of carrying it simply for trans-

portation. The court, therefore, had abundant reason for refusing the request in any view of the matter.

2. Instead of giving the charge requested, the court charged "that a person might carry a pistol in a basket or bucket or wagon, or wrapped up in a paper so as to be hid from view, if he carry it simply for transportation, or to a shop to have it repaired. But, if he carry it about his person concealed, the fact that it is a broken pistol would make no difference; and if he carries such a pistol, though simply to have it repaired, concealed in his pocket or under his coat, he is guilty under the statute." Under the facts of this case, there was no error, as against the accused, in so charging. In *Boles v. State*, 86 Ga. 255, 12 S. E. 361, this court held that a violation of section 4527 of the Code, which prohibits the carrying of a concealed weapon about the person, might consist in carrying a pistol in a basket or bag upon the arm, "and not for transportation alone." Even if, by the use of the words just quoted, it was intimated that carrying a pistol in a basket or bag for transportation only would not be a criminal offense, there certainly was no intimation that carrying a pistol concealed upon the person, for any purpose, would fall short of being a violation of the section in question. Granting, however, for argument's sake (though we do not, by any means, wish to be understood as so holding), that one might lawfully carry concealed upon his person a broken and inefficient pistol for the purpose of taking it to a shop and having it repaired, we are quite certain the individual so doing criminally violates the law if he superadds to his original purpose a resolution to suddenly produce and use it in making a hostile demonstration against one whom he happens to encounter while he has the pistol so concealed. It appeared in this case that, while the accused was proceeding along the street with a pistol in his pocket, he became engaged in a quarrel and difficulty with other persons, in the course of which he suddenly pulled the pistol from his pocket and pointed it at one of them. Under these circumstances, we have no hesitation in holding that the accused was guilty of the charge made against him, and that the jury were right in so finding. Judgment affirmed.

(95 Ga. 12.)

### LOTT v. WILSON et al.

(Supreme Court of Georgia. Oct. 22, 1894.)

#### HUSBAND AND WIFE—PROPERTY RIGHTS—LAND OF WIFE'S FATHER—DEED BY ADMINISTRATOR.

A deed made jointly to husband and wife in October, 1867, by the administrator of the wife's deceased father, operated prima facie to invest each of the grantees with an undivided half interest in the land conveyed; and, in order for the wife to assert exclusive ownership of the whole, by reason of her having acquired the property by descent, it is necessary for her to show that her father died after December 18, 1868. If he died before that time, intestate,

the husband was entitled to take her share of the real estate by virtue of his marital rights; and the acceptance of the administrator's deed, afterwards made, was, in effect, the assertion of his marital rights as to one-half and the relinquishment to her of the other half of the land covered by the deed. In the present case, as it did not appear when the father died, the deed is the controlling evidence as to the state of title.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Execution proceedings by Joel Lott against one Wilson. A claim to the property levied on was made by H. B. Wilson. There was a judgment for claimant, and plaintiff brings error. Reversed.

Hitch & Myers, for plaintiff in error. L. A. Wilson, for defendant in error.

**LUMPKIN, J.** This was a claim case. The plaintiff's execution was based on a judgment dated June 18, 1892. It was levied on a lot of land, August 31, 1893, and it appeared from the sheriff's entry that Wilson, the defendant in execution, was in possession at the time of the levy. This made a prima facie case for the plaintiff in execution. Mrs. Wilson, the claimant, introduced a deed from the administrator of her deceased father, dated October 1, 1897, and recorded February 22, 1894, conveying the property in dispute to herself and her husband. She testified, in substance, as follows: The land was her share in the estate of her father. She was a minor when the deed was made, and did not know what effect putting the name of her husband in the deed would have. He never paid anything for the land, and disclaimed having any interest in it. The deed has been in her possession ever since it was made. She supposed her husband returned the property for taxation, but he was not authorized by her to return in his own name, and she did not know he had done so. She and her husband lived on the land about six years ago, and she has been living on it since. They were not living on it when the levy was made, nor when the judgment was rendered. It was shown by the tax digests that the defendant in execution had returned the property for taxation from 1887 to 1892, inclusive. It did not appear when the claimant's father died, nor are the contents of the administrator's deed to herself and her husband set forth in the brief of evidence. The record shows nothing as to the nature of that deed, further than as above stated. Upon these facts, the jury found the land not subject, and the court overruled a motion for a new trial, based on the general grounds that the verdict was contrary to law, to the evidence, and the charge of the court. Under the evidence, at least one undivided half interest in the land was subject to the plaintiff's execution. It seems clear that the effect of the administrator's deed was to invest the husband and wife each with an undivided half interest in the land thereby conveyed. If the claimant's father

died after the passage of the act of December 13, 1866, known as the "Woman's Law," her share in his estate came to her free from the marital rights of her husband. If her father died before that date, her husband, by virtue of his marital rights, was entitled to take her share in the real estate, and hold it as his own. If he had such right, and accepted a deed from the administrator of the father, conveying to him only an undivided half interest in the land, this conduct on his part would amount to an assertion of his marital rights as to that half and a relinquishment to his wife of the other half of the land. In the absence of any testimony as to the date of her father's death, and there being no explanation as to why the administrator came to make the deed to the husband and wife jointly, her parol evidence is entirely insufficient to overcome the plain, legal effect of the deed, especially as she kept it in her own possession more than 25 years without making any effort to have it reformed, and, as she herself testified, allowed her husband to return the property for taxation for a series of years, not only neglecting to see that it was returned in her own name, but failing to discover that her husband had uniformly returned the property in his own name. As the case appears in the record now before us, the deed should have been treated by the court and jury as the controlling evidence upon the question of title. We leave for future determination the questions which may arise in the event it should be shown that the claimant's father died after the passage of the "Woman's Law." Judgment reversed.

(96 Ga. 40)

McDANIEL et al. v. MITCHELL et al.

BRAY et al. v. McDANIEL et al.

(Supreme Court of Georgia. Nov. 12, 1894.)

**MOTION FOR NEW TRIAL — NEWLY-DISCOVERED EVIDENCE — SUIT FOR SPECIFIC PERFORMANCE — JUDGMENT FOR DEFENDANT — OWNERSHIP OF LAND.**

1. The evidence being conflicting, and that introduced in behalf of the defendants being sufficient to warrant the verdict, and it not being at all probable that the newly-discovered evidence would change the result, this court will not interfere with the discretion of the trial judge in refusing to grant a new trial.

2. Where an equitable petition, filed for the purpose of obtaining specific performance of an alleged parol contract for the sale of land, was met by answers setting forth facts showing that the plaintiffs were not entitled to the relief prayed for, but containing no prayer for affirmative or specific relief against the plaintiffs, and there was a general verdict for the defendants, upon which a judgment for costs was entered against the plaintiffs, it was not error to deny a motion subsequently filed by the defendants to so amend this judgment as to make it adjudge that the title to the land in controversy was in one of the defendants, and direct that a writ of possession do issue in his favor.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Petition by E. W. McDaniel and others

against Alexander W. Mitchell and others. Defendant Mitchell having died, Wellborn Bray and others, as his executors, were made parties defendant. There was a judgment for defendants, and plaintiffs bring error. Defendants also assign error on the refusal of a motion to amend the judgment. Judgment in each case affirmed.

W. T. Moyers and L. P. Skeen, for plaintiffs.  
M. J. Clarke and Dorsey, Brewster & Howell, for defendants.

LUMPKIN, J. Ed Wilson McDaniel and others filed a petition against Alexander W. Mitchell and others, the chief object of which was to obtain a decree for the specific performance by Mitchell of a parol contract for the sale by him of a tract of land to the father and mother of the plaintiffs. They alleged that Mitchell agreed to sell the land to their parents for \$300, to be paid in money or work, immediate possession to be given them, and a deed to be made on payment; that possession was accordingly given them; that they remained on the land till they died; that plaintiffs have occupied it ever since, and that the purchasers fully complied with their agreement. Plaintiffs further alleged that they demanded a deed of Mitchell, and that he refused to make one; that in the spring of 1889 they informed one of the defendants, John T. Backus, of their rights in the land, but that he, about two months later, having bought the land from Mitchell, took forcible possession of a part of it; that Mitchell now claims title under a tax sale, and that on August 14, 1889, he sued out a dispossessory warrant against two of the plaintiffs, and on August 20, 1889, Backus sued out a dispossessory warrant against one of the plaintiffs as a tenant of his who refused to pay rent. Plaintiffs denied that they had ever been tenants of either Mitchell or of Backus, but alleged that they were too poor to give the bonds necessary to resist the proceedings instituted to dispossess them. The prayers were that Mitchell be decreed to make them a deed, that the land seized by Backus be restored, that Mitchell's tax deed be canceled, and that he and Backus be enjoined from prosecuting their dispossessory proceedings. The defendant Mitchell, in his answer, denied that he ever made a contract with the mother and father of plaintiffs for a sale to them of the land, and denied that they had ever paid him any purchase money. He admitted that the parents had possession, as alleged, and that plaintiffs have had possession, as alleged; but averred that such possession was merely permissive. He denied that plaintiffs ever demanded a deed of him, or that he claims title under a tax sale. He further answered that he sold to the defendant Backus, December 24, 1888, and notified plaintiffs of the sale, and that they agreed to surrender possession whenever required. He explained further that the dispossessory

warrant was sworn out under a mistake of law, and had been dismissed. The defendant Backus answered that when he sued out the dispossessory warrant mentioned by plaintiffs they were his tenants under a contract of rent which expired about two months before. He averred that he bought the land from Mitchell, December 24, 1888, without any notice of plaintiffs' claim; that he received a deed in July, 1889; that soon after buying he took possession of the south half without objection from plaintiffs, and built two houses upon it; that in July, 1889, he consented for plaintiffs to remain on the land till August, 1889; and that, they having failed to pay rent, he resorted to the dispossessory proceedings. Mitchell died pending the suit, and Bray and others, as his executors, were made parties defendant. There was a general verdict in favor of the defendants. The plaintiffs moved for a new trial on the grounds that the verdict was contrary to law and the evidence, and because of certain newly-discovered evidence. The judgment of the court below overruling their motion is the error complained of in the first of the above-stated cases.

The evidence was decidedly conflicting, but that introduced by the defendants was amply sufficient to sustain the finding in their favor, and therefore this court cannot interfere with the discretion of the trial judge in refusing to set the verdict aside as being contrary to the law and evidence. The evidence for the plaintiffs consisted largely of alleged admissions made by Mitchell. The newly-discovered evidence related to still another alleged admission on his part, tending to show that the plaintiffs were entitled to the premises in dispute; but, even if this evidence had been introduced at the trial, we do not think it in the least degree probable that the result would have been different, and consequently a new trial on the ground of newly-discovered evidence cannot properly be granted. This disposes of the first case.

On the day the verdict for the defendants was rendered, a judgment for costs was entered in their favor. At the next term of the court the defendants filed a motion to amend a judgment so as to adjudge that the title to the premises was in Backus, and direct that a writ of possession do issue in his favor. The motion was denied, and the judgment denying it is the error assigned in the bill of exceptions sued out in the second of the above-stated cases. From the preceding statement of the pleadings it will be observed that neither of the answers contains a prayer for affirmative or specific relief of any kind against the plaintiffs. The answers are, in effect, a mere general denial of the plaintiffs' cause of action, without more. While it may have been perfectly proper and germane for the defendants to have prayed for the relief sought by the motion they afterwards made to amend the

judgment, yet, as they did not do so, we are unable to perceive either how the jury could have found they were entitled to this relief, or the court could have so adjudged. There was nothing in their pleadings to authorize a verdict or judgment of this kind. It is a fundamental principle that all verdicts must be based on proper pleadings, and that all judgments must follow the verdicts upon which they are founded. If the defendants could not, at the term when the case was tried, have had a verdict and judgment for the particular relief in question, they could not, of course, either then or subsequently, obtain such relief by a mere motion to amend the general judgment for costs which had been entered up in their favor. With the utmost respect for the able and distinguished counsel who so earnestly insisted before this court that the allowance of the motion would have been proper, and that the refusal to allow it was erroneous, we are unable to bring our minds to take this view of the matter. The only thing that could make us entertain the least doubt that the denial of the motion was correct is the fact that so accurate and profoundly learned a jurist as he sincerely entertained an opinion differing from our own. Judgment in each case affirmed.

(94 Ga. 770)

**HAMILTON v. STATE.**

(Supreme Court of Georgia. Oct. 8, 1894.)

**SELLING MORTGAGED CROPS—CRIMINAL PROSECUTION.**

A crop of cotton and corn, mortgaged in May, and sold in November, is, when sold, personal property under mortgage; and, if the sale be such as violates section 4600 of the Code, prescribing a penalty for fraudulently selling personal property, the offense is punishable under that section.

(Syllabus by the Court.)

Error from superior court, Gordon county; W. M. Henry, Judge.

Mollie Hamilton was convicted of selling mortgaged property with intent to defraud, and brings error. Affirmed.

R. J. & J. McCamy, for plaintiff in error.  
A. W. Flite, Sol. Gen., for the State.

**SIMMONS, C. J.** Section 4600 of the Code prohibits a mortgagor of personal property from selling or otherwise disposing of the same without the consent of the mortgagee, and with intent to defraud him. Under this section the accused was indicted; the indictment alleging, in substance, that on the 10th of May, 1892, she executed and delivered to Alexander a mortgage on her growing crop to secure the payment of a certain amount of money which she owed him, which would become due on the 15th day of October, 1892; and that on the 1st day of November, 1892, she sold and disposed of the mortgaged property with intent to defraud Alexander, without first obtaining his consent, and before

payment of the indebtedness for which the mortgage was executed; and that Alexander sustained loss thereby. The accused was found guilty, and made a motion in arrest of judgment on the ground that the property described in the mortgage was not personal property, and therefore not within the provisions of the section above referred to. A distinction exists by which it may be determined whether things growing upon the land are realty or personalty. That distinction is that, if the growths are fructus naturales,—that is, the natural and spontaneous productions of the land,—they are regarded as a part of the land, and consequently as real estate; but, if they are fructus industriales,—that is, the result of labor performed about the land,—they are personalty. 1 Corbin's Benj. Sales, § 126; note to Norris v. Watson, 55 Am. Dec. 162. Growing trees, fruit, or grass, the natural produce of the earth, and not annual productions raised by the industry of man, are part of the land itself; while, on the other hand, annual productions or fruits of the earth, planted and cultivated by labor, are personalty. Cotton, which is planted each year, and cultivated, is therefore personal property, and subject to be mortgaged as such, though still growing upon the land. Before maturity, growing crops cannot be sold under execution (Code, § 3642), but it is quite likely that the owner can sell them before that time, and, if he should do so without selling the land at the same time, it would be a recognition on his part that they were personalty. So, if he should give a mortgage upon them, and should afterwards sell them before maturity, without the consent of the mortgagee, and with intent to defraud him, we think he would be subject to the penalty prescribed in section 4600, supra. But, whether this is so or not, we think there can be no doubt that, if he should sell them after maturity, as appears to have been done in this case, without such consent, and with intent to defraud the mortgagee, this section would apply. It is well settled that when such crops have matured, and ceased to draw sustenance from the land, they become personalty. The crop in question being personalty when sold, and being then subject to the mortgage, it does not matter whether it was personalty or not at the time it was mortgaged. The trial judge therefore did not err in overruling the motion in arrest of judgment. In addition to the authorities cited supra, see 2 Schouler, Pers. Prop. §§ 448-452. Judgment affirmed.

(94 Ga. 775)

**SAVANNAH, F. & W. RY. CO. v. BUNDICK.**

(Supreme Court of Georgia. Oct. 15, 1894.)

**INTERSTATE CARRIER—RIGHT TO SCHEDULE RATE—MISTAKE OF AGENT—NAMING OF RATE—RETENTION OF GOODS.**

Inasmuch as the interstate commerce act prohibits not only contracting for, but also collect-

ing, a less rate of freight on interstate shipments than that specified in the schedule of rates in force at the time (such schedule being required by the act to be printed, and kept in every station for inspection and use by the public), a common carrier who has complied with the terms of the act in respect to providing and keeping the schedule is not precluded from collecting from a shipper the full schedule rate because, by mistake, a less rate was named to him by the carrier at the point of shipment, and also inserted in a bill of lading signed both by the carrier and the shipper, no fraud or willful deception having been practiced or attempted. On discovery of the mistake, after the shipment, but in time to correct it at the point of destination, it may there be corrected by the exaction of the full schedule rate, and payment of the same by the shipper,—he being also the consignee,—as a condition to surrendering the goods to him, the transportation being fully completed. Should he refuse to comply with the conditions, the detention of the goods by the carrier to enforce payment of the correct charges is no conversion.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by R. H. Bundick against the Savannah, Florida & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Erwin, Du Bignon & Chisholm and S. W. Hitch, for plaintiff in error. L. A. Wilson and Atkinson, Dunwoody & Atkinson, for defendant in error.

**LUMPKIN, J.** The plaintiff below shipped nine horses over the Savannah, Florida & Western Railway from Gainesville, Fla., to Waycross, Ga., having the shipment consigned to himself. According to his testimony, the company's agent at the shipping point expressly informed him that the rate would be \$19.70. Certainly this amount was inserted in the bill of lading, which was signed by both him and the agent. There can, however, be no possible doubt that this rate was less in amount than that specified for a shipment of this kind in the schedule of rates in force at that time. There was evidence in behalf of the company tending to show that the plaintiff was in error in stating that the rate quoted to him was \$19.70. But, be this as it may, it cannot be doubted, taking into consideration all the evidence, that, if such rate was named to the plaintiff, it was the result of a mistake; and it is also perfectly clear that the insertion of this rate in the bill of lading was the result of a mistake on the part of the agent's clerk. There is nothing whatever in the record to suggest that any fraud or willful deception was practiced upon the plaintiff, or that anything of this kind was attempted. Taking the case in its most favorable light for him, he obtained a rate less than that which ought to have been charged; and, granting that he was perfectly honest in the matter, the fact that he secured the reduced rate was due solely to a mistake or mistakes on the part of the company's servants, who were themselves acting with perfect honesty, and in good faith. The mistake in

the bill of lading being discovered before the horses reached Waycross, the company's agent at that point was advised by the agent at the shipping point to collect the proper charges, which amounted to \$29.70. There was some contention that the horses were delivered to Bundick at Waycross, and afterwards taken from his possession by the company's agent, for the purpose of enforcing the payment in full of the \$29.70. This contention, however, is not borne out by the evidence as a whole, nor, indeed, by the testimony of Bundick himself, taken alone. It does appear that he paid to a servant of the company \$20, which was 30 cents more than the amount expressed in the bill of lading, and was permitted to take the horses out of the car, and to a neighboring livery stable, for the purpose of feeding them. This person, however, had no authority either to receive the money or to deliver the horses, and expressly notified Bundick that the permission to take his horses from the car was subject to the approval of the agent who did have authority to make delivery. The agent last named, on receipt of the \$20 from his subordinate, at once sent for Bundick, and informed him he must pay \$9.70 more, and, upon the refusal of the latter so to do, took charge of the horses, and refused to deliver them to Bundick. The truth of the case, therefore, is that there was no delivery to Bundick, that he refused to pay the legal rate of freight when demanded of him, and that the company retained possession of the horses. It also appears that the company afterwards caused them to be sold for the purpose of collecting in full the proper charges. Bundick brought an action against the company for the value of the horses, and there was a verdict in his favor. Quite a number of questions were presented by the motion for a new trial, but the case really turns upon the propositions announced in the head note. This was an interstate shipment, and therefore must be governed by the provisions of the interstate commerce act. That act prohibits not only contracting for, but also collecting, a less rate of freight on such shipments than that specified in the schedule of rates in force at the time; and the act requires that such schedule shall be printed, and kept in every station for inspection and use by the public. It appeared unmistakably in this case that the railway company had fully complied with the law in reference to providing and keeping the schedule. One of the main purposes of the act in question is to prevent carriers subject to its provisions from making discriminations either for or against any of its customers, and to compel such carriers to observe uniformity and equality in their dealings with all shippers. Therefore, it was unlawful for this company to make in Bundick's favor a rate of freight less than that which, under the schedule, it was required to charge every customer. It makes no difference whether Bundick was or was not ignorant that the rate



named to him was an unlawful one. Under no circumstances would he be entitled to the benefit of a rate which was denied to other customers. To so hold would be in the very teeth of the statute, and would utterly defeat its purpose to prevent just such discrimination. Such advantage as he could gain under the terms of the statute, and no more, would be the precise measure of Bundick's rights under any contract of shipment he might make with the carrier. Besides, he might easily have informed himself upon this point by merely inspecting the schedule which the law required to be kept, and to which, as the evidence discloses, he had ready access. If the company's agent at the shipping point had willfully deceived him, and thus have fraudulently induced him to make a shipment which he would otherwise not have made, and to his damage, we are not prepared to say he would not have a cause of action of some kind against the company to redress the tort; but we are quite certain, under the facts of this case, he had no right to rely on and enforce the illegal contract, which, at best, resulted alone from innocent mistake. Nor has he any right to an action of any kind against the company, to maintain which he must necessarily invoke the illegal contract in question. "The general rule of law is that a contract made in violation of a statute is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover." *Hancock v. Railroad Co.*, 145 U. S. 416, 12 Sup. Ct. 969, and authorities there cited.

Our ruling that the railway company was entitled to collect the proper legal charges, notwithstanding the insertion in the bill of lading of an erroneous and illegal rate of freight, is supported by *Rowland v. Railroad Co.*, 61 Conn. 103, 23 Atl. 755. Another case somewhat in point is that of *Baird v. Railway Co.*, 41 Fed. 592. In that case the error in the bill of lading resulted from the fraud or mistake of the consignor, but nevertheless the plaintiff, who was the consignee, insisted that the carrier was bound by the rate named in the bill of lading, under the statute of Arkansas making it unlawful for any railroad company to collect a greater sum for transporting freight than that specified in the bill of lading. After stating that such a construction of the statute would enable the plaintiff to profit by his own fraud or mistake, and that the statute was not susceptible of any such construction, *Caldwell, J.*, adds that, even if the statute in question would admit of the construction contended for by the plaintiff, it would avail him nothing, because the shipment, being from New Orleans to Little Rock, was interstate commerce, and therefore the act of congress would control. It was accordingly adjudicated that under the provisions of this act the railway company was entitled to collect the legal rate of freight, notwithstanding the error in the bill of lading. On the other hand, the supreme court of Alabama, in *Rail-*

road Co. v. Dismukes, 94 Ala. 131, 10 South. 289, took a different view of the questions involved in the case before us; but after giving the opinion of *McClellan, J.*, a careful perusal and consideration, we remain satisfied with our own conclusion, as above expressed. Judgment reversed.

(94 Ga. 709)

# WILLIAMS v. MACON & B. R. CO.

(Supreme Court of Georgia. Aug. 14, 1894.)

## CONDEMNATION PROCEEDING BY RAILROAD COMPANY—PRACTICE—EVIDENCE—REVIEW ON APPEAL.

1. As to the right to open and conclude, the case is controlled by *Harrison v. Young*, 9 Ga. 359; *Strever v. Railroad Co.*, 15 S. E. 637, 90 Ga. 56; *Wolff v. Railroad Co.* (this term) 20 S. E. 484.

2. Several of the grounds of the motion for a new trial present no question which this court can review; some of them not being sufficiently verified by the judge, and others not specifying the ground or grounds of objection to the evidence.

3. In none of the other grounds of the motion for a new trial does any error appear authorizing or requiring this court to grant a new trial over the approval of the verdict by the presiding judge. (Syllabus by the Court.)

Error from superior court, Upson county; *J. J. Hunt, Judge.*

Proceeding by the Macon & Birmingham Railroad Company against *F. J. Williams*, administrator, and others, for the condemnation of a right of way. From the award of assessors both parties appeal to the superior court, and, a motion by the administrator in such court for a new trial being overruled, he brings error. Affirmed.

The following is the official report:

The Macon & Birmingham Railroad Company, desiring to procure a right of way over the land of the estate of *Laura Jones*, deceased, under section 16891 of the Code, which section had been adopted in its charter, appointed as its assessor *J. S. King*. *Williams*, as administrator of *Laura Jones*, appointed as his assessor *C. A. Norris*, and these two assessors selected, as provided by law, *H. J. Wheelless* as the third assessor. These assessors awarded the administrator \$500 as damages for right of way through the lands, the railroad company to move the houses off the right of way to the place designated by the administrator, the log house on north of the roadbed not included or not required to be moved by the railroad. Both parties entered appeals to the superior court. The appeal filed by the railroad company was tried at the July term, 1892, and there was a verdict in favor of the administrator for \$905.75. Whereupon a motion for new trial was made and granted, after which the appeal filed by the railroad company upon motion was dismissed upon its failure to strengthen its appeal bond, thereby leaving the case to be tried upon the appeal filed by the administrator. The case coming on to be tried at the November term, 1893, upon the latter appeal there

was a verdict for the administrator for \$423.50. He moved for a new trial, and, his motion being overruled, excepted.

The motion contained the grounds that the verdict was contrary to law, evidence, etc.; also, that the verdict was inadequate, and showed an undue bias on the part of the jury in favor of the railroad company and against the administrator:

Because, when the case was announced ready, the attorneys for the railroad company and the attorney for Williams, administrator, both claimed and contended before the court for the right to open and conclude both in the introduction of the testimony and in the argument before the jury, the attorney for Williams, administrator, so claiming the right to open and conclude on the ground that he represented the heirs of Laura Jones, who were the owners of the land, and that he was the appellant in the superior court from the award of the assessors; and the court decided the question in favor of the railroad company, and allowed it to open and conclude both in the introduction of the evidence and the argument before the jury, the railroad company being the movant in the original proceedings to condemn.

Because the court committed error in refusing to allow, upon motion of administrator's attorney, G. A. Weaver, to testify that he sold the right of way over some land to the railroad company which joined to the land of Laura Jones on the west. Movant says that where there is a sale of land adjacent to the property in controversy, and the money paid for such land is paid without the appointment of assessors or any compulsory proceedings, and that the sum paid for such land is paid by mutual argument and consent, it is competent evidence to go before the jury in estimating the damage to the property in dispute; and he says that the court's refusal to allow such evidence when offered was error. Movant also says that he expected to prove by Weaver, and so stated to the court, that he received \$2,500 in cash for the land sold by him, and that it was a much smaller lot than the right of way over the Laura Jones land.

Because the court committed error in refusing to allow counsel for the administrator, upon his motion to do so, to read a decision (*Railroad Co. v. Nettles*) in the Supreme Court Reports from 77 Ga. 576-579, as part of his argument before the jury. Movant says that his counsel simply desired to read the facts in that case, and by analogy to the jury that there was but very little difference in the facts of the two cases, only that one was town and the other farm property, and that the town property, on account of being such, most naturally received greater damage.

Because the court committed error in allowing J. H. Hall, of counsel for the railroad company, over objection of administrator's attorney, to argue in his speech before the jury that should further damage result to the

land in the event the railroad company broadened the cut (100 feet right of way) through the land a distance of 50 feet from the center of the track to the dwelling house, said dwelling house being situated only 52 feet from the edge of said cut as it now is, it could be recovered by the parties who might own the land at the time such work was done, if done at all, and not the present administrator. That he went to the judge's stand at the time it was done, and called the court's attention to such argument by Mr. Hall, and that he promised to cover the ground in his charge to the jury, but which fact the court overlooked, and neglected and failed to do. That such argument, undenied, was calculated to greatly influence the jury in arriving at a true and just verdict. That Mr. Hall was at the time making the concluding speech in the case before the jury. The argument of Mr. Hall was in reply to the argument of attorney of administrator that the jury might look to such future use by the railroad company in considering the question of consequential damage.

Because the court committed error in directing the attorney for the administrator, when he was making his speech before the jury, not to so repeatedly refer to and speak of the wards of this administration as being "orphans," and when it was in testimony before the jury that they were orphans, and which testimony was unobjected to and never ruled out; that such direction by the court was calculated to bias their minds against the said orphans, and to influence their verdict in favor of the railroad; that J. H. Hall several times referred to them by name in his last speech before the jury, and continued to do so at intervals throughout his entire speech, and that he received no similar direction from the court, as movant's counsel did. All of which he assigns as error, and says that it was calculated to influence the verdict of the jury against him.

Error in refusing to allow the introduction of the brief of evidence, or the same to be read before the jury, which was introduced on a former trial of this case, and which had been approved by the judge of said court, the motion being made by the administrator's attorney to so introduce it, as it applied to witnesses named in this ground, for the purpose of showing that their testimony on that trial was very materially different to what it is on the present trial; and that said brief of evidence should have been allowed by the court to go to the jury, for the purpose of not only showing such a material difference, but also to show that R. A. Matthews, one of said witnesses, knew very little about the damages to the property, but was a violent and willing witness for the railroad, and prejudiced and biased in their behalf. In a note to this ground the court states that all that transpired relative thereto is reported fully in the brief of evidence.

Error in refusing to allow counsel for the

administrator to show by R. A. Matthews that the place in dispute was undesirable for him to live at because of the railroad being built through it. Movant alleges that such evidence would have been an element of damage for the consideration of the jury.

Error in confining administrator's counsel, over objection, to cattle of the owner of the place, on the question of the danger of cattle being caught in the cut by passing trains.

Because when administrator's counsel asked J. R. Lassater: "If you swore that the right of way before was worth \$250 to \$500, is it true that it was?" the court said: "It is embarrassing to put a question in that way." In a note to this ground the court states that it is approved by reference to the approved brief of testimony.

Because the court refused, upon motion of administrator's attorney, to allow the question put to witness C. A. Norris, to wit, "Please explain to the jury why you say that damage to the property is \$1,000, when you, as one of the assessors, said it was \$500." Movant says that he expected to show by witness that, as one of the assessors, he contended for \$1,000, and that the \$500 agreed to was a compromise award; and he also says such fact the court should have allowed him to explain to the jury.

Because the court refused to allow the introduction of the judgment founded on the note in favor of the administrator for \$150 as rent for the year before the railroad was built. Movant says he offered to show how much the place rented for before the railroad was built.

Because the court, over objection, allowed Sandwich, witness for plaintiff, to testify how much land there was in a piece 100 feet by 1,100 feet long. Movant says such calculation was for the jury, and that it was illegal and irrelevant. It was agreed afterwards that there were 2% acres. It is not stated in this ground what objection was made to the evidence when offered.

Because the court committed error in allowing, over objection of administrator's attorney, all that part of N. H. Sandwich's testimony about the passage of an act in November, 1889, amending the charter of the Macon & Birmingham Railroad Company, and also as to matters and things coming to his knowledge on account of his relationship as attorney and client; and also as to the contents of a bill of injunction filed by the people of Thomaston; and also a mandamus granted by the judge of the Middle circuit against the ordinary, compelling him to appoint an assessor; and as to the contents of the decision of the supreme court made about April 14, 1890, on the case; and also about the provision of the act about the town paying the difference of cost in the two lines, and the selection of the engineers to ascertain the cost of each; and also as to certain moneys being deposited in the Atlanta National Bank to the credit of said railroad

company. Movant says there was higher and better testimony of such facts, and that it was illegal and irrelevant, but it was not stated in this ground what objection was made to this evidence when offered. In a note to this ground the court stated that it is approved by reference to the approved brief of testimony as to what occurred.

Because movant says the court committed error in all that part of his charge to the jury on the question of damages to the land; that it fails to charge what elements of damage are to be considered by them, and it also fails to charge what are benefits, such benefits as contemplated by the law, and that it would be only certain kinds of benefits which could be set off against the consequential damages resulting to the land; that the court failed to charge that noise, vibrations, noxious vapors, soot, smoke, dust, cinders, and things of that sort were elements of damage; and that the broadening of the cut to the extent of 50 feet, or their full right of way, was a prospective or consequential damage which could be considered by them, and that, in order to set off such damages, there would have to be such benefits accruing to the property that would amount to more than mere convenience or comfort on account of the location and operation of the railroad; that the court should have explained what are the elements of damage and what constituted the benefits referred to in his charge; and that that part of his charge was too general and insufficient for the jury to understand the rules by which they were to be governed, and rather tended to confuse than enlighten them.

Error in charging: "In estimating the damages you will consider the market value of the property at the time of the appropriation," without more. Movant says that such language was calculated to mislead them on the question of what rule or criterion they should be governed by in ascertaining the damage. It should have gone further, and have stated the rule or the measure of damages to be the difference in the market value of the property at the time of the appeal trial and its market value just before the railroad was built, the railroad having failed to tender the amount of the award or to file the same with the clerk of the superior court; and that compensation should be assessed by them accordingly, with interest added to such difference. This ground was not approved or disapproved, because the court had no recollection of it, one way or the other.

Error in charging: "You will inquire whether the construction of the railroad had the effect of enhancing the value of the property if it did have such effect, and all the evidence should show the unappropriated property was as valuable as before, that is, before the railroad was built; then the only damage done by the railroad company is the occupying of a certain right of way 100 feet wide, and you will find only damages

for the value of the right of way." Movant says that it is not the actual value of the land taken up by the right of way, but it is the entire damage done to the whole property; that the intrinsic value of the right of way might be very small as compared to the intrinsic and actual damage done to the whole property accruing from no other cause than the right of way itself.

Error in charging: "If you believe from the evidence that benefits were conferred upon the balance of the land by the construction of the railroad, but that such benefits are not equal to the damage done, you will deduct the value of the benefits from the amount of damages, and find in favor of F. J. Williams as administrator, and add the amount to the value of the land actually appropriated as right of way; finding a verdict for one total sum, and calculate the interest thereon, and add it to the other sum; finding one sum as damages for the actual appropriation, and such other damages, if any, as you may find, added." Movant says that such language was not clear enough to be understood by the jury; that it was too vague and uncertain.

Because the court committed error in allowing, over objection of attorney of administrator, the introduction of the original petition filed by F. J. Williams on October 28, 1889, for permanent letters of administration on the estate of Laura Jones, deceased, in which he sets up that she "departed this life on the — day of —, 1886, leaving a large estate of real and personal property, worth the sum of \$2,500.00;" and also in allowing the order of appointment attached thereto; and also in allowing another order attached thereto, appointing certain parties appraisers of the estate. Movant says the court erred in allowing it as an "admission of the administrator as to the value of it at that time;" and he also says, first, that it is not an admission, and, second, that the value of the estate, especially in October, 1889, had nothing to do with the value of the property appropriated by the railroad just before it was built in August, 1890, and at the time of the trial in November, 1893. That such ruling was illegal and calculated to bias the mind of the jury against the heirs, who are not bound by the allegations in the petition filed by a man who, at the time, was not their administrator or the administrator of their mother's estate, and could not be such until the order of his appointment was rendered; and that the order was not passed until December 2d following after the petition was filed. It was not stated in this ground what objection was made to this evidence when offered.

Miller & Miller, for plaintiff in error. Gustin, Guerry & Hall, M. H. Sandwich, and B. L. Tisinger, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 17)

# CONSTITUTION PUB. CO. v. DE LAUGHTER.

(Supreme Court of Georgia. Nov. 12, 1894.)

STATUTE OF LIMITATIONS—DISMISSAL OF SUIT—RENEWAL IN SIX MONTHS.

An action brought in the United States circuit court for the Northern district of Georgia, and dismissed by the plaintiff, cannot, under the provisions of section 2932 of the Code, be renewed in the city court of Atlanta within six months after such dismissal, so as to avoid the bar of the statute of limitations, which had attached before the second motion was brought.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by J. E. De Laughter against the Constitution Publishing Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dorsey, Brewster & Howell, for plaintiff in error. Hall & Hammond, for defendant in error.

SIMMONS, C. J. This was an action in the city court of Atlanta for a libel alleged to have been published September 21, and September 29, 1891. The action was filed May 26, 1893. In order to take the case out of the statute of limitations, the plaintiff, by amendment, alleged that he had brought suit against the defendant in the United States circuit court for the Northern district of Georgia on October 13, 1891, for the same cause of action, that court having jurisdiction of the same, and that the suit was pending therein until May 25, 1893, when it was dismissed by the plaintiff, and the case renewed by bringing the present suit within six months thereafter; this amendment being predicated upon section 2932 of the Code, which declares that, "if a plaintiff shall be nonsuited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing, as to limitation, with the original case." The defendant moved to dismiss the declaration as amended, on the ground that the cause of action was barred by the statute of limitations, and contended that this section of the Code does not apply where the suit was commenced in a federal court and renewed in a state court. The court overruled the motion, and the defendant excepted. The section above quoted was taken from the thirty-third section of the act of March 6, 1856 (Acts 1855-56, p. 237), and that section of the act of 1856 was predicated on the act of December 29, 1847 (Cobb, Dig. p. 569). Construing this section of the Code in the light of these acts, we do not think it applies to suits brought in the federal courts. It seems to us to have been the manifest intention of the legislature that it should apply only to state courts, for in the act of 1847 it uses the words "courts of this state," meaning, in our opinion, courts created by the constitution and laws of this state. It confers a personal privilege upon

suitors who bring their actions in courts of this state to renew them in the same or other courts of the state having jurisdiction thereof, where such an action would otherwise be barred by the statute of limitations. While the act of 1856 and the Code both leave out the words "courts of this state," we do not think the legislature or the codifiers intended to enlarge this privilege by conferring it upon suitors who commence their actions in the federal courts. The act of 1856, and the section of the Code under review, were merely codifications of the act of 1847, and it will not be held that the codifiers or the legislature intended to change the law, unless that intention is clear and manifest. We think, therefore, that the court erred in not dismissing the case. We are strengthened in this conclusion by the ruling of this court in the case of *Cox v. Railroad Co.*, 68 Ga. 446. Judgment reversed.

(95 Ga. 34.)

**HOYLE et al. v. EXCELSIOR STEAM LAUNDRY CO.**

(Supreme Court of Georgia. Nov. 12, 1894.)

**INJURY TO EMPLOYEE—DANGEROUS OCCUPATION.**

The plaintiff being an adult engaged in the work of cleansing a machine, an operation the danger of which was obvious without instructions from the master, there was no negligence in failing to give her warning of the danger; and, it appearing from the evidence that by the exercise of ordinary care she might have avoided the injury she sustained, there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Lavinia Hoyle and others against the Excelsior Steam Laundry Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Goodwin & Westmoreland, for plaintiffs in error. Jackson & Leftwich, for defendant in error.

**SIMMONS, C. J.** The record shows that the plaintiff was over 30 years old at the time of the injury complained of, and that she had worked several months in the laundry, and about two months on the particular machine by which she was injured. This machine was an iron cylinder, about the size of a flour barrel, which revolved towards the person using it, and was used for the purpose of ironing tablecloths, sheets, etc. The plaintiff was directed to wipe it off every Monday morning, and to do this while it was running. In order to perform this duty, it was necessary to wrap a cloth around her hand, and in this particular instance she left part of the cloth hanging down from her hand, and this part of the cloth was caught between the cylinder and the piece against which the articles ironed were pressed, and her hand drawn into the machine and injured. The super-

intendent had not warned her of the danger attending the work in which she was engaged, and this is the main ground upon which she sought to recover.

It seems to us from the description of this machine in the record that any person of ordinary intelligence would have known that it was dangerous if proper care was not taken in working upon it. The plaintiff being an adult, and having worked upon it for two months and having cleaned it several times before, must have known as well as the superintendent that, if a part of the cloth wrapped around her hand was allowed to hang down, the cylinder in its rapid revolutions would be likely to take it up and draw her hand into the machine, as it did on this occasion; and, when the danger was as obvious to her as it was to him, what was the necessity of his telling her that the machine would mash her hand unless she was careful? Under this state of facts, the failure to warn plaintiff of the danger was not negligence on the part of the defendant, and the court did not err in granting a nonsuit. See *Engine Works v. Randall*, 50 Am. Rep. 798. Judgment affirmed.

(95 Ga. 50.)

**SIMMONS v. COOLEDGE et al.**

(Supreme Court of Georgia. Nov. 12, 1894.)

**LEVY ON PERSONALTY—SALE UNDER ORDER—ABSENCE OF JUDGE—JURISDICTION OF ORDINARY—NOTICE.**

1. When the judge of the superior court is absent from the county in which a levy of an execution or other process issued by the clerk of that court is made on personal property, the ordinary, under the provisions of section 3648 of the Code, is the only judicial officer authorized to grant an order for the speedy sale of such property, and an order for such sale granted by the judge of the superior court of another circuit is void.

2. Whenever a speedy sale of personal property is made under the provisions of the above-cited section, it should affirmatively appear that two days' notice of the applicant's intention to apply for the order of sale was duly given, unless the case falls within some one of the exceptions specified in that section.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Writ of error by C. J. Simmons on a judgment in favor of F. J. Cooledge & Bro. Reversed.

Simmons & Corrigan, for plaintiff in error. Harrison & Peeples, for defendants in error.

**LUMPKIN, J.** It is unnecessary to deal specifically with the numerous questions made in this case. It turns mainly upon the proposition announced in the first headnote. Section 3648 of the Code provides in substance, among other things, that whenever any process issuing from a superior court is levied on personal property of a perishable nature, or which is liable to deteriorate in

value from keeping, or is expensive to keep, and it remains in the hands of the levying officer because of a failure by the defendant to replevy the same, "upon the facts being made plainly to appear to the judge of the superior court, or to the ordinary of the county in which such levy is made, during the absence of the judge of said superior court," it shall be his duty to order a sale of the property, provided "that no judicial officer shall grant any order for the sale of personal property where the defendant in *fi. fa.*, or other process, or his attorney, has not had at least two days' notice of applicant's intention to apply to such order, which notice shall specify the time and place of hearing."

The question is whether, in the absence of the judge of the superior court from the county, the judge of another judicial circuit has the authority to grant an order of sale under the provisions of this section, or is such authority then confined to the ordinary of the county in which the levy is made? It was insisted that the nonresident judge had such authority by virtue of sections 247 and 248 of the Code. The first of these sections, after declaring that judges of the superior courts have authority in various matters not pertinent to the present inquiry, provides generally, in paragraph 6, that they may "exercise all other powers necessarily appertaining to their jurisdictions, or which may be granted them by law." The next section declares that: "The authority granted in the preceding section to each judge in his own circuit, may be exercised by any judge of another circuit whenever the resident judge is absent from the circuit," etc. While the language authorizing judges of the superior court to exercise all powers "which may be granted them by law" would probably be broad enough to include the power mentioned in section 3648, and, consequently, to authorize a nonresident judge to exercise that power in the absence of the resident judge, if that section had not distinctly provided upon whom the exercise of this authority should devolve in case of such absence, we are of the opinion that, by deliberately conferring this power upon the ordinary, the legislature meant to declare that he, and he alone, should act when the judge of the superior court whose circuit embraced the county of the levy was away from that county. Section 3648 of the Code became a part of our statute law long after the adoption of sections 247 and 248; and it is hardly probable that, in enacting the law embodied in section 3648, the legislature had in mind that they were conferring upon a judge of the superior court authority to grant outside of his circuit an order for the speedy sale of personal property, because of the broad and very general provisions in sections 247 and 248 which we have already pointed out. Certainly there was no express intention to extend the au-

thority conferred by section 248 to cases arising under section 3648. It is far more reasonable to conclude that it was intended to grant authority to order such a sale to an officer who would most probably be always at hand during the absence of the resident judge. At any rate, it was distinctly declared that, in the absence of the judge of the superior court from the county, the ordinary should attend to this business; and, there being no intimation of a purpose to authorize or allow any other judicial officer to attend to it, we think the section confers the authority exclusively upon the ordinary when the resident judge of the superior court is absent from the county. It follows from the foregoing that the sale by the sheriff, at which the defendants in error became purchasers, was void, and passed no title to them, it having been made under an order granted by the judge of the Stone Mountain circuit, who had no legal power to grant the same. In view of the provisions of section 3648, recited in the beginning of this opinion, it cannot be doubted that, even if the order had been granted by an officer vested with full authority in the premises, it should be made to affirmatively appear that the two days' notice of the applicant's intention to apply for the order of sale was duly given, unless the case be one which falls within some of the exceptions specified in that section where, in the sound discretion of the judge, a sale may be ordered without notice. Judgment reversed.

(96 Ga. 136)

DAVIS et al. v. DAVIS et al.

(Supreme Court of Georgia. April 15, 1895.)

ACTION AGAINST EXECUTOR—DEVISEE'S CREDITOR AS PLAINTIFF—PETITION FOR INTERPLEADER—NONRESIDENT DEFENDANT—APPEARANCE BY ATTORNEY.

1. Ordinarily there is no privity between an executor of an estate and a creditor of a devisee under the will, and, in order to sustain an action by such creditor against the executor for a fund which would under the will belong to the devisee, the petition should affirmatively establish a privity by showing some such lien, charge, or claim on the fund in favor of the creditor as would justify the court in awarding it to him rather than to the devisee.

2. It is essential to the maintenance of a petition for interpleader that there be, by at least two persons, conflicting claims, each apparently well founded, to a fund in the hands of a person having no interest in or claim thereon, and who, as between the conflicting claimants, is perfectly indifferent. Where, therefore, it appears that an executor is being sued by a devisee for a sum to which she is entitled under the will of the testator, and a creditor of such devisee is likewise suing the executor to recover the interest of such devisee upon an alleged indebtedness due from such devisee to himself, in the absence of allegations in the petition for interpleader showing clearly how and upon what account the creditor is entitled to maintain an action against the executor for the recovery to his own use of the sum due the devisee, an order directing an interpleader will not be awarded.

3. The principle above announced would also be applicable when, by decree of the proper

court, the rights under a will of a person named therein as devisee, and all other claims of that person against the testator's estate, had been fixed and adjusted, and the executor directed to pay such person a specific amount of money in lieu of the devise or legacy mentioned in the will, and in full satisfaction of all demands of that person against the testator's estate.

4. As against a special demurrer, a sworn allegation or an affidavit of noncollusion by the person seeking relief is indispensable to the maintenance of a petition for interpleader.

5. An attorney at law who acknowledges service for a defendant, and who afterwards, with the knowledge of the defendant, appears of record as representing him in the further progress of the cause, as long as such acknowledgment stands unchallenged upon the record, will be presumed to have been in the first instance authorized to make it, and such acknowledgment will be treated in the further progress of the action as personal service upon the defendant. Where, therefore, a person who resides beyond the limits of the state is thus served, the court may thereon proceed to judgment in personam, as though service had been regularly perfected upon the defendant while within this state, to the extent, at least, of binding the property of the defendant within this state; and especially is this true when it does not appear that at the time of the acknowledgment of service the defendant was not within the limits of the state.

(Syllabus by the Court.)

Error from superior court, Greene county; W. F. Jenkins, Judge.

Petition by Charles A. Davis, Jr., and others, executors of Charles A. Davis, deceased, against Hart & Sibley, attorneys at law, and Mrs. Icella E. Davis, to enjoin the prosecution of certain suits and to require defendant to interplead. An order of interpleader was granted, and Mrs. Davis excepted, and, on the refusal to grant an injunction, the executors took a cross bill of exceptions. Reversed on main bill of exceptions, and affirmed on cross bill.

The following is the official report:

The executors of Charles A. Davis brought their petition against Hart & Sibley, attorneys at law, and Mrs. Icella E. Davis, widow of Charles A. Davis, to enjoin them from prosecuting suits they had brought against petitioners, and to require them to interplead and establish their respective rights to a fund in petitioners' hands; and for direction as to how petitioners should further comply with a previous decree touching the settlement with said widow, and the payment of the balance of the indebtedness due thereunder. Hart & Sibley answered, admitting the truth of the facts alleged, and stating that they were willing to interplead with Mrs. Davis as to the fund, but denying that their suit should be enjoined, etc. Mrs. Davis answered: (1) That at the date of the filing of the petition she was, and has been ever since, a citizen and resident of Cook county, Ill., and that the superior court of Greene county has no jurisdiction of her. Not waiving, but insisting upon, said want of jurisdiction, she says: (2) That said superior court has no authority to enjoin the suit filed by her against the executors in the circuit court of the United States for the Northern district of Georgia; (3) that the

petition is not sufficient in law, because not supported by an affidavit of noncollusion on the part of the petitioners; (4) and that the averments as to the claim of Hart & Sibley show that they have no valid claim against the executors, and therefore she cannot be held to interplead with them. The court granted the order of interpleader as prayed, to which Mrs. Davis excepted. The injunction prayed for was not granted, for the reason that Mrs. Davis was a nonresident, and there would be no way of enforcing the injunction on this account. To this ruling the executors took a cross bill of exceptions. The petition of the executors alleges the following: Mrs. Davis, being dissatisfied with the legacy left her in the will of Charles A. Davis, filed a caveat to the probate of the same, and filed an application for a year's support. Besides, other differences arose between her and the executors touching her interest in the estate. Growing out of said litigations and disputes, a contract of settlement was entered into between her and the executors, whereby it was agreed that the executors should pay to her \$40,000 in full settlement and satisfaction of her interest in the estate, as soon as the judgment of the superior court ratifying this agreement could be had, upon proceedings to be at once instituted by the executors for that purpose. This agreement is attached as an exhibit. In compliance with its terms, the executors instituted the proceedings in the superior court, to which the widow and all other legatees under the will were parties; and at the August term, 1894, a decree was rendered ratifying and confirming the contract of settlement, and directing the executors to execute the same. Record of these proceedings is attached as an exhibit. After the rendition of the decree, the executors immediately commenced to make payments on the contract of settlement as fast as they could realize cash from the assets of the estate, until the amount due thereunder was reduced to a balance of \$8,507.45. Throughout said litigations, disputes, and settlement, Hart & Sibley were the sole attorneys at law and counsel for Mrs. Davis, representing, by her employment of them, her entire interests, claims, and demands against the estate. Payments heretofore made by the executors under the contract of settlement and decree were, by knowledge and consent of Mrs. Davis, made to her said attorneys; but in August, 1894, shortly after the last payment was made, she notified the executors to pay no more money to her attorneys, but to pay all the balance due directly to her. On the other hand, the attorneys notified the executors to pay the balance of the fund to them, claiming that their client had agreed that their fees should be taken out by them from the balance due. Soon afterwards Hart & Sibley sued the executors in the superior court for \$8,250, besides interest, claiming that this

much of the balance had been assigned to them by said widow; and they have notified the executors that they demand 7 per cent. interest on their fees, and that a sufficient sum to meet such demand and all costs of suit should be held in their hands. Mrs. Davis has since brought suit against the executors in the circuit court of the United States for the Northern district of Georgia for the balance in their hands due under the settlement and decree. They cannot undertake to decide the differences between the attorneys and their client, for want of information of the facts. They, therefore, cannot, with safety to themselves and to the interests of the estate, pay out the fund or execute the decree touching the settlement with the widow until the rights of herself and her attorneys are judicially ascertained by this court. On October 17, 1894, service of this petition was acknowledged by the attorneys for Mrs. Davis and by Hart & Sibley. On November 24, 1894, an affidavit to the truth of the facts stated in the petition was made by Charles A. Davis, Jr., one of the executors. Two days later the court granted a rule to show cause service of which was acknowledged by the attorneys for Mrs. Davis and by Hart & Sibley. On December 11, 1894, the executors filed an amendment to their petition, alleging as follows: Mrs. Davis was a resident of Greene county, Ga., at the time the executors instituted the proceedings for the decree ratifying the settlement with her, continued to be a resident of that county until after she had acknowledged service of said proceedings, and did not claim to have changed her residence till after the appearance term of said case. Since the rendition of said decree, the amount due by the executors under the contract and decree has, by agreement between them and Mrs. Davis, been definitely fixed at the sum of \$8,645.53, which includes all interest up to the 1st of November, 1894, the sum stated in the original petition being the amount due without interest; and it was further agreed between them and her that this balance was the proper sum to be held by them till the respective rights of herself and Hart & Sibley could be judicially ascertained. Petitioners are not colluding with any of the parties defendant in this case; but they simply hold the balance of said fund because of the contention, set forth in the petition, between Mrs. Davis and her attorneys. They are ready to pay over said fund to whatever party or parties may be entitled thereto upon a final adjudication of this case, and they should not be chargeable with any further interest thereon. They pray to be allowed to deposit the fund with such custodian as the court may direct, and to be discharged from further liability to any of defendants. They attach as an exhibit a receipt dated November 1, 1894, signed by Mrs. Davis, for \$3,000, as a credit on the amount due under set-

tlement between her and the executors, ratified by decree of the superior court at the August term, 1894. The receipt further recites: "After allowing said credit of \$3,000.00, there remains a balance due of \$8,645.53, which bears interest from this date (Nov. 1st, 1894) at the rate of six per cent. per annum; it being understood that said balance is to be paid by the executors of said will at the end of the litigation between myself and my former attorney, John C. Hart, touching our respective rights to said fund, and to be paid in accordance with the final decree or judgment of court settling the rights of said parties." An affidavit to the truth of the facts stated in this amendment was made by John C. Hart, December 27, 1894.

Bishop & Andrews and Marshall J. Clarke, for plaintiffs in error. H. T. Lewis, Hart & Sibley, and N. J. & T. A. Hammond, for defendants in error.

ATKINSON, J. The facts upon which the questions were made in this case are sufficiently stated in the official report. The general principles announced in the first, second, and third headnotes are such as not to require further elaboration than as therein stated. To a correct application of them to the facts of this case it is only necessary that the circumstances under which this litigation arose be briefly stated. The plaintiffs in the petition for interpleader were the executors upon an estate. In the course of its administration, a charge thereon was established in favor of one of the correspondents for a certain sum of money. The other party respondent claimed that, because of a pre-existing lien created thereon or assignment thereof, this fund should be paid to them rather than to the one entitled as devisee under the will. These were conflicting claims to this fund in the hands of the executors. Prima facie, the obligation of the executors was to pay to the devisee, and the burden of showing the contrary would have been upon the other claimant. Being pressed, however, by both claimants, the executors filed a petition praying for interpleader. In this petition the claim on the devisee is plainly and distinctly set forth in such form as that this court might adjudicate its merits. The petition for interpleader states in general terms the claim of the other respondent, alleges that a suit thereon has been brought which is pending in the superior court, in which the petition for interpleader is filed, and alleging further that this suit against them as executors plainly and distinctly sets forth the cause of action of the adverse claimant. No copy of this petition is attached to the petition for interpleader, but leave of reference is prayed to it as the court from time to time may require. Presumably the judge of the superior court had before him the original record of this suit at the time he passed upon the question



made in the petition for interpleader, but inasmuch as it was not introduced in evidence upon the hearing, nor certified to this court as such, and inasmuch as no copy of said suit is attached as an exhibit to the petition for interpleader, it could not come up to this court upon this writ of error, either as a part of the record or as a part of the evidence. For this reason, this court has not before it such a statement of the claims of these contesting parties as that it can adjudicate that the petition for interpleader should have been allowed. Upon the contrary, according to the record as we have it here, there does not appear to be any valid subsisting, substantial claim to this fund upon the part of any person adverse to the claim of this devisee. We know of no reason why, upon the remittitur being entered in the court below, the petition may not be so amended as to obviate the difficulty which we encounter in deciding the question here. It is readily conceivable how a devisee, by assignment of a specific portion of a legacy, or by the creation of liens thereon, may create such a right in favor of a third person as would entitle him to assert his title as against the claim of the devisee, and we presume that if upon a further investigation of this matter, with the record complete and the evidence before it, the circuit judge shall find that to this fund in the hands of these executors there are adverse claims, each apparently well founded, by two separate and distinct persons, he will make such order as will serve to protect the executors against loss.

That an affidavit of noncollusion by the plaintiff in propria persona is essential to the maintenance of a petition for interpleader we do not think is open to serious question, but, under our liberal system of pleadings and amendments, we know of no reason why the judge of the superior court may not allow this formal affidavit to be supplied when this case shall again be reinstated in the superior court, and then proceed to final judgment as though it had been originally made.

We think that, upon the facts disclosed in the record, the superior court had jurisdiction of the person of this nonresident respondent. She was represented by attorneys at law, in favor of whose acts liberal presumptions are indulged. These attorneys acknowledged due and legal service, for and on behalf of the defendant, of this petition for interpleader, both of the petition and process; they waived copy and all other and further service, and up to this time their authority in this respect stands unchallenged upon the face of the record. Conceding even that there is sufficient evidence of the nonresidence of this defendant, the affidavit submitted by her in this case does not of itself exclude the idea of her presence at the time nor an actual personal direction to her counsel to make for and on her behalf the acknowledgment and waiver upon the petition. It is perfectly consistent with the affidavit made

by her that she was then and there present, and we think this acknowledgment affords sufficient ground and is sufficient authority for the court to proceed to judgment against this respondent as if upon personal service. It is not necessary for us to inquire now and here whether a judgment rendered against her under such circumstances would be recognized in other jurisdictions as a judgment in personam, nor is it necessary to inquire what would be its extraterritorial effect; but we are satisfied that a judgment rendered upon such a service is so far a judgment in personam as to bind all the property of the defendant within the limits of this state and which may be subject to the jurisdiction of the courts of the state of Georgia. Where parties litigant once submit themselves to the jurisdiction of the court, the court having obtained, will retain, jurisdiction of their persons and property, at least to the extent of awarding judgment in favor of citizens resident within this state, and will not, by the dismissal of a remedy, compel them to assert their rights in foreign jurisdictions. Judgment on main bill of exceptions reversed. Judgment on cross bill of exceptions affirmed.

(94 Ga. 796)

**SIMMONS v. SOUTHERN BANKING & TRUST CO. (two cases).**

(Supreme Court of Georgia. Nov. 12, 1894.)

**ACTION ON WRITTEN CONTRACT — JUDGMENT BY DEFAULT—SUFFICIENCY OF DEFENSE—ENTRY OF COUNSEL'S NAME ON DOCKET.**

The action being upon an unconditional contract in writing, and the defendant having made no defense, except by having the name of his counsel marked upon the bench docket, there was no error, when the case was called for trial, in striking the defense thus made, and rendering a judgment against the defendant; it appearing that the court, before so doing, offered to allow the defendant to file other and further defenses, which he neglected and refused to do. While, under the rulings of this court, marking the name of defendant's counsel upon the docket may have been equivalent to filing a plea of the general issue, which was enough to amend by, yet, if no amendment setting up an issuable defense on oath was in fact filed when the opportunity to do so was presented, as stated, there was no obstacle to the rendition of a judgment by the court against the defendant.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Two actions by the Southern Banking & Trust Company against C. J. Simmons. There was a judgment in each case for plaintiff, and defendant brings error. Affirmed.

Simmons & Corrigan, for plaintiff in error. Brandon & Arkwright, for defendant in error.

LUMPKIN, J. In *Barrett v. Pascoe*, 90 Ga. 826, 17 S. E. 117, this court held, in effect, that, even in an action on an unconditional contract in writing, the marking of the name of defendant's counsel upon the bench docket at the appearance term prevented the case

from being in default, and was equivalent to filing a plea of the general issue, to which plea any other issuable defense supported by the oath of the defendant might afterwards, at any stage of the case, be added by amendment, subject to the imposition of such terms as the court might properly impose in case of negligence "In respect to the matter of amendment." The decision in the case just mentioned was based upon previous rulings of this court, some of which are cited in the opinion filed in that case. The writer has always been strongly inclined to the opinion that under paragraph 7 of section 4 of article 6 of the present constitution, which provides that "the court shall render judgment without the verdict of a jury, in all civil cases founded on unconditional contracts in writing, where an issuable defense is not filed under oath or affirmation" (Code, § 5145), it would have been better to hold that nothing short of a written plea, sworn or affirmed to by the defendant, could constitute a valid defense to an action founded upon an unconditional contract in writing, and consequently that a mere oral answer, and the marking of the name of counsel upon the docket, would be no plea at all to such an action, nor one which could properly be regarded as a basis for amendment. What has just been said would, of course, have been applicable with reference to the similar provision in the constitution of 1868, except that there the power of the court to render a judgment without a jury extended to "all civil cases founded on contract," where issuable defenses were not filed on oath. The Barrett-Pascoe Case, however, followed the precedent established by repeated decisions of this court; but, so far as we are informed, this court has never yet decided that, in an action upon an unconditional written contract, simply "answering" when the case is called, and having the name of counsel marked upon the docket, would, of itself, constitute such a defense as would prevent the court from rendering a judgment, without a jury, in the plaintiff's favor. Certainly, taking these steps, and doing nothing more, would not be filing an issuable defense under oath or affirmation.

In the first two of the cases with which we are now dealing, the court, before rendering judgment, distinctly offered to allow the defendant to file other and further defenses, which he neglected and refused to do. In the last case it did not appear that any such offer was made by the court, but it did appear that, up to and including the time when the case was called for trial, the defendant had entirely failed to file an issuable defense under oath or affirmation, and that he made no offer whatever to do so. Both cases, therefore, stand substantially upon the same footing. Surely, the rule laid down in the Barrett-Pascoe Case, and the decisions upon which that case rests, is sufficiently liberal to defendants, and goes quite far enough for their full protection. Our judgments in the pres-

ent cases are, we think, not only perfectly sound upon principle, but entirely consistent with the rule just mentioned. It is proper to add that these cases have been decided without reference to the pleading act of December 15, 1893, but the law announced seems to be in harmony with the spirit and purpose of that act. Judgment in each case affirmed.

ATKINSON, J., not presiding.

(94 Ga. 735)

LIVERPOOL & LONDON & GLOBE INS.  
CO. v. ELLINGTON.

(Supreme Court of Georgia. Oct. 22, 1894.)

ASSIGNMENT OF INSURANCE POLICY—SUIT FOR USE OF ASSIGNEE—AMENDMENT OF PETITION—PROOFS OF LOSS — WAIVER — CONDITION OF POLICY — KEEPING OF BOOKS — REFUSAL TO PAY LOSS — BAD FAITH.

1. It is no cause for dismissing, on motion, an action founded upon a policy of insurance which has been assigned in writing, that the assignor sues for the use of the assignee, both these parties being before the court as such by virtue of the petition thus brought, and the petition being amendable by striking out the assignor. A recovery may be had without amendment, the defect not being one which could prejudice the defendant on the merits of the litigation. The pleading, being bad in form, was open to special demurrer to enforce correction by amendment.

2. One of numerous conditions in the policy of insurance declared upon being that the assured was to furnish the company with proofs of loss, and the plaintiff's petition alleging in general terms that he "has complied with all the conditions, precedent to a recovery, the petition, on being amended by setting out that the proofs furnished were not satisfactory, and were returned as objectionable and insufficient, that the company's adjuster absolutely refused to pay the loss, saying that it would have to be adjusted in the courts, and alleging that this refusal constituted a waiver by the company to insist upon or require the plaintiff to furnish the preliminary proofs of loss required by the policy, and consequently he did not furnish them," is consistent with itself, and contains no duplicity, inasmuch as the amendment qualified and virtually canceled pro tanto the general allegation of compliance with all conditions.

3. The legal evidence of agency for the company by the person who was called and recognized as an adjuster, and who, as such, examined somewhat into the loss, being wholly uncontradicted and unanswered, was sufficient; and the absolute refusal of that person to pay, at the same time referring the assured to the courts for redress, was, prima facie and unexplained, a waiver on the part of the company of the preliminary proofs of loss. And although some illegal evidence was admitted and some error committed by the court in charging the jury, both as to agency and waiver, the verdict, save as to damages and attorney's fees, was obviously correct, and for this reason no new trial is awarded.

4. One of the stipulations in the policy being that the assured should "keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit," it was not indispensable that the set of books kept should embrace what is usually termed a "cashbook," or that the books should be kept on any particular system or in a manner to render it easy, rather than slow or difficult, to ascertain the amount of purchases and sales, and distinguish cash transactions from those on credit. It was enough that these matters would be ascertainable from the books with the assistance of those who kept them or who understood the

system on which they were kept. But the obscurity or complication of the books, and the probability of their not being understood by reason of not being kept on some clear and regular system, would furnish good cause for unwillingness on the part of the company to pay in full when the statement from the books furnished to the adjuster appeared to him to show a much less loss than that claimed; and in such case bad faith in refusing to pay the whole should be treated as negatived by an offer to pay a sum approximating the whole, but falling short thereof about 20 per cent.

5. There was no abuse of discretion in denying the motion for a continuance.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by W. B. Ellington, to the use of another, against the Liverpool & London & Globe Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Atkinson, Dunwoody & Atkinson and L. A. Willson, for plaintiff in error. W. G. Brantley and John C. McDonald, for defendant in error.

SIMMONS, J. 1. It appears from the record that on November 1, 1892, the London & Liverpool & Globe Insurance Company issued to Ellington a policy of insurance for the term of one year upon a certain stock of goods and storehouse in the town of Saussy, Ga. On December 29, 1892, the property insured was destroyed by fire. On December 30, 1892, Ellington made a written assignment of the policy to the Savannah Grocery Company. Subsequently this action was brought by Ellington, for the use of the assignee. When the case came on for trial, the defendant moved to dismiss the same, on the ground that it appeared, from the allegations in the declaration that Ellington had no legal title nor any equitable interest in the policy, and hence no action could be maintained by him either for himself or for the use of the Savannah Grocery Company. This motion was overruled, and the defendant excepted.

It is undoubtedly true that sound principles of pleading require that an action shall be brought by the person having the legal interest therein, and this action should have been brought by the assignee without Ellington as a party. If the defendant had demurred specially upon the ground that Ellington was not entitled to institute the action, the court should have dismissed it, unless the declaration was amended by striking therefrom the name of Ellington as plaintiff. One of the objects of special demurrer to a declaration is to require the plaintiff to amend the declaration in matters of form, and, if he refuses to amend, the court may dismiss the action. But a motion to dismiss an action for improper joinder of parties is a different thing from a special demurrer, which, as above indicated, is predicated on the theory that the declaration needs amendment in matter of form, while the motion to dismiss is

upon the theory that the action cannot proceed at all, because there is no cause of action. While it would have been better pleading to have brought this action in the name of assignee, yet, as against a motion to dismiss, the court did not err in allowing the action to stand. The fact that the names of the assignor and the assignees were both in the declaration, one suing for the use of the other, did not make it void, so that no recovery could be had thereon. It could have been amended at any time by striking the name of the assignor, and the rights of the defendant were not prejudiced by having both parties before the court. Any defense the defendant may have had could have been set up as well with the declaration in this form as it could have been if the assignee had sued alone; and a judgment in the case would bind both the assignor and the assignee. What substantial difference, then, could the bringing of the suit in this form make to the defendant if none of its rights were prejudiced thereby? See *Gilmore v. Bangs*, 55 Ga. 403; *Cheese Co. v. Smith* (March term, 1894) 20 S. E. 106.

2. One of the conditions of the policy declared upon was that, if the property should be destroyed by fire, the insured should furnish the insurance company with proofs of loss within a specified time. The original declaration alleged that the plaintiff had "complied with all the conditions precedent to a recovery." On the trial of the case the plaintiff was allowed to amend his declaration by alleging that the proofs furnished were not satisfactory, and were returned as objectionable and insufficient; that the company's adjuster absolutely refused to pay the loss, saying that it would have to be adjusted in the courts; and that this refusal constituted a waiver by the company of its right to insist upon or require the plaintiff to furnish the preliminary proofs of loss required by the policy, and consequently he did not furnish them. The defendant demurred to the amendment, and to the entire declaration, upon the ground that the declaration as amended was double, and that, because of duplicity, the plaintiff should be put to his election thereon. The court overruled the demurrer, and refused to compel the plaintiff to elect, and to these rulings the plaintiff excepted. This amendment did not change the cause of action, as was insisted upon by counsel for the plaintiff in error. The cause of action was a breach of the contract. The amendment related to the manner of proof. In the original declaration the plaintiff alleged that he had complied with all the conditions of the policy. In the amendment he averred that he had not complied with certain of those conditions, because the defendant had waived compliance. This, in our opinion, meant that he abandoned that part of the original declaration which alleged compliance with the conditions referred to, and would not rely upon it, but would rely upon

the waiver. Where a plaintiff, having averred in his original declaration his ability to prove a certain state of facts, subsequently amends it by alleging another state of facts inconsistent with the first, he abandons or cancels the first averment, and it is virtually stricken by the allowance of the amendment. The better practice would be to take an order striking the first allegation from the declaration, or else enlarge the amendment so as expressly to expunge that allegation or substitute the new matter for it.

3. There was evidence to the effect that, after the fire, one O'Connor visited the place where it occurred, and that the agent who had issued the policy recognized him as an adjuster of the company, and as such he examined somewhat into the loss. This evidence was wholly uncontradicted and unanswered, although O'Connor and this agent were present at the trial, and, in our opinion, was sufficient proof of O'Connor's agency for the company. The record further discloses that he negotiated with the insured in regard to the payment of the loss, instructed him how to make proofs of loss, and the proofs were sent to him, and returned by him as insufficient, and finally he refused absolutely to pay the loss, and referred the insured to the courts for redress. These facts, unexplained, constituted prima facie a waiver on the part of the company of the preliminary proofs of loss. Although some illegal evidence was admitted, and some error committed by the court in charging the jury, both as to agency and waiver, we are satisfied, after a careful examination of the evidence in the record, that the verdict was correct, save as to damages and attorney's fees; and as the case, under the evidence, could have no other legal result than a verdict for the plaintiff, we decline to award a new trial, but direct that the damages and attorney's fees be written off from the judgment.

4. At the conclusion of the plaintiff's evidence, the defendant moved for a nonsuit. One of the grounds of this motion has already been dealt with as a ground of the motion to dismiss the action; namely, that, prior to the institution of the action, Ellington had parted with his entire interest in the policy. Of course, if this was not sufficient as a ground for the motion to dismiss the action, which is in the nature of a general demurrer, it is not sufficient as a ground for nonsuit. The second ground of the motion for nonsuit was that the plaintiff had covenanted to "keep a set of books showing a complete record of business transacted, including all purchases and sales both for cash and credit," as stated in the policy, and, in the event of a failure to produce the same, the policy to be void; and that he had failed to keep a set of books or to produce the same showing his cash sales, and therefore the action could not be maintained. The record discloses that the plain-

tiff did keep a set of books, in which were entered his purchases and sales, both for cash and on credit, and that he kept a cash account, though he did not keep what is usually termed a "cashbook," showing daily cash sales or a distant record of merchandise sold for cash. The plaintiff and his bookkeeper testified, however, that they could ascertain and did ascertain from these books the amount of cash and credit sales. Under the clause referred to, it was not indispensable that the books kept should embrace what is usually termed a "cashbook," or that the books should be kept on any particular system. It was sufficient if the books were kept in such manner that, with the assistance of those who kept them or understood the system on which they were kept, the amount of purchases and sales could be ascertained, and cash transactions distinguished from those on credit, although it might be slow and difficult to do this. The plaintiff and his bookkeeper having testified as above stated, and the books themselves being before the jury, the court did not err in refusing a nonsuit on this ground. The fact, however, that the books were complicated and difficult to be understood, by reason of their not being kept on some clear and regular system, afforded a good reason on the part of the company for being unwilling to pay in full when the statement from the books furnished to the adjuster appeared to him to show a much less loss than that claimed by the plaintiff. The evidence shows that it took the person who kept the books a long time to show how much of the goods were sold for credit and how much for cash, and that to do this he had to resort to complicated calculations. Under this state of facts, we think it was not bad faith for the agent to refuse to pay the whole of the loss claimed. The fact that, under these circumstances, he offered to pay four-fifths of the amount claimed, should itself negative bad faith on the part of the company. The verdict was wrong, therefore, in so far as it awarded damages and attorney's fees against the defendant.

5. Under the facts there was no abuse of discretion in denying the motion for a continuance. Judgment affirmed, with direction.

(94 Ga. 792)

#### HIGHT v. BARRETT et al.

(Supreme Court of Georgia. Nov. 12, 1894.)

PLEADING ACT—CONSTRUCTION—ABSENCE OF DEFENSE.

The principal object of the pleading act of 1893 is to dispense with trials where there is nothing to try, and to restrict trial to issues actually raised between the parties. Hence, when no defense whatever is filed, every essential averment of fact distinctly and plainly made in plaintiff's petition is to be taken as prima facie true, because not denied by answer, nor any excuse rendered for failing to deny.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Barrett & Bradley against James L. Hight. Judgment for plaintiffs, and defendant brings error. Affirmed.

Hulsey & Bateman and Hillyer, Alexander & Lambdin, for plaintiff in error. E. M. & G. F. Mitchell, for defendant in error.

ATKINSON, J. In accordance with the act of 1893, which regulates the method of pleading in civil actions in this state, the plaintiff brought his action in the city court of Atlanta for damages for the nonperformance by the defendant of a contract for the purchase of certain real estate, by reason whereof he was prevented from earning certain commissions which otherwise he would have earned, and to which he was entitled under his agreement with the defendant. This action was properly framed in accordance with the terms of the act referred to; each averment of fact was plainly and distinctly made, in orderly paragraphs, logically stated, each in its appropriate place; and the whole presented a perfect cause of action. Of the day set for the call of the appearance docket the court gave due notice, and, this cause being then called in its regular order, and no defense being filed, the same was marked in default. Afterwards, when the cause was reached in its order, the court, without the plaintiff having introduced any evidence in support of his declaration, instructed the jury to return a verdict in his favor. A motion for a new trial was made upon the ground that "the verdict was obtained without submitting to the court and jury any evidence, and was taken without any proof whatever, and is, therefore, void." This motion was overruled, and the question is now for the first time presented whether such a verdict could be legally rendered.

Prior to the passage of the act under which this suit was brought, there were only two cases in which, upon causes of action cognizable in common-law courts, a judgment or verdict could be entered against the defendant without formal proof of plaintiff's demand either before the court or jury. One of these was where the defendant appeared and entered a formal confession of judgment. The other was where, being sued upon an open account, and the writ being served personally, he failed to appear and plead at the first term. In such case the court was required to enter a default against the defendant, and thereafter the plaintiff was allowed to take a verdict without further proof, upon the confession implied from his failure to defend. The act now under consideration marks a new era in the law of pleading in this state. It makes a sweeping, far-reaching, and radical change in the old order of things. It restores in a new form some of the best prin-

ciples of the ancient common-law rules of pleading, and blends with them, to some extent, the remedial procedure of courts of chancery. It prunes away the refined subtleties of the special pleader, presenting in a simple, tangible form the real vital issues necessary for consideration in determining the rights of litigants. The legal profession is slow to accept such striking innovations upon rules of civil procedure to which it has been long accustomed, and to which it has, in a certain sense, become endeared. It is disposed to look with suspicion, and, in many instances, justly so, upon the modern law reformer, who, without the slightest reference to the symmetry or permanence of a judicial system, seeks to invent some new statutory remedy for the enforcement of every supposed right, instead of leaving such matters for determination under general and uniform rules of procedure. But the statute now under review, though it may shatter some idols, is so salutary in its effect, so simple and easy of understanding, so highly remedial in its operation, and so eminently beneficial and just in its purposes, it cannot but commend itself to the favor of the profession. It is not perfect in all its details, but whatever defects may exist may easily be remedied by the general assembly. At all events, it is the law, and this court, in dealing with it, will, at the outset, endeavor so to interpret its provisions as to give full expression to its remedial features. It is neither to be so strictly construed as to the hearing and determination of exceptions to declaration or plea, timely made, as to deprive the court of all discretion as to the proper time for the determination thereof, nor in such manner as to revolutionize the order of pleading which has heretofore obtained; nor is it to be so liberally construed in favor of dilatory defendants as to deprive the diligent plaintiff of the advantage resulting to him from a failure upon the part of the defendant to timely plead. Let us consider what the right of such a plaintiff is. Assuming that he has in all respects complied with the requirements of this act, he is entitled to have the defendant appear at the first term, and demur or plead to the action. If no demurrer is filed, or, being filed, is thereafter overruled, he must then make answer to each averment of fact stated in the declaration, and, failing this, the plaintiff is entitled to have a judgment or verdict (as the cause of action may be upon an unconditional contract, in writing or otherwise) pro confesso. Should the defendant appear and plead, such averments of fact only are to be so taken as the defendant neither denies nor alleges his inability, for want of information, either to admit or deny. The act carefully guards the rights of each of the parties, and, saving only that the declaration is not required to be sworn to (an omission which the general assembly might wisely correct), it closely resembles proceedings in equity where dis-

covery is prayed, and the defendant fails to answer. With this understanding of the act, how stands this plaintiff in error? The suit against him, as we have seen, was brought upon a liquidated demand in strict compliance with the statute. He was duly served. He failed to appear and plead. Under this condition of affairs, no alternative was left for the court save to take as confessed the plaintiff's declaration, and direct a verdict. The judgment overruling the motion for new trial was, therefore, correct. Judgment affirmed.

(94 Ga. 780)

SAVANNAH, F. & W. RY. CO. et al. v. ATKINSON.

(Supreme Court of Georgia. Oct. 22, 1894.)

AMENDMENT OF PETITION—CHANGE IN PRAYER—APPEARANCE—ACTION AGAINST RAILROAD COMPANY—VENUE—DEED OF RIGHT OF WAY—ABANDONMENT OF ROAD—REMEDY OF LANDOWNER.

1. A petition cast in the form of a bill in equity, and addressed to the judge of the superior court by name, and also to the superior court of the county, is amendable by expunging from the address everything but to the superior court of the county, and by striking out the word "orator" wherever it occurs, and inserting the word "petitioner," and by changing the prayer for subpoena to a prayer for process.

2. The absence of process is immaterial where the defendants have appeared and demurred generally to the merits of the petition. After the hearing and overruling of such demurrer, it is too late to move to dismiss the action for the want of process or service.

3. As to the cases provided for by section 3406 of the Code, the residence of a railroad corporation is, for the purposes of suit against it, whether the cause of action be legal or equitable, or partly one or partly the other, no less in the various counties in which its line of railroad is located than in the county in which it keeps its principal office or place of business, and it acquires this breadth of residence as soon as its line is permanently defined and the work of construction commenced; nor is its residence in any given county, after being once acquired, lost by abandoning work in that county, or even abandoning and suspending operations throughout the entire line. Where the consideration of a deed conveying a right of way to a railroad company was, as expressed in the deed itself, the benefits which were expected to accrue to the landowner from the construction of the contemplated railroad, and there was an express promise on the part of the company to construct the road, by virtue of which promise the conveyance was procured, and also a parol license to cut cross-ties induced, a breach of the contract by failing to construct the road, abandoning work upon it, and selling out to a rival company, with intent that the whole enterprise should be suppressed and forever abandoned, constitutes a cause of action in behalf of the landowner to the extent, at least, of having decreed a cancellation of the conveyance, and of having awarded to him compensation for any damage done to the land by severing timber and cross-ties therefrom, and digging up the soil, or by other means, while the work of construction was in progress; and, inasmuch as the alleged purchase made by the second company of the first would render the second company interested in any decree of cancellation which could be made, this company is a proper party defendant to the action, and, under the act of 1885, may rightly be made a party out of the county of its residence, the suit being appropri-

ately located with reference to jurisdiction over the other company.

(Syllabus by the Court.)

Error from superior court, Camden county; J. L. Sweat, Judge.

Action by Burwell Atkinson against the Savannah, Florida & Western Railway Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Goodyear & Kay, Erwin, Du Bignon & Chisholm, and W. L. Clay, for plaintiffs in error. S. C. Atkinson and S. R. Atkinson, for defendant in error.

SIMMONS, J. 1, 2. The act approved October 24, 1887, requires that "all civil suits begun in a superior court of this state, founded on a legal or equitable cause of action, for a legal or equitable remedy or both, shall be commenced by a petition addressed to said court," and that "the form of process to the petition referred to above shall be that at present required in actions at law." Acts 1887, p. 64. A year after the adoption of this act, a bill was filed, in the old form of equity pleading, addressed to the judge of the superior court by name, and also to the superior court of the county, and praying for subpoena instead of process. The defendants demurred, generally, on the ground that no cause of action was set forth, and upon the special ground, among others, that the plaintiff in bringing this bill had failed to comply with the act above referred to, that the bill was not properly addressed, and that no process was issued thereon. The plaintiff thereupon moved to amend by striking out the address of the judge, and by striking out the word "orator" and inserting "petitioner," and by changing the prayer for subpoena to a prayer for process; also to amend the process, which was addressed to the defendant, by adding an address to the sheriff of the county or his lawful deputy. These amendments were allowed, over the objection of the defendants. The defendants then moved to dismiss the cause for want of proper service, and this motion was overruled. Under our Code and the practice prevailing in this state, the court did not err in allowing the plaintiff to amend by striking out the address of the judge, and by striking out the word "orator" and inserting "petitioner" in lieu thereof, and by changing the prayer for subpoena to a prayer for process. That this kind of amendment could be made was decided in the case of *De Lacy v. Hurst*, 83 Ga. 223, 9 S. E. 1052. So far as the want of process is concerned, the proper mode of taking advantage of such a defect was by a motion to dismiss, and not a demurrer; and after the defendants had appeared and demurred generally to the petition as presenting no cause of action, and the demurrer had been overruled, it was too late to move to dismiss the action for want of process or service. To demur generally to a petition as presenting no

cause of action is to plead to the merits. *Lyons v. Bank*, 86 Ga. 485, 12 S. E. 882.

3. The petition was filed in the county of Camden against the East Georgia & Florida Railroad Company and the Savannah, Florida & Western Railway Company. It appears from the allegation in the petition that the former of these companies, having obtained a charter authorizing it to build a railroad in the county of Camden, commenced work upon its line of road therein, cleared its right of way, made excavations, cut cross-ties and established agencies in the county, and that, while the work was in progress, the contract upon which the suit is founded was entered into between the company and the plaintiff, to be performed in that county. One of the grounds upon which the defendants demurred to the petition was that it showed upon its face that the jurisdiction thereof was in Chatham county, and not in Camden county, the principal office and place of business of the defendants being in the former county. It was contended that, this being an equitable proceeding, the constitution (Code, § 5169) required that it should be brought in the county in which the defendants resided, and that the defendants resided where their principal office or place of business was located. Under our Code, all railroad companies are residents, for purposes of suit against them, in every county through which the road runs, whether the cause of action be legal or equitable, or partly the one and partly the other. Code, § 3406; *Watson v. Railroad Co.*, 91 Ga. 222, 18 S. E. 306. Such corporations are creatures of the state, and the constitutional provision above referred to does not preclude the legislature from fixing their place of residence in this manner. Another paragraph of the constitution (Code, § 5172) declares that "all other civil cases shall be tried in the county where the defendant resides," yet this court has held uniformly since the passage of the act of 1855, embodied in section 3406, *supra*, that a railroad company may be sued, under this act, in a different county from that in which its principal office is located, without violating that provision of the constitution. We see no reason why this cannot be done where equitable principles are involved as well as in other cases. As soon as the East Georgia & Florida Railroad Company located its line in the county of Camden and commenced the work of construction there, it acquired a residence in that county, and could be sued there for causes of action arising or on contracts to be performed therein; and such residence, after being once acquired, could not be lost by abandoning the work in that county, or even abandoning the whole enterprise and suspending operations throughout the entire line.

4. It appears from the allegations in the petition that the plaintiff made a deed conveying a right of way to the East Georgia

& Florida Railroad Company, the consideration of which, as expressed in the deed itself, was the benefits which were expected to accrue to the grantor from the construction of the contemplated railroad; and there was an express promise on the part of the company to construct the road, by virtue of which promise the conveyance was procured. By reason of this promise, he was also induced to grant a parol license to cut cross-ties upon his land. It was alleged that, after the conveyance was made, the company entered upon the land, cleared off the right of way, dug ditches, threw up embankments, and prepared its roadbed, and cut cross-ties, but afterwards abandoned the work, and sold out to the Savannah, Florida & Western Railway Company, a rival company, with intent that the whole enterprise should be suppressed and forever abandoned. Under this state of facts, we think the plaintiff had a cause of action, to the extent, at least, of having a decree cancelling the conveyance, and of having awarded to him compensation for any damage done to the land by severing timber and cross-ties therefrom, and digging up the soil, while the work of construction was in progress. The consideration of the conveyance being the benefit which the plaintiff expected to receive from the construction of the railroad, it would be unjust to him to allow the railroad company to enter upon his land and damage it as alleged in the petition, and then abandon the construction of the road and sell the property, with the purpose alleged, without allowing him compensation for the damage sustained by him; and it would also be unjust to him to allow the company to retain title after it had failed to comply with its promise to build the road, and the consideration of the conveyance had failed. These allegations gave the superior court of Camden county jurisdiction to cancel the deed and award compensation for the damage; and, inasmuch as the alleged purchaser of the right of way from the East Georgia & Florida Railroad Company by the Savannah, Florida & Western Railway Company would render the latter company interested in any decree of cancellation which could be made, that company is a proper party defendant to the action, and, under the act of October 16, 1885 (Acts 1885, p. 36), could rightly be made a party out of the county of its residence. Judgment affirmed.

(40 W. Va. 337)

CHANCELLOR v. SPENCER et al.

(Supreme Court of Appeals of West Virginia.  
April 3, 1895.)

BILL OF REVIEW—WAIVER.

1. A person is not entitled to file a bill of review who is not a party to the original suit, and whose rights are in no manner affected by the decree sought to be reviewed.

2. A joint owner of property, who, being a



party to a suit, allows his undivided interest in such property to be sold to satisfy judgment liens thereon, cannot file a bill of review to set aside the decrees in such suit, for the sole purpose of having the property, not being susceptible of partition, sold as a whole, for by his negligence he has waived whatever rights he may have had in this respect.

(Syllabus by the Court.)

Appeal from circuit court, Wood county.

Action by W. N. Chancellor against E. M. Spencer and others. Judgment for plaintiff, and defendants E. M. and Camden Spencer filed a bill of review. Dismissed and complainants appeal. Affirmed.

Geo. Loomis and Hutchinson, Hutchinson & Camden, for appellants.

DENT, J. The circuit court of Wood county, at the August term, 1892, entered a final decree dismissing a bill of review filed by Camden Spencer in the chancery cause of W. N. Chancellor v. E. M. Spencer et al., for the reason that the errors assigned were not sufficient to authorize a review and reversal of the decree complained of, and from this decree Camden Spencer and E. M. Spencer appeal to this court. The errors assigned are as follows, to wit: (1) Because it is apparent upon the face of the bill and the papers of the cause that the decree rendered in the said suit of W. N. Chancellor was wholly erroneous, in that the minor children of E. M. Spencer and Mary P. Spencer, deceased, whose interests were to be vitally affected, were not made parties to that suit. (2) E. M. Spencer, if he has any interest by the curtesy in the said house and lot conveyed to him as trustee for his wife, Mary P. Spencer, took only such interest as belonged to her, to wit, an equitable interest, or use of the property during her life. At her death the fee went to the said four minor children. If, however, such construction be given to section 17, c. 71, Code 1891, as shall conflict with this view, it in no wise relieves the proceedings of the first error complained of, viz. these minor children were not made parties to the suit, nor did they appear by guardian or otherwise. (3) It was manifest error in the court, having in his hands at the same time both the Chancellor suit and the Coffer petition, each seeking a sale of the same property, to decree a sale in each case. The court should, of its own motion, have consolidated the two, and directed that they be heard together. The effect of the separate decrees in each, in force at the time of sale, was to sacrifice the property, no matter which decree the property was sold under. (4) The court erred in directing the sale of E. M. Spencer's interest in the wharf property without first ascertaining, by reference to a commissioner, the other joint owners of said wharf property, and the extent of their several interests, and requiring them to be made parties, that they might be apprised of the sale, as being most likely, in view of

their own interests, to offer better prices than would casual purchasers or strangers.

The decrees sought to be reviewed were entered in a suit brought by W. N. Chancellor to enforce a judgment lien against two certain pieces of property alleged to be owned by the judgment debtor, E. M. Spencer, to wit: (1) A life estate in a certain house and lot belonging to Mary P. Spencer, deceased, his wife. (2) An undivided interest in a certain wharf property. E. M. Spencer, though a party served with process, made no appearance or defense, but permitted the decrees to be entered on bill confessed. Camden Spencer was not a party, nor in privity with any party, to the suit; and he could not be bound, nor could his rights be affected, by any decree entered therein, and therefore he is not entitled to maintain a bill of review. 1 Bart. Ch. Prac. p. 204, § 64. He claims that E. M. Spencer was not entitled to a life estate in the property of his wife, Mary P. Spencer, deceased. If this be true, then none was sold, as the court could only sell such interest as E. M. Spencer had in the property, in the absence of those lawfully entitled to it. He further claims that, if the life estate did exist, it was an injury to the heirs to sell it separately from the reversion, and that the property should be sold as a whole, to insure a fair price. This can be easily accomplished by making the present owner of the life estate a party to the suit to sell the reversion, as it makes no difference to the reversioners whether the life estate is owned by E. M. Spencer or by W. S. Tracewell, as in one case the purchase price of the life estate will go to E. M. Spencer's creditors; in the other, to W. S. Tracewell. Therefore, in no event is Camden Spencer interested in reviewing the decrees complained of, and the circuit court did right to dismiss his bill. As to E. M. Spencer, while he might have had the right to have all the parties interested in the two properties before the court, and have had them partitioned and sold as a whole, yet by his negligence he acquiesced in the proceedings in the suit, and cannot now be heard to complain. Bart. Ch. Prac. 335. The decree complained of is therefore affirmed.

(40 W. Va. 324)

MACK et al. v. PRINCE et al.

(Supreme Court of Appeals of West Virginia.  
March 30, 1895.)

FRAUDULENT CONVEYANCES — JUDGMENT BY CONFESSION.

A judgment confessed by an insolvent debtor, together with the execution issued thereon, is, in effect, an assignment of the debtor's property to the extent of the lien or levy of such execution, is void as a preference under section 2, c. 74, of the Code, and inures to the benefit of all the insolvent's creditors.

(Syllabus by the Court.)



Appeal from circuit court, Cabell county.

Action by Mack, Stadler & Co. against Prince, Dunn & Co. and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Couch, Flournoy & Price, for appellants.  
Simms & Enslow, for appellees.

DENT, J. The facts are as follows, to wit: On the 17th day of June, 1893, the defendant D. H. Nugen, in the clerk's office of said court, confessed a judgment in favor of P. H. Noyes & Co. for the sum of \$397.34, on which execution was forthwith issued, and placed in the hands of the sheriff of said county, and was levied on a certain stock of store goods belonging to said Nugen. Before said execution, said Nugen made a sale of said goods to the defendant Walter Wilson at the price of \$1,200, to be paid on a debt due himself, and said judgment of P. H. Noyes & Co., and a debt due Mack, Stadler & Co. Several parties then sued out attachments, and levied on said goods; among them, Prince, Dunn & Co. and Sehon, Blake & Co., who join in this appeal, but have made no assignment of error. Mack, Stadler & Co. then filed their bill in chancery, convening all the parties in interest, and praying that the sale to Wilson be held a general assignment for the benefit of all the creditors of said Nugen, and the proceeds be distributed accordingly. An answer was filed by P. H. Noyes & Co., claiming the right to have their judgment and execution paid in full; also by the attachment creditors, claiming the benefit of their attachment liens. The cause was referred to a commissioner, and on the coming in of his report the various defendants excepted thereto. On the 13th day of December, 1893, the court entered a decree overruling the exceptions to the commissioner's report, confirming the same, and distributing the net proceeds of the property among all the creditors pro rata; from which decree P. H. Noyes & Co. appeal, and assign the following errors: First, overruling petitioner's exceptions to the commissioner's report; second, setting aside and annulling petitioner's judgment, and the execution thereon, and refusing to give it priority of payment out of the funds derived from the sale of said goods; third, distributing said funds pro rata among all the creditors of said D. H. Nugen.

Exceptions to report are as follows: "P. H. Noyes & Co. except to within report (1) because the commissioner fails to report their writ of fieri facias against D. H. Nugen as a first lien on the stock of goods of D. H. Nugen; (2) because the commissioner reports the judgment in their favor against D. H. Nugen as void; and for other reasons apparent on the face of the report."

The only question raised by these exceptions and presented for the consideration of the court is whether the language used in section 2, c. 74, of the Code includes within its meaning, according to legislative intent, a confes-

sion of judgment and execution thereon. In other words, whether the statute is rendered abortive by the failure to embrace confessed judgments therein; for, if such be the case, all an insolvent debtor will have to do to entirely evade the provisions of the statute is to go into the circuit court clerk's office, and confess judgments to his favored creditors, according to the priority in which he wants them paid; thus defeating the very object of the law, and accomplishing as complete a preference among his creditors as if made by sale, assignment, or transfer, and just as expeditiously. The word "charge" has a specific technical and also a broad legal meaning, under which it includes any lien on property of any description. In construing a word susceptible of two meanings, the court will give it such construction as will render the law effective, and not nugatory. 3 Am. & Eng. Enc. Law, 118, note 3; 23 Am. & Eng. Enc. Law, 319, 362, 364; 1 Cooley, Bl. 59, 61, note 21. The section under consideration provides that "every gift, sale, conveyance, assignment, transfer or charge, made by an insolvent debtor to a trustee, assignee, or otherwise, giving or attempting to give a priority or preference to a creditor or creditors of such insolvent debtor, or which provides or attempts to provide for the payment in whole or in part, of a creditor or creditors of such insolvent debtor, to the exclusion or prejudice of other creditors, shall be void as to such priority, preference or payment so made; and all such gifts, sales, conveyances, assignments, transfers and charges, shall be deemed void as to such priority, preference or payment; and every such gift, sale, conveyance, assignment, transfer or charge shall be deemed, taken and held to be made for the benefit of all the creditors of such debtor except as heretofore provided; and all the estate, property and assets, given, sold, conveyed, assigned, transferred or charged as aforesaid, shall be applied upon the debts and paid to the creditors of such insolvent debtor pro rata; provided that nothing in this section shall be taken or construed to change, impair or affect any prior lien, priority or incumbrance acquired by a creditor on the real estate of such debtor in any manner now prescribed by law," etc. The plain intention of this enactment was to prevent preferences among the creditors of an insolvent debtor, and secure a pro rata distribution of his assets. The gist of the whole matter is whether the debtor, recognizing his insolvency, is aiding, abetting, or colluding with the creditor to secure to him payment of his debt in priority or preference of his other creditors; and any way in which this could be accomplished is included within the intent of the statute; and, if the language used can be construed so as to cover this intent, it is the duty of the court so to construe it. The appellants are here claiming the benefit of a preference forbidden by the statute, and the reason urged in support of their claim is that they have discovered

an oversight of the legislature, which has enabled them to evade its enactment, provided they can convince the court that it is contrary or derogatory to the common law, and should be strictly construed. While this may be true, yet the statute should not be abrogated or annulled or rendered absurd. Equality is equity, and the legislature was seeking to produce equality among the creditors of an insolvent debtor, and put it beyond his power, if possible, to turn his assets over to preferred creditors, when the rights of all his creditors should be regarded as equal, and each entitled to an equal share in assets insufficient in amount to satisfy all in full. The debtor has a peculiar knowledge of his own insolvency, and it is not equitably right that he should be permitted to use this knowledge in such way as to advance the interests of some to the detriment and loss of other creditors; and the law, to prevent this injustice, deprives the creditor of any advantage gained by him through the connivance of the debtor, and places all creditors on an equal footing as to such advantage. And yet it does not prevent a creditor acting entirely independent of the debtor from gaining any possible preference or priority of payment against any estate, real or personal, of the debtor, in any manner prescribed by law; but it is the debtor's hands and conscience it seeks to bind according to the rules of common honesty and fair dealing among men, and therefore, when he seeks to give an undue preference to one of his creditors, the law holds it to inure to the benefit of all indiscriminately. The good intent of the debtor, which must be deduced from the circumstances surrounding the transaction, is involved; and if it reasonably appear from the transaction that he was not endeavoring to give the creditor an undue priority or preference over others, but was simply securing a just debt, then the statute would not destroy the security. The language used is, "giving or attempting to give," or "provides or attempts to provide," "to the exclusion or prejudice of other creditors." If he is not insolvent, the law does not apply; but, if he is insolvent, he must treat all alike.

In this case personal property is alone affected, and it is unnecessary to discuss the effect of a judgment lien as to real estate, and it would be improper to review the decision in the case of *Refining Co. v. Quinn*, 39 W. Va. 535, 20 S. E. 576, the same questions of law not being presented. While the provisions of the section are derogatory to the common law, they are remedial in their nature, and therefore should be liberally, and not strictly, construed, "so as to prevent the mischiefs at which it is aimed." *White v. Cotzhausen*, 129 U. S. 329, 9 Sup. Ct. 309; *Hudler v. Golden*, 36 N. Y. 446; *Hart v. Cleis*, 8 Johns. 41. In the case of *Richardson v. Thurber*, 104 N. Y. 610, 11 N. E. 183, it is said: "The word 'assignment' may sometimes have reference to the instrument which affects the transfer, and sometimes to

the transfer itself, considered as a legal effect or result;" and "in such cases the context or the apparent meaning determine the sense in which the word is used." And the same may be said of the words "transfer" or "charge." In the section under consideration it is the "legal effect or result," rather than the instrument, which the legislature had in contemplation in using the words "assignment," "transfer," or "charge," and it intended to cover thereby and include therein any transaction, of whatever kind or character, which an insolvent debtor might use or attempt to use to secure an appropriation of his property, or a part thereof, for the benefit of one creditor, to the exclusion or prejudice of his other creditors. The judgment confessed and execution issued and levied operated in effect as an assignment and transfer of the debtor's property to the extent of the levy as completely, to all intents and purposes, as any other mode of assignment or transfer could have done. In the case of *White v. Cotzhausen*, 129 U. S. 342, 9 Sup. Ct. 309, Justice Harlan says: "We only mean by what has been said that when an insolvent debtor recognizes the fact that he can no longer go on in business, and determines to yield the dominion of his entire estate, and in execution of that purpose, or with intent to evade the statute, transfers all, or substantially all, his property to a part of his creditors, in order to provide for them in preference to other creditors, the instrument or instruments by which such transfers are made and that result is reached, whatever the form, will be held to operate as an assignment, the benefit of which may be claimed by any creditor not so preferred who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute." And on page 344, 129 U. S., and page 309, 9 Sup. Ct., he quotes approvingly from the opinion of Judge Treat in *Freund v. Yaegerman*, 26 Fed. 812, 814, as follows: "You may call it a mortgage, or you may make a confession of judgment, or use any other contrivance, by whatever name known; if the purpose is to dispose of an insolvent debtor's estate, whereby a preference is to be effected, it is in violation of the statute." And he continues on the same page (344, 129 U. S., and page 309, 9 Sup. Ct.): "Surely the mere name of the particular instruments by which the illegal result is reached ought not to be permitted to stand in the way of giving the relief contemplated by the statute. Courts of equity are not to be misled by mere devices, nor baffled by mere forms." *Berger v. Varrelmann*, 127 N. Y. 281, 27 N. E. 1065; *Preston v. Spaulding*, 120 Ill. 208, 10 N. E. 903; *Miners' National Bank's Appeal*, 57 Pa. St. 193; *Winner v. Hoyt*, 66 Wis. 227, 28 N. W. 380; *Wilks v. Walker*, 22 S. C. 108, 111; *Wright v. Fergus Falls Nat. Bank* (Minn.) 50 N. W. 1030. The conclusion, therefore, is that the judgment confessed, together with the execution and levy, was, in effect, an as-

signment, made by the debtor, giving or attempting to give a priority or preference to a creditor, to the exclusion or prejudice of other creditors, and therefore, to the extent of the property levied on, was void, and operated as an assignment of such property for the benefit of all the creditors of the debtor. The judgment, however, was not void in toto, but remained good as between the debtor and creditor; and the effect of the decree complained of is to so hold. The court referred the case to the commissioner to ascertain whether or not the said judgment was and is void under the statute in such case made and provided. The commissioner reported that it was so void. And the court, in confirming said report, decreed that the said confessed judgment and execution issued thereon be set aside, annulled, and held to be of no effect, so far as the same gave or attempted to give a preference to the creditor; thereby simply annulling the preference as to the property in controversy, and leaving the judgment and execution in full force and effect in all other respects,—that is to say, to the extent they operated as an assignment contrary to law, they were void; otherwise not.

The attaching creditors who join in this appeal do not assign errors, nor have they filed briefs, and it is apparent they have abandoned their pretensions that the sale from the debtor, Nugen, to defendant Wilson was absolutely void, as having been made with intent to delay, hinder, and defraud creditors; for it is plain that it was a mere attempt on the part of the debtor to prefer favorite creditors, which he would have had the right to do prior to the enactment of section 2, c. 74, of the Code, and that by virtue of the provisions of this section it inured to the benefit of all the creditors. But the confessed judgment and execution operated as a general assignment for the benefit of all the creditors, prior to the sale to defendant Wilson, as to all the property on which said execution was a lien or levied, and hence the subsequent sale could not affect the status of the property. The partial conduct of the insolvent debtor in attempting in violation of the law to secure a preference to any one of his creditors amounts to such a fraud as to deprive him of further control of the property involved, and, there being no other administrative tribunal provided, at the instance of any interested party a court of equity will assume the responsibility. No error appearing in the decree prejudicial to the appellants, it is affirmed.

(40 W. Va. 307)

**GREENBRIER INDUSTRIAL EXPOSITION v. SQUIRES.**

(Supreme Court of Appeals of West Virginia.  
March 30, 1896.)

**CORPORATIONS—ESTOPPEL TO DENY CORPORATE EXISTENCE.**

A party who takes part in the meeting of stockholders for the organization of a corporation under chapter 54 of the Code, and votes therein

as a stockholder for directors, and, when called upon by order of the directors, pays an assessment on his stock, cannot deny the existence of the corporation when sued for his stock, and is liable therefor.

(Syllabus by the Court.)

Error to circuit court, Greenbrier county.

Action by the Greenbrier Industrial Exposition against L. W. Squires. Judgment for plaintiff, and defendant brings error. Affirmed.

A. F. Mathews, for plaintiff in error. J. W. Harris, for defendant in error.

**BRANNON, J.** The Greenbrier Industrial Exposition, as a corporation, obtained a judgment in the circuit court of Greenbrier county against L. W. Squires, based on a subscription by him to its capital stock, and Squires obtained this writ of error. Squires depends on the theory that there never was a legal corporation as to him, and that the subscription which he made to its stock is not binding. The formation of this alleged corporation was under chapter 54 of the Code. The preliminary agreement constituting the first step and basis in the process of formation of the corporation was signed by Squires, but not acknowledged by him. The certificate of incorporation issued colorably under it. By the agreement the proposed corporation was to expire December 1, 1910, while the certificate of incorporation fixes the date of its expiration December 1, 1919. By reason of nonacknowledgment of agreement and variance between it and the certificate of incorporation, Squires would not be liable for his subscription, made by said preliminary agreement, had he done nothing more, as this court decided in *Industrial Exposition v. Rodes*, 37 W. Va. 738, 17 S. E. 305. That statutory requirements as to preliminary steps in the organization of a corporation, to bind signers of the agreement, must be complied with, I refer to 1 Lawson, Rights, Rem. & Prac. §§ 436, 437; *Childs v. Smith*, 55 Barb. 45. The case of *Real-Estate Co. v. Tower*, 161 Mass. 10, 36 N. E. 680, holds the right of one signing preliminary articles to withdraw before organization, and is a full discussion of how he may withdraw. See *Tavern Co. v. Burkhard*, 87 Mich. 182, 49 N. W. 562. This case, however, differs from the *Rodes* Case in its facts. *Rodes* did not acknowledge the agreement, though he signed it, and took no part in the organization of the company; did nothing but sign the agreement. Squires signed the agreement, and, though he did not acknowledge it, he attended the organization meeting held by stockholders on 25th November, 1890, after the issue of the certificate, and voted as a stockholder for the directors then elected, and when, after the directors had made a call for the payment of 10 per cent. on the stock, payment of the assessment was asked of him, he paid \$20, the 10 per cent. on his two shares of stock, and an account was opened on the books of

the corporation, charging him with two shares of stock, and crediting him with the \$20. In June, 1891, after further calls had been made upon stockholders, the assistant secretary addressed an official letter to Squires, informing him of the action of the directors incurring cost in the erection of buildings and race course, and asking payment of Squires' assessments, to which he wrote a reply, dated July 24, 1891, stating that his understanding was that he was only taking \$100 of stock, and was only to pay \$50, and that, if that suited the directors, it was all right, and, if not, he wished his money returned, and he would not pay the amount demanded. Thus he recognized the directory of the corporation, and that he had subscribed stock, and on a certain basis would pay as a stockholder, differing only as to amount of subscription, a matter outside of the question of his character as stockholder, and governed by the evidence bearing on it, the agreement. In the Case of Rodes, *supra*, it is stated incidentally—not as a point necessary to the decision in the case—that as to subscribers before the issue of the charter, those becoming so by executing the agreement preliminary, if they acquiesced in the mode of incorporation by subsequent acts by payment of installments, or otherwise treat it as a corporation, they cannot set up that the corporation was not legally incorporated. I have taken pains, by examination of authorities cited and some others, to ascertain whether this position is correct, and I find it so. I find it laid down in the very recent work (1 Thomp. Corp. § 523), which, judging from the two volumes now out, will prove an invaluable work upon that all-important subject. In *Rikhooft v. Machine Co.*, 68 Ind. 388, it was held that payment of part of stock upon assessment and promise to pay balance, "involved a clear admission of the full and complete organization of the corporation, and of the existence of every fact necessary to such organization." *Railroad Co. v. Bowser*, 48 Pa. St. 29, held that when, after subscription of stock under an act requiring a certain amount before incorporation, a later act lessened it, the change would not release the subscriber who voted at the organization and in the election of directors in right of his subscription. In *Bell's Appeal*, 115 Pa. St. 88, 8 Atl. 177, it was held that one who subscribed in view of and for purposes of organization, and paid part of the stock, was estopped from denying his liability. In the supreme court of Missouri, in *Hotel Co. v. Hunt*, 57 Mo. 126, the opinion says it is well settled that a defect in the certificate is not available to a stockholder, who, by his conduct, has waived the defect. The court also said; "The cases in regard to this point have all been examined, and they all agree that, where the subscription has been acquiesced in, either by payment of part of the subscription, or by becoming

a director, or by attending meetings of stockholders, or by any other act indicating an acquiescence in the validity of his subscription, his defense, based on mere technical objections, will be disregarded. But the present case is peculiar, in that it shows nothing but the bare act of subscribing.

\* \* \* It appears that the 10 per cent. required by the articles of association to be paid on subscription was never paid; that the defendant never took any part in the company's acts, except to subscribe." The Alabama court says: "A subscriber to stock may, like any other person, be estopped from disputing the *de facto* existence of a corporation, especially as against creditors, where he attends meetings of stockholders, or otherwise participates in the business of the company, thereby inducing others to act upon the faith of his admissions, to their prejudice." *Schlöss v. Trade Co.*, 87 Ala. 414, 6 South. 360. In *Bridge Co. v. Chapin*, 6 Cush. 50, it is admitted that if a subscriber, knowing the whole capital had not been subscribed, but attended meetings, and participated in the business of the company, he would be estopped to deny his subscription. In *Association v. Walker*, 83 Mich. 386, 47 N. W. 338, attending meeting and voting stock was held to be a waiver of objection to an increase of stock. Presence of a party at organization of a company as a corporation, his election as president, and signature as such to a note is, in effect, an admission of the existence of the corporation, and that he was a stockholder. *Haynes v. Brown*, 36 N. H. 545. Payment of calls is an admission that subscription is binding. *Boggs v. Olcott*, 40 Ill. 304; *Musgrave v. Morrison*, 54 Md. 161. Such acts waive irregularity of subscription. *Railroad Co. v. McPherson*, 86 Am. Dec. 128, and note.

It is contended that a corporation was formed, but not the corporation contemplated. It is the same name, differing only as to date of expiration from the agreement. We cannot say this makes it another corporation. It is the same in all other aspects. "Even where articles of association are altered, or an attempt is made to transfer a subscription to a new company, the subscriber will be liable, if he consented to the change, either by word or act indicating acquiescence." *Hammond v. Straus*, 53 Md. 1, 16; 1 Mor. Priv. Corp. § 63. "If any question could arise as to the identity of the corporation organized as the one mentioned in the subscription paper, it must be held to have been waived by the defendant when he appeared at its meetings, and took part in the discussion of questions there raised, and voted his stock." Opinion in *Association v. Walker*, 83 Mich. 393, 47 N. W. 338. There is not a shadow of evidence that any other corporation of anything like the same name existed, and it seems to me that it is utterly impossible to say that Squires, in his acts of participation, in fact meant any other, or that the law would say it was not

referable solely to the corporation contemplated by the agreement which he signed. It was the same. The mere variance above spoken of between agreement and certificate did not, for the purpose of the question now spoken of, make it another company; it did not change identity. The frame, the business, the nature of the corporation made by the certificate are the same as those of the one contemplated by the article, so that Squires' acquiescence or waiver would surely apply to the corporation made by the certificate. Where, even, there is a material departure from the original plan, the cases agree that action such as that of the subscriber in this case will bind him. Note in *Machine Co. v. Davis* (Minn.) 26 Am. & Eng. Corp. Cas. 69, 41 N. W. 1026. The case of *Manufacturing Co. v. Hockaday*, 89 Va. 557, 16 S. E. 877, while holding that a material change in the purposes of a corporation will release a stockholder, admits in the opinion that attendance on meetings, or paying subscriptions, is a waiver of the objection. The rule of release, meet it where you will, is always stated with this qualification. *Railroad Co. v. Wilson*, 22 Conn. 435, is strong to same point. See, on this estoppel subject, *Glass Co. v. Alexander*, 9 Am. Dec. 102.

But it is argued that when Squires did the acts of acquiescence he did not know of the variance. The certificate of incorporation was read aloud at the organization. He says he did not hear it read. No one was charged with duty to inform him of it. It was his own duty to look to that, and means were open. In *Railroad Co. v. Bowser*, 48 Pa. St. 29, it was argued, as here, that to bind the subscriber by acquiescence he must know of the change. An instruction to the jury that, if he did not know of it, he was not bound, was held erroneous. The opinion said that, after the act of the legislature reduced the capital, "the company was organized, and the defendant voted in right of his subscription at the organization and at the election of directors. Upon this state of facts the court instructed the jury that, unless the defendant knew when he voted that the required subscription to the capital stock had been reduced by law from \$150,000 to \$25,000, the change released him from his subscription; that the presumption of law would be that he knew of the change in the charter, but that whether he did or not the jury should determine. In this, we think, there was error. By voting, the defendant admitted himself still a corporator, and the general principle of law is that a corporator must be held cognizant of his own charter. There was no evidence to rebut this legal presumption, even if it was capable of rebuttal. \* \* \* The change in the charter could not relieve the defendant. After it was made, he had contributed to involve his co-corporators in the venture, encouraged the creation of debts, and it was no longer for him to deny his liability to pay his own subscription. We affirm the judgment.

(40 W. Va. 421)

# BOARD OF EDUCATION OF OCEANA DIST. v. MITCHELL et al.

(Supreme Court of Appeals of West Virginia.  
April 6, 1895.)

## MARRIED WOMAN—SEPARATE ESTATE—RIGHTS OF HUSBAND'S CREDITORS.

1. Married woman's separate property. Syllabi 1, 2, 3, 4, 5, and 10 in the case of *Trapnell v. Conklyn*, 18 S. E. 570, 37 W. Va. 242, and syllabus 2 in case of *Stewart v. Stout*, 18 S. E. 726, 38 W. Va. 478, approved.

2. A court of equity will not at the instance of the husband's creditors attempt to charge a wife's separate property with alleged improvements put thereon by the skill and labor of the husband, unless the evidence establishes the existence, and at least the approximate amount, of such improvements.

(Syllabus by the Court.)

Appeal from circuit court, Wyoming county.

Action by the board of education of Oceana district against Richard Mitchell, Virginia D. Mitchell, and others. From the decree rendered, Virginia D. Mitchell appeals. Reversed in part.

Watts & Ashby, for appellant.

DENT, J. Virginia D. Mitchell appeals from a decree of the circuit court of Wyoming county rendered on the 17th day of July, 1890, in two consolidated chancery suits pending therein in favor of certain judgment creditors to enforce their liens against the real estate of R. Mitchell, the husband of the appellant. An amended bill, to which appellant was made defendant, brought in to these suits two certain small tracts of land, one containing 1 acre, the other 273 poles, the legal title of which was in the defendant, and alleged that said tracts were purchased and paid for by the husband, and large improvements were put thereon by him, and were conveyed at his instance, in order to delay, hinder, and defraud his creditors, to the appellant. Appellant filed her answer, denying the allegations and claiming that said lands and the improvements were paid for and made by her out of her separate estate. The commissioner to whom the causes were referred reported that the 1-acre tract was purchased and paid for by her with funds not furnished by her husband, but that the 273-pole tract and the improvements to the amount of \$1,400 on the other tract were in fraud of the husband's creditors. Appellant excepted to this report, but the court overruled the exception and decreed accordingly.

The evidence for appellant shows that she bought the 1-acre tract, and paid for it with money earned by her in teaching school before marriage. The consideration was only \$30. She also testifies, and is sustained by her husband and her vendor, that she purchased the 273-pole tract for \$60, part of which she paid out of the proceeds of a cow, which was her separate property, and partly out of goods purchased on credit and sold by

her, and that the vendor, Clay, had her note for the balance, which was unpaid. Mr. Henry J. Clay, who sold the two tracts of land to appellant, had a stock of goods, and proposed to her, if she would build on the 1-acre tract, he would pay for the same in goods, and move in and occupy the store-room. The improvements cost about \$500. \$328 of this amount was paid by Clay out of the store goods, and remains an open and unsettled account between said Clay and appellant; \$74, for lumber, was also paid out of the store; and \$80, for lumber, was paid with a horse which appellant purchased from her father-in-law, Joseph Mitchell, on credit, and which she was to pay for in such things as and when he needed them. A large part remains unpaid. Apparently, from the evidence, the appellant has been since the year 1888 carrying on a store business for herself. About all these matters she had the aid and assistance of her husband, who sometimes clerked for her without charge, and sometimes for H. J. Clay. He also did some inconsiderable work on the buildings, assisting and superintending the carpenters. But the extent and value of such work does not appear. Several witnesses on behalf of the plaintiffs give their opinion that the improvements on the property were worth from \$1,200 to \$1,500. These witnesses give a mere estimate, founded on the appearance of the property, with little or no expert knowledge. They furnish no basis on which to found a solid judgment, contradicted as they clearly are by the actual cost of the improvements. One witness testifies that, some time after the improvements were put on the property, Mr. Mitchell told him that the improvements had cost him \$1,400 besides his own work. It is not pretended that this declaration was made in the presence of the appellant, and it would be an exceedingly harsh rule to permit a wife's separate property to be taken away from her by reason of sweeping declarations made by her husband in her absence, even admitting such declarations to be unquestioned. As a case in point, see *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570, where it is held that the declarations of the husband are not admissible against the wife in a contest between the wife and his creditors; that the general rule of evidence is applicable in such cases, *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799. Husbands are so accustomed to their old and senile common-law prerogatives, which are slowly yielding to the nobler and more righteous enactments, that, as barons not quite shorn of their strength, they still talk egotistically of their femes' separate estates. They, in ordinary conversation, with a selfishness born of pride, cling to the exploded theory that whatever is my wife's is mine alone, for she is, and yet is not, for I am. We are two in one, and I am the one even though she supports me.

Man, poor man, said the pitying spirit,  
Dearly you pay for your primal fault,  
Some flow'rets of Eden you still inherit,  
But the trail of the serpent is over them all.

This appears to be a case wherein a woman who had earned a small amount of money teaching school marries a man who is notoriously insolvent, and undertakes with her frugal savings to buy a small tract of land, improve it by its use, her credit and services in selling goods, and in such other ways as are open to her, and then because her husband has given her to some extent the benefit of his time and labor, and is entitled to her earnings, his creditors must come in and swallow up the whole. In short, in marrying an insolvent man she has hopelessly mortgaged herself to his creditors, and her small accumulations must be surrendered to the satisfaction of his debts. His misfortunes attach to her with remorseless grasp, under the unbending rules of the common law. In the case of *Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. 636, this court held that a wife's earnings are the separate property of her husband. This law is now abrogated by legislative enactment. Acts 1893, c. 3, § 12. But it was in full force at the time of the institution of the present suits. It is the settled law that improvements put upon a wife's separate property by her husband can be subjected to the payment of the latter's debts. *Bank v. Wilson*, 25 W. Va. 244; *Rose v. Brown*, 11 W. Va. 122. As an exception to both these rules it has been held that, when her skill and labor in the use of her separate property produce profits, they are hers, not earnings belonging to her husband. *Stewart v. Stout*, 38 W. Va. 478, 18 S. E. 726; *Trapnell v. Conklyn*, 37 W. Va. 248, 16 S. E. 570. Also, that a husband may give his attention and labor to the care and improvement of his wife's separate property without making the same liable for the payment of his debts. *Robinson v. Neill*, 34 W. Va. 128, 11 S. E. 999; *Stewart v. Stout*, and *Trapnell v. Conklyn*, supra; *Atwood v. Dolan*, 34 W. Va. 563, 12 S. E. 688. The appellant in the present case purchased this property with her separate funds and credit, improved it on credit, and proceeded to pay for the improvements by the use of the property as a storeroom in which to sell goods. While paying for it in this manner, and before it was paid for, these suits were brought against it. This case is especially in point with *Trapnell v. Conklyn*, supra, as followed by *Stewart v. Stout*, supra. As to any services rendered or labor performed by the husband, it is governed by the case of *Bogges v. Richards' Adm'r*, 39 W. Va. 567, 20 S. E. 599, where it is held that from the husband's services and labor must be first deducted the support of himself, wife, and family before his creditors can ask the benefit of profits thereby accumulated. But there is no evidence to show that there were any profits, or putting any value whatever on his

services. Uncertain "guesses" as to the increased value of property furnish no basis on which the court can determine how much the services and labor of a husband may have been instrumental in producing such value, in the absence of any evidence showing or tending to show what such labor and services were worth, and, even if this were in evidence, there is nothing to show a clear profit subject to apportionment by a court of equity. For the foregoing reasons the decree complained of is reversed as to the appellant, Virginia D. Mitchell, and said suits are dismissed in so far as she and her separate property involved therein are concerned.

(40 W. Va. 480)

WEST et al. v. RAWSON, Justice of the Peace,  
et al.

(Supreme Court of Appeals of West Virginia.  
April 6, 1895.)

**TAKING UNLAWFUL TOLL—RECOVERY OF PENALTY  
—PROHIBITION.**

1. The five dollars' forfeit prescribed by law (section 37, c. 44. Code) to be paid by the proprietor of a gristmill to his customer for taking more toll than allowed by the statute may be recovered in a civil proceeding before a justice of the peace.

2. Where such justice has jurisdiction of the subject-matter in controversy, and does not exceed his legitimate powers, a writ of prohibition should not be granted.

(Syllabus by the Court.)

Error to circuit court, Wirt county.

Writ of prohibition by O. West and others against W. J. Rawson, justice of the peace, and John Lockhart. From an order dismissing the writ, plaintiffs bring error. Affirmed.

T. A. Brown, for plaintiffs in error. Casto & Lockhart, for defendants in error.

HOLT, P. Upon a writ of error to the judgment of the circuit court of Wirt county rendered on the 21st day of June, 1894, refusing to award plaintiffs in error (defendants below) a writ of prohibition. The plaintiffs in error, O. West and others, are the owners of a gristmill in the county of Wirt. John Lockhart, one of the defendants, took grain to the mill, to be ground for the consumption of himself and family. He complained that the proprietors of the mill took for toll more than the statute allows, and accordingly brought suit before W. J. Rawson, a justice of the peace, against West and others, to recover five dollars, the sum which the statute declares the proprietor of the mill shall forfeit to the party injured for such violation. Such proceedings were had before the justice that the cause was ready and about to be tried when defendant West applied for and obtained from the circuit judge, in vacation, a rule against W. J. Rawson, the justice, and John Lockhart, the plaintiff, to appear at a time and place designated after being served with a copy of the order, and

show cause, if any they could, why a writ of prohibition should not be awarded commanding Rawson, the justice, and Lockhart, the plaintiff, from further proceeding in said action then pending before the justice. On the 27th day of March, 1894, the plaintiffs, O. West and others, appeared in court; and on their motion, the rule having been served, their motion for writ of prohibition was docketed. On the 6th day of April, defendant Lockhart tendered his answer to the rule, and the same was ordered to be filed. On the 21st day of June, West and others moved the court to strike out the answer, but the court overruled the motion; and the cause then coming on to be heard upon the pleadings and evidence, including the transcript of the record of the proceedings pending before the justice and argument of counsel, the court was of opinion that plaintiffs, West and others, did not show themselves entitled to the writ, and gave judgment that the same should not issue, dismissing the rule, with costs.

The only question of importance turns upon the meaning and application, with reference to the jurisdiction of a justice, of section 37 of chapter 44 of the Code (Ed. 1891, p. 358), which reads as follows:

"Sec. 37. At every mill which grinds grain, whether the same be established under an order of the court or not, there shall be well and sufficiently ground, all grain brought to the mill for the consumption, when ground, of the person bringing or sending it, or his family, and in due turn as the same is brought, and within a reasonable time thereafter; and there shall not be taken for the toll more than one-eighth part of any grain of which the remaining part is ground into meal, nor more than one-sixteenth part of any grain of which the remaining part is ground into hominy or malt. If at any mill there be a violation of this section in any respect, the proprietor thereof shall, for every such violation, forfeit to the party injured \$5.00, but with these provisos, that the proprietor shall not be obliged to run more than one pair of stones to grind grain brought to the mill for consumption of the persons bringing or sending it, or their families, and that such proprietor may grind grain for the consumption of his family in preference to that of others."

This statute, in its main features, has a long history, going back to the acts of 1748 (see 6 Hen. St. pp. 58, 59), and has been kept up in every revision of statutes from that time to this. I have not been able to find any case where this section has called for construction, but it was the practice to bring actions of debt in such cases under the Code of 1849, and I can discover no material change. See Code 1849 (Ed. 1880, p. 370) c. 63, § 12. If the statute prohibits the doing a thing under a penalty, and does not prescribe any mode of recovery, an action of

debt may be maintained. Com. Dig. "Action upon Statute," F; 2 Bac. Abr. "Debt," A; Sims v. Alderson (1836) 8 Leigh, 479. Here no mode is prescribed. By section 28 of article 8 of the constitution the civil jurisdiction of a justice of the peace extends to actions of assumpsit, debt, detinue, and trover, if the amount does not exceed \$300,—that is, all causes of action for which these might be brought; and, under power conferred on the legislature by the same section, it has, in chapter 50 of the Code, made this civil jurisdiction still broader.

The plaintiffs in error contend that the five dollars prescribed by the statute, as the forfeit to be paid by the proprietor of the gristmill to his customer for taking more toll than what is allowed by law, viz. one-eighth, cannot be recovered before a justice in a civil proceeding; that it only can be recovered either by presentment or indictment in the circuit court, or by criminal warrant and arrest before a justice; that a justice has no jurisdiction of the subject-matter at all, or, if jurisdiction, it is only on a criminal warrant, and not by any civil proceeding, and therefore the circuit court erred in refusing the writ of prohibition. We do not think, however, that they make good this contention. Chapter 36 of the Code (the one in part relied on) relates to the mode of recovering fines. It provides that the term "fine" shall include every pecuniary penalty or forfeiture, and that it shall be to the state for the support of free schools, unless it is otherwise expressly provided, or would be manifestly inconsistent with the intention of the legislature. Here, as we have seen, it is otherwise expressly provided, for section 37 of chapter 44 says in so many words that the forfeit of five dollars shall go to the party injured; and Mayo, in his Guide (page 673), gives a civil warrant as the form for its recovery. In certain cases the informer or prosecutor is entitled to have a part of the fine, and no more. See Code, c. 36, § 2. Here the whole goes unconditionally to the injured party, and, in no event or contingency does any part go to the state. Then, why should the state sue or prosecute for a penalty in which in no contingency it has any interest? And, as no costs can be recovered against the state, the mill owners would think it a great hardship, and quite a one-sided affair, that any customer could sue them with impunity without any risk as to the payment of costs on failure to make out a case; yet the mill owner must pay, and pay always, to some extent, whether he gains or loses. We are of opinion that the justice of the peace does have, by civil action, jurisdiction of such cases; that in this case Justice Rawson was in no particular exceeding his legitimate powers; and that the judgment of the circuit court in refusing the writ of prohibition was right. Judgment affirmed.

(40 W. Va. 282)

## BOYD et al. v. WOOLWINE et al.

(Supreme Court of Appeals of West Virginia.  
March 30, 1895.)

## EASEMENT—WHAT CONSTITUTES—HIGHWAY—INJUNCTION.

1. A private right of way is the right of going over another man's land, and may be acquired by grant, express or implied, or by prescription.

2. When a man grants land to another in the middle of land retained, he impliedly gives the grantee a way to come at it across the land retained. This is an instance of what is called a "way of necessity."

3. A private right of way by prescription may be acquired by a visible, continuous, uninterrupted use for 20 years under a bona fide claim of right.

4. The continuous and uninterrupted use of a passway for 20 years or more by the people generally, though with the knowledge and consent of the owner of the land, will not constitute it a county highway; it must be accepted or in some way recognized as such by the county court.

5. A mandatory injunction will lie to cause an obstructed or closed private way to be cleared and opened for the use of the owner.

A case in which these principles are applied.  
(Syllabus by the Court.)

Appeal from circuit court, Summers county.

Bill by George A. Boyd and another against Caroline Woolwine and others. From a decree dismissing the bill, plaintiffs appeal. Reversed.

Jas. H. Miller and J. J. Swope, for appellants. Thos. G. Mann, for appellees.

HOLT, P. This was a bill of injunction in the circuit court of Summers county to protect and enforce a private right of way. On the 23d day of June, 1892, the injunction was granted the plaintiffs restraining the defendant Caroline Woolwine and the other defendants from obstructing the road in the bill mentioned, and requiring them to unlock the gates and remove all other obstructions placed in the road by defendants, and leave the same open and unobstructed until further order. All the defendants put in answers, the plaintiffs replied, depositions were taken, exhibits filed, and the cause coming on for final hearing on the 15th day of September, 1893, before a special judge, the injunction was dissolved, and the bill dismissed, with costs, and from this decree this appeal was allowed the plaintiffs.

The bill was demurred to. Does it make out a case for relief? The plaintiffs allege that they are the owners of valuable real estate, on which they reside, situate in Talcott district, Summers county, on the waters of Eagle branch, a small stream flowing into Greenbrier river; that defendants are owners of a tract of land below on said branch. This latter tract appears to have been conveyed by Augustus Gwinn and wife to defendant Caroline Woolwine and her children by deed dated the 7th day of April,



1883, as containing 24 acres lying on Greenbrier river, and including the mouth of Eagle branch. That when plaintiffs bought their land and commenced to reside upon it, 24 years ago, there was an open and notorious way running up said branch for persons to pass and repass from plaintiffs' lands, through the 24 acres now belonging to defendants, to the public highway; that it has been open to such travel time out of mind. Plaintiffs also allege that they own an easement as a private right of way along said Eagle Branch road; that for 24 years they have used and enjoyed the same continuously and without interruption, openly and visibly, and claiming the same as a private right of gateway; that they have worked upon it and kept the same in repair without objection or molestation on the part of the defendants, who had made two small changes in that part running through their own land, after having first asked for and obtained from plaintiffs permission to make them; that plaintiffs have no other way through their own premises to the public road; that this easement is the only way they own by which they can have access to the public highway to mill, to market, and to church, and that there is a public school house on the branch, called "Boyd's School House"; that they are informed that there was a parol agreement between defendants and the person from whom defendants bought their land that this way and easement was to remain open and unobstructed by defendants; that on the 1st day of June, 1892, defendants conspired together to injure and annoy plaintiffs by preventing their use of this passway, and to that end put trees and other obstructions across the same, closed and locked the gates, and refused to open them or to permit plaintiffs to pass through, though they were often requested to do so,—by all which plaintiffs are greatly damaged and annoyed; praying for the injunction already mentioned as temporarily granted, and for general relief. Such is the substance of the bill, with the order in which the facts are set forth slightly changed. Some defects are obvious, such as the allegation made on information alone, which plaintiffs, perhaps, did not believe to be true. The plaintiffs, however, could to advantage have made the location and title of their own lands more definite and explicit, but I shall take for granted that some of these facts sufficiently set forth make out a prima facie case, two circuit judges having so held, and nothing to the contrary being claimed in defendants' brief.

1. As to the public right of way. I can scarcely think of anything a private right of way would be likely to embrace beyond a public one while the latter one lasted; yet it is easy to see that the two are not necessarily inconsistent, and that the former may be coexistent with the latter, and so it has been held. *Brownlow v. Tomlinson*, 1 Man.

& G. 484. The proof shows that it has been used as a way continuously by the public in the sense of any and all who saw fit to pass over it, and for 60 years or more, going back to a time when all these lands were in a state of nature, uncleared and unfenced. When the tract of 24 acres was first fenced and gates put across the road does not appear, but it does appear that it was not done for the purpose, and did not have the effect, of putting a stop to its use; but the erection of the gates without leave of the county court tends to show that it was not, or at least was not regarded as, a county road. It does not appear that it was ever a thoroughfare. It is now, and has long been, only a cul de sac a mile or so long, opening out into the highway after passing through the land of defendants. Augustus Gwinn became the owner of the land in 1858, and this was a public passway then, and has been ever since. He sold to plaintiff Taylor and his father where the former now resides, and it was the agreement that plaintiff was to have the right to use this road as an outlet to the public road, but there was no evidence in writing of such agreement or of such sale. Gwinn afterwards sold and conveyed the 24 acres to defendants, who knew of this public passway, and agreed to leave it open, but there was no reservation thereof in the deed or any contract to that effect in writing. This, together with such long user, is the evidence of dedication to the public of this right of way. No acceptance thereof by the county court appears, and it must be taken that none was ever made, as the county court speaks only by record. It has long been the settled law in this state that the mere user of a road by the public, for however long a time, will not make it a public road. On the contrary, the mere permission by the owner of the land to the public to pass over the road is, without more, to be regarded as a license revocable at his pleasure. A road dedicated to the public must in some way, directly or by inference, be accepted by the county court upon its records before it can become a public county road. This may be done by laying it off into precincts or road districts, by appointing for it an overseer or surveyor, or by any act, formal or informal, showing plainly that it claims and treats the road as a public one. And if, after notice of such claim, the owner of the soil permitted the road to be passed over for any time, the road might well be inferred to be a public road. See *Brander v. Justices of Chesterfield*, 5 Call, 548; *Clarke v. Mayo*, 4 Call, 374; *Com. v. Kelly* (1851) 8 Grat. 632; *Ball v. Cox*, 29 W. Va. 407, 1 S. E. 673. It is true that section 31, c. 43, of the Code, by change of language made in 1861, now reads as follows: "Every road \* \* \* used and occupied as a public road \* \* \* shall in all courts and places be taken and deemed to be a public road \* \* \* whenever the establishment thereof as such may come in

question;" yet the court has held that this means used and occupied under the sanction of the county court in some way expressed. See *Ball v. Cox*, 29 W. Va. 407, 1 S. E. 673; *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48; *Yates v. Town of West Grafton*, 33 W. Va. 507, 11 S. E. 8; *People v. Underhill*, 144 N. Y. 316, 39 N. E. 333. This doctrine and this construction of this statute find their reason and justification in the following facts: In this country, new and sparsely settled as it is, passways run here and there, used more or less during more than a lifetime of one generation with the silent permission of the owners of the land, but without the faintest intent on their part to dedicate, or thought that they were thereby dedicating, a right of way to the public. In contemplation of our law of county, police, and economy, there can be no county road which is not in some way committed to the care and supervision of some road surveyor, whose duty it is to see that it is kept open and free from obstruction. Is the county court to be held liable in damages to any person who has sustained an injury in person or property by reason of a road being out of repair which it has never in any way accepted or recognized as a public county road or caused to be occupied as such by its road officers? See section 53, c. 43, of the Code. But the question remains, have the plaintiffs shown themselves to have a private right of way? This is quite a different thing, not only in its nature and extent, but in the methods of its creation and the evidence of its existence. It falls under the head of an easement, an incorporeal right, is of many varieties and with various characteristics, according to its own peculiar facts, which need not be noticed here or discussed further than they are brought into question by this record.

2. It is claimed that plaintiffs have a right of way through defendants' land of necessity. A way of necessity arises as an incident to a grant of land surrounded wholly by that of the grantor, when otherwise the land granted would not be accessible and the grantee would derive no benefit from the grant. It is an instance of the maxim that one is always understood to intend, as an incident, to grant whatever is necessary to give effect thereto which is in the grantor's power to bestow. 2 *Minor's Inst.* 20; *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632; *Nichols v. Luce* (1834) 24 *Pick.* 102; 6 *Rob. Prac.* 804. But these plaintiffs do not allege in their bill that they acquired their lands by purchase or conveyance from Augustus Gwinn or from any other person, but simply say that they are the owners of the land on which they reside, without alleging when, how, or from whom they acquired title thereto. By their evidence they make out a very clear case of inaccessibility into their homes, and out to the mill, market, church, and courthouse and highway, without using the road in controversy; such a case of ne-

cessity as the county court would not hesitate to relieve them from by making it a public road if addressed to that body (*Lewis v. Washington*, 5 *Grat.* 265), but they produce no competent proof here that they have any title at all to their lands except their actual possession, which makes them *prima facie* owners in fee, sufficient, perhaps, for the purposes of this case in other aspects, but certainly giving us no clue as to how or why they own this way as a way of necessity. They also claim title to this way by prescription. This right is fully set forth in their bill and clearly made out by the proof. Augustus Gwinn, while he was still the owner of the 24 acres at the mouth of Eagle branch, agreed verbally that plaintiff Taylor and the others living on the branch should have the use of the road in dispute as an outlet to the public road. *Trueheart v. Price* (1811) 2 *Mun.* 468; *McKinzie v. Elliott* (Ill.; 1890), 24 *N. E.* 965. Under this claim of right, and thus claiming it as their own, they have visibly and continuously used and enjoyed this passway without interruption for more than 20 years, working it and keeping it in some sort of repair during all that period, with the help of some of the defendants who resided on it where it runs through their own land. By such adversary user for that period of time they acquired a right to the unobstructed use of said way. *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632; *Stokes v. Upper Appomattox Co.* (1831) 3 *Leigh*, 318; *Coalter v. Hunter* (1826) 4 *Rand.* 58. If such is the right of the plaintiffs, no question is made that this is their proper remedy; in fact, their only plain, adequate, and complete remedy, seeing that it is the unobstructed use of the road they are after, and not damages for the obstruction of it. Therefore the decree of September 15, 1893, complained of, must be set aside, and the temporary injunction awarded on the 23d day of July, 1892, be made perpetual.

(40 W. Va. 371)

#### TRICE v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia.

March 27, 1895.)

#### EJECTION OF PASSENGER—MISTAKE IN TICKET BY AGENT—DAMAGES.

1. By mistake, a ticket agent selling a mileage ticket good for one year stamps upon it, as the date of issue, 4th March, 1892, instead of 1893. The passenger tenders it on 24th April, 1893, in payment of fare, but it is refused, and he ejected for nonpayment of fare. The passenger can recover damages.

2. By mistake a ticket agent selling a mileage ticket good for one year from issue stamps upon it, as the date of issue, 4th March, 1892, instead of 1893, and after the figures 189— writes the figure 3, making the date of the expiration of the book 4th March, 1893, and then corrects the latter mistake by writing over the 3 the figure 4, making it read 1894, not correcting the 1892. On 24th April, 1893, the holder tenders this book in payment of fare, but it is rejected as out of date, and he is ejected from the train, after explaining to the collector that the agent had made

the mistake, and he had himself not altered the ticket, and asking that the collector wait until the train reached Huntington, where the book was sold, so that the collector would be satisfied that the book had not been fraudulently altered; and the collector made no inquiry at any of several telegraph stations of the railroad company as to it. The passenger can recover damages of the company.

3. Where the case is one of indeterminate damages, and the law gives no specific rule of compensation, the decision of the jury upon the amount of damages is generally conclusive, unless the amount is so large or small as to induce the belief that the jury was influenced by passion, partiality, corruption, or prejudice, or misled by some mistaken view of the case; but, if so excessive as to induce such belief, it will be set aside.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Action by R. C. Trice against the Chesapeake & Ohio Railway Company. Plaintiff had judgment, and defendant brings error. Affirmed.

Simms & Enslow, for plaintiff in error. E. W. Wilson, for defendant in error.

BRANNON, J. Trice sued the Chesapeake & Ohio Railway Company, in Cabell county, for damages for his ejection from a train, and, on demurrer to evidence, recovered judgment for \$550, and the defendant brought the case here. The facts, in short, are as follows: Trice boarded a passenger train on the 24th of April, 1893, at Charleston, to go to Huntington. He had a mileage ticket issued for 1,000 miles, having remaining unused coupons for 40 miles' travel. These tickets are good for one year from issue. This one had stamped upon it as date of its issue March 4, 1892. For date of expiration there were printed on it the figures 189-, to be filled out with the particular year of issue; and there was inserted in ink, with the pen, the figure 3, making the date of expiration 4th March, 1893; but over the 3 was written with pen and ink the figure 4, making the expiration, considering the figure 4 as the right one, and disregarding the figure 3, 4th March, 1894. The question is, when was this ticket issued? When fare was demanded, Trice gave the collector this mileage ticket as paying 40 miles' fare, and 50 cents in money, which the collector accepted, and passed on, saying that there was some change coming to Trice, which he would hand him. The collector soon returned, saying to Trice that his ticket was not good, because out of date. When the dates on the ticket were called to his attention, Trice insisted that the ticket was good; that he had purchased it at the Huntington office 4th March, 1893, and that the stamp of 1892 as the date of purchase was a mistake in the agent who sold it to him; that, even though the stamp gave the date 1892 for its purchase, still the date of expiration on the ticket was 1894. Whereupon the collector said: "That won't help you any. That four has been made there since you bought the ticket. You have

changed that three to a four. I won't accept it." Trice still insisted upon the correctness and validity of the ticket, and said, if there was any mistake, it could be rectified at Huntington, and the collector would there find out that it was genuine and correct, to which the collector replied that he did not have to go to Huntington to ascertain about it, and that he would have to put Trice off, and told him to get off at next stop. Trice did not get off at the next stop, Spring Hill; and, after the train left Spring Hill, the collector said to Trice that he would have to pay fare or get off the train, and handed him back the mileage book and 50 cents. Then the conductor came to him, inspected the book, said the collector was right in rejecting it, and Trice would have to get off at St. Albans, which he did under protest, still demanding right of passage.

Was the mileage ticket still good for 40 miles' travel? That depends on whether it was issued in 1892 or 1893, and this depends on whether the stamp date, 4th March, 1892, was a mistake as to the year, or was right, and the figure 4, written over the figure 3 in its date of expiration, was wrongfully put there by forgery. Trice swears he purchased the ticket 4th March, 1893, and that he did not put the figure 4 in the date of expiration, but that the agent at Huntington did. There is no evidence to the contrary; and, even if we were not deciding the case on a demurrer to evidence, we would be required to say that the facts are as Trice states them; but the more certainly and plainly that is our duty under principles governing us upon a demurrer to evidence. Where is the registry kept at the Huntington office, if any was kept, showing sales of mileage books by date and number? Where the agent who sold this book? They are absent, and their absence unaccounted for. No alteration in the ticket is shown. We must consequently say that the stamped date of issue is a mistake of the selling agent, as also the date of 1893 for expiration a mistake, and that he discovered it, and corrected it by writing the figure 4 over the figure 3 in date of expiration, and omitted to change the 1892 in date of issuance. It does seem strange that the selling agent would retain as late as 4th March, 1893, the old stamp of 1892, and still more that he would put 1893 in date of expiration if the book was issued in 1893, making two mistakes. Did this happen only in the case of this ticket? How did it happen? We do not know. But the evidence shows mistaken date of issuance. The collector could not say that the date 1892 in date of issue was infallibly right, and that the date 1894 in date of expiration was wrong, unless the latter was forgery. Indeed, the fact that the figure 4 was written in ink over the figure 3 would indicate that the 1892 was erroneous and 1894 right, unless forged, and the ink of the figures 3 and 4 and in other parts seems the same, and the 4

In day of month made like the 4 in the year 1894. Thus, the passenger had a lawful ticket, and was wrongfully ejected. There is nothing forbidding oral evidence to show mistake in date. The mileage book is a contract, but, under the rule that error in mere date may be shown, I take it the true date can be shown. The defense is only that the collector acted under a rule of the company, directed to collectors, saying that "a ticket bearing any evidence of alteration or erasure should not be accepted for passage, unless collectors are satisfied that the same has been done in ignorance and contrary to instructions by agent who sold the ticket." That is good between company and collectors; but can it destroy the right of a passenger under a ticket which in fact has not been mutilated or changed? Suppose the collector should find marks of mutilation or alteration when a court should find none. Would the rights of the party be defeated in a court by the decision of the collector? The rule is prudent; but if an instance of its application is one of misapplication or error, and thereby one guilty of no fault is injured, the company, like others, must answer for the consequence of its action or the mistakes of its agents, though well meant. This ticket was apparently good, or, at least, as apparently good as apparently bad; more apparently good than bad.

In the McKay Case, 34 W. Va. 65, 11 S. E. 737, we held that where a railroad company agreed to sell a ticket for passage between certain points, but by mistake wrote the ticket for passage to other points, the passenger could not ask passage where the ticket did not carry him, it being apparently not good for the passage demanded; and the passenger leaving the car, at the command of the conductor, but without force, could not sue in tort, but must sue for breach of contract by the company in agreeing to carry him that passage, and failing therein by not giving him the ticket contracted for. That case was confessedly somewhat close, but I still think it was rightly decided, and sustained by cases of eminent authority. There the ticket showed nothing for, and all against, the right of the passenger to the ride, which he claimed, and was transparently not good,—a mere blank or nullity as to the ride claimed; while here it is apparently good, more apparently good than bad, and turning out in the end to be good. There is a difference, though it cost reflection to see it. In this case I go upon the theory, which I think is correct, that the plaintiff's grievance is not a breach of contract in agreeing to sell him a ticket for a certain passage, and giving him a wrong ticket, as in the McKay Case, but in the fact that he had a ticket entitling him to go to Huntington as he demanded, and in its wrongful rejection and his expulsion. He had a ticket turning out ultimately to have been good from the start. The confusion as

to date arising from the agent's error, without fault in the passenger, does not change its validity. In *Railroad Co. v. Rice*, 64 Md. 63, 21 Atl. 97, a party had a ticket for a round trip containing two coupons, one each way; and the conductor tore off the wrong one, and left the other one with the passenger for return, and the conductor on the return ejected him, and he recovered. He had bought a ticket good on its face, and the mistake of the conductor could not change it. His rights depended on his ticket good from the first as issued, not on the conductor's error. So in *Railroad Co. v. Fix*, 88 Ind. 381, where conductor tore off wrong coupon in round-trip ticket. This passenger, Trice, made explanation as to the ticket to the collector, and, what showed his good faith, asked the collector to wait till they got to Huntington, where any mistake could be corrected. This was a reasonable proposition no doubt. In *Hufford v. Railroad Co.* (Mich.) 31 N. W. 544, it was held that, where an agent had made a mistake in selling a ticket, the conductor ought to rely on the passenger's statement as true, until found to be untrue, without regard to words, figures, or other marks on the ticket, and the company was held liable for ejection. And then this was a train stopping at all the stations, nearly a dozen, between Charleston and Huntington, and many of them telegraph stations, so that the collector could have ascertained about the ticket by inquiry of the Huntington office without cost. He took no steps to ascertain the truth, but assumed a forgery on Trice's part.

Is the amount of damages found excessive? While, from the first, I have had no doubt of the plaintiff's right to recover, my inclination was to think that the jury had imposed too heavy a hand on the company, and compensated Trice beyond any harm or loss he suffered. Not a finger was laid upon him to force him from the train, but he got off of his own action, under protest. It does not appear that he suffered from weather. He got off at a regular station. It is not shown that he was greatly delayed, or lost anything thereby. He says he had important business in Huntington, but what, or whether he lost anything, he does not say. There is no evidence that he was exposed to public humiliation, or that what was said was heard by other passengers. The appearance of the ticket might well suggest a doubt to the conductor. Where a passenger is wrongfully ejected from a train by a conductor for non-payment of fare, in good faith, in execution of the rules of the company, as he supposes, without malicious intent or circumstances of indignity or insult, without force, there ought not to be heavy or exemplary damages, but only such as compensate actual loss. *Railroad Co. v. Guinan*, 47 Am. Rep. 279; *Fitzgerald v. Railroad Co.*, 50 Iowa, 79; *Car Co. v. Reed*, 75 Ill. 125. But here the collector charged upon Trice the crime of for-

gery, and, where circumstances of insult and indignity attend, that fact may be considered fairly by a jury in estimating damages. In *Railroad Co. v. Flx*, supra, where the verdict was \$600, a distinguishing feature was the conductor's charge that plaintiff wanted to cheat the company. This is a matter considered everywhere. But as is said in 3 *Suth. Dam.* § 953: "In actions for personal injuries, and in cases generally where there is no fixed legal rule of compensation, the theory of the law is that the decision of the jury is conclusive, unless they have been misled, or their verdict has been influenced by corruption, passion, or prejudice. Unless the verdict finds an amount so out of proportion to the actual injury as to evince such misleading, or the presence of some malign influence, it will be sustained, although it may materially differ from the judgment of the court. But if the amount of the verdict so far exceeds or falls short of what to the court appears to be just compensation as to induce the belief that the jury have not given the case a fair and dispassionate consideration, it will be set aside." Our own authorities are the same, and in such cases hold that the finding of the jury governs, unless so excessive as to induce the belief that it was governed by partiality, corruption, or prejudice, or misled by some mistaken view of the merits of the case. *Farish & Co. v. Reigle*, 11 *Grat.* 697; *Pegram v. Stortz*, 31 *W. Va.* 220, 6 *S. E.* 485; *Boster v. Railway*, 36 *W. Va.* 318, 15 *S. E.* 158; *Sheets v. Railroad Co.*, 39 *W. Va.* 475, 20 *S. E.* 566. Under these principles, we cannot interfere with the amount found. In a note to *Railroad Co. v. Guinan*, 13 *Am. & Eng. R. Cas.* 41, are collected cases in which verdicts have been held excessive for ejection of passengers and others where large verdicts have been sustained, but they afford no certain guide. Certainly, where the conductor is honestly executing his duty, though he is mistaken, and there is no force, insult, or harsh treatment, the finding ought to be only compensatory, not punitive and heavy. We think this verdict heavy, but we hesitate to interfere with the finding of the jury. Affirmed.

(40 W. Va. 405)

## UNION TRUST CO. v. McCLELLAN.

(Supreme Court of Appeals of West Virginia.  
April 3, 1895.)ACTION — ACCOMMODATION NOTE — BURDEN OF  
PROOF—CONSIDERATION OF PLEDGE—EVI-  
DENCE—PRESUMPTIONS.

1. Where it is shown in evidence that a certain negotiable promissory note was made and delivered to the payee at his instance, and for his accommodation for a specific purpose, and that such payee, without the knowledge or consent of the maker, used such note for a different purpose, the burden is on the holder of such note to show that he received it in the ordinary course of business, before maturity, for value, without notice of its wrongful misuse by the payee, before he can recover from the maker.

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2. A pre-existing debt is not such valuable consideration as will protect the holder of a negotiable note wrongfully pledged as collateral security by the payee.

3. Where the burden is on a party to a suit to prove a material fact in issue, the failure, without excuse, to produce an important and necessary witness to such fact, raises the conclusive presumption that such witness' testimony, if introduced, would be adverse to the pretensions of such party.

(Syllabus by the Court.)

Error to circuit court, Mercer county.

Action on a note by the Union Trust Company against J. L. McClellan. Defendant had judgment, and plaintiff brings error. Affirmed.

Johnston & Hale, for plaintiff in error. A. W. Reynolds, for defendant in error.

DENT, J. A suit brought by the Union Trust Company against J. L. McClellan on a certain promissory note, in the circuit court of Mercer county, resulted, on the 24th day of February, 1894, in a judgment for the defendant, from which the plaintiff obtained a writ of error, and here relies on the following prolix and argumentative assignment, to wit: "First. The court erred in permitting the defendant to read as evidence to the jury the deposition of Wm. B. Reed, over the objections of the plaintiff. This deposition was wholly immaterial and irrelevant. This suit was brought upon a note negotiable under the laws of the state of Pennsylvania. The plaintiff was the owner thereof, having taken it for value, and this deposition undertakes to explain the circumstances under which it was executed by the defendant to the said Wm. B. Reed, the payee thereof. Second. The said circuit court erred in permitting the defendant to testify before the jury in explanation of the circumstances under which he executed the said negotiable note to the said Wm. B. Reed, over the objection of the plaintiff. Third. The court erred in permitting the defendant to testify to the jury why the said Reed proposed to give to the said defendant 500 shares of stock in the Fottrell I. W. O. Company, over the objection of the plaintiff. This was wholly irrelevant and immaterial, and tended to lead away the mind of the jury from the issue in the case. Fourth. The court erred in permitting the defendant to testify before the jury as to the opportunity that the plaintiff had to see the defendant in Philadelphia, and as to the number of times they passed by the plaintiff's place of business while in Philadelphia, and as to where he first found out that the note sued on in this case had not been used according to the contract between him and the said Reed, and as to how long it was before the first action was brought on said note, over the objections of the plaintiff. Fifth. The court erred in refusing to strike out the whole of the examination in chief of the defendant. Sixth. The said court erred in refusing to strike out the whole of the defendant's evidence in this

case, and direct the jury to find a verdict for the plaintiff, because it presented no valid defense. This practice was approved by the court of appeals of this state in the case of *Spencer v. Rose*, 28 W. Va. 333. Seventh. The court erred in permitting the defendant to testify to the jury in sur rebuttal that he had never executed the note referred to in the deposition of D. Howard Foote, read in the case before the jury. Eighth. The court erred in refusing to give to the jury, at the instance of the plaintiff, instructions Nos. 1, 2, 3, 4, and 5. It was clearly error in the court in refusing to give these instructions, especially so as to No. 3. There was evidence in the case showing that the note sued on was indorsed to the plaintiff by the payee, Reed, for a consideration, and there was evidence showing or tending to show that a consideration passed from the payee, Reed, to J. L. McClellan, the maker thereof, and there was evidence tending to show that Reed, the payee, practiced a fraud upon McClellan, the maker; and it is hard to conceive why the court rejected this instruction, which was intended to meet this view of the case. Ninth. The court erred in giving to the jury instruction No. 1 for the defendant. This was clearly erroneous. It garbles the facts, and violates a well-established principle. It put prominently before the jury parts of the evidence, and ignored other parts of the evidence. It is long, prolix, and hard to understand, and does not propound the law correctly. Tenth. The verdict was contrary to the evidence in the case. Wm. B. Reed in his deposition says that the note was given him for the purpose of having it discounted; and he further said in his deposition that said note was used by him in paying for stock in the Fottrell I. W. C. Company for the defendant. The whole evidence in the case shows that the note sued on was either based on valuable consideration to the defendant, the maker, or that it was an accommodation note, given by the defendant to accommodate his friend, Wm. B. Reed, and in either event the verdict should have been for the plaintiff."

No other errors were assigned at the bar, and, as none are apparent from the record, after careful inspection, it must be presumed they do not exist, as the able counsel for the plaintiff would not have overlooked them.

The four instructions asked for plaintiff, and refused, are as follows, to wit: "Instruction No. 2: The court further instructs the jury that if they believe from the evidence in this case that the note sued on in this case was made and delivered by the defendant, McClellan, to Wm. B. Reed, as payee, for the personal accommodation of said Reed, and with the understanding that the said Reed should use the said note for the purpose only of paying for or showing to the stockholders of the Fottrell Insulating Wire Cable Company that 500 shares of the capital stock of said company had been paid for by the said defendant, or the said defendant and

said Reed jointly; and the jury shall further believe from the evidence in this case that the said Reed, with said understanding, which he made known to the plaintiff at the time he negotiated said note to the plaintiff, and that he did, before the maturity of said note, negotiate the same to the plaintiff for value by getting the money thereon, by having the same discounted, and getting the money, or by having his own note discounted, and at the time of such discount, and in part consideration thereof, he, Reed, deposited the note in suit as collateral security,—then the jury should find for the plaintiff. Instruction No. 3: The court instructs the jury that if they believe from the evidence in this case that the note sued on in this case was taken by Reed, the payee, for valuable consideration, and that the said Reed indorsed and delivered the said note to the plaintiff for valuable consideration, then the plaintiff has the right to recover on said note, unless they further believe from the evidence in this case that the said Reed procured said note from the defendant through fraud, and that the plaintiff, at the time it took said note, knew of said fraud, and the burden of proving said fraud and notice is on the defendant. Instruction No. 4: The court instructs the jury that if they believe from the evidence in this case that the note sued on in this case was made by the defendant, J. L. McClellan, to W. B. Reed, as payee, and that said note was made for the purpose of discount, and that the said Reed, before the maturity of the said note, indorsed and delivered the same for value to the plaintiff, Union Trust Company, then the said plaintiff is entitled to recover in this case, unless the jury shall believe from the evidence in this case that the said note was obtained by the said Reed from the said McClellan by fraud, and that the plaintiff had knowledge of such fraud when it took the said note from the said Reed; and the burden of proving fraud is on the defendant. Instruction No. 5: The court further instructs the jury that if they believe from the evidence in this case that the plaintiff took the note in suit before its maturity, for value, and without notice of any equities (if the jury from the evidence shall believe any equities existed) between the defendant, McClellan, and W. B. Reed, the payee of said note, then the plaintiff is entitled to recover in this case, and the jury should so find." Indorsement on this instruction by the judge of the court: "This instruction is refused upon the ground that it is abstract, and submits to the jury questions of what equities are, and tends to mislead and confuse it,—the jury. R. C. M."

The instruction given for defendant over objection of plaintiff is as follows: "Defendant's instruction No. 1: The court instructs the jury that if they believe from the evidence in this case that the defendant, J. L. McClellan, made and delivered to W. B. Reed, payee, the note sued on in this

case, that it might be indorsed by him, said Reed, and delivered to the Fottrell Insulated Wire Cable Company at a then proposed meeting of the stockholders thereof, in order to have the books of said company show that said McClellan had fully paid up for five hundred shares of the capital stock of said company; and if the jury further believe from the evidence that the said W. B. Reed had agreed, or did agree, that he would give said five hundred shares of said capital stock to said McClellan in consideration of certain sales that McClellan had made for said Reed of Penn placer mining stock; and if the jury believe from the evidence that the said note was made by said McClellan and received by said Reed for the purpose aforesaid, and for no other purpose, and that it was the contract and agreement between said Reed and said McClellan at the time said note was made and delivered that said note should be used for said purpose, and none other; and if the jury further believe from the evidence in this case that said Reed agreed with said McClellan, at the time of the making and delivery of the note sued on in this case, that he, said Reed, would pay the amount of said note to said Fottrell Insulated Wire Cable Company, and that said McClellan should not pay the same; and if the jury further believe from the evidence in this case that the said W. B. Reed, in violation of his said contract with McClellan, instead of using said note for the purpose aforesaid, indorsed and delivered the said note to the plaintiff in this case; and if the jury believe from the evidence in this case that said indorsement and delivery of said note was made to one M. S. Stokes by said Reed, that said Stokes was at that time the treasurer of said plaintiff, the Union Trust Company, and was authorized to act for said plaintiff, and did act for it in said negotiation, and received said note from said Reed for said company, and that at the time said Stokes so received said note from said Reed said Stokes knew of the specific purpose for which said note was executed, and the facts and circumstances attending its making and delivery, aforesaid,—then the jury should find for the defendant in this case, notwithstanding they may further believe from the evidence in the case that the plaintiff paid a valuable consideration to said Reed for said note."

The facts clearly established by the evidence are as follows: W. B. Reed, feeling himself under obligation to the defendant for certain services rendered by the latter in disposal of certain shares of stock, agreed to give him 500 shares of stock in the Fottrell Insulated Wire Cable Company; and he obtained from the defendant the following note: "\$1,000. Oct. 21, 1889. Ninety days after date I promise to pay to the order of W. B. Reed at the \* \* \* one thousand dollars, without defalcation; value received. J. L. McClellan." Indorsed: "Pro-

test waived. W. B. Reed,"—to show the directors of the company that the stock promised defendant was fully paid, and then he would pay for the stock in a few days, and take up the note. That said Reed then took said note, which was negotiable under the laws of Pennsylvania, the place of making being Philadelphia, and transferred the same to the plaintiff, either as collateral security for his own note, executed for money then borrowed, or for a pre-existing debt. That defendant resided in Norristown, 17 miles out of the city, and remained at Philadelphia until March 1, 1890, and, except that Reed informed him that he had paid off the note, he heard nothing from it, and never knew it was held by the plaintiff, until May, 1891, after he had moved to West Virginia, shortly before suit was brought upon it. There are some disputed questions of fact in the case. Mr. Reed, the payee of the note, says that he assigned and delivered the same to one M. S. Stokes, secretary and treasurer of the plaintiff, as a collateral security for his own note, executed at the same time; that Mr. Stokes knew the purpose for which the McClellan note was executed, and at first objected, but finally took it. D. Howard Foote testifies that he was assistant treasurer of the Union Trust Company during the year 1889 (in his first deposition), and that W. B. Reed brought the note to the company, and obtained a loan on it. His deposition was taken a second time January 11, 1894, and he then testified that it was given in renewal of another note of defendant. Reed and McClellan both testify that they never gave any such prior note as the witness Foote refers to in his last deposition. There are other matters of controversy in this case, but these are all that are necessary for its correct decision.

It is the settled rule of commercial law that, where a negotiable note is given for a specific purpose, is indorsed and used by the payee for an entirely different purpose, without the knowledge or consent of the maker, the burden of proof is on the holder of such note to show that he received it in the ordinary course of business before maturity for a valuable consideration, and without notice of its misuse by the payee before he can recover from the maker. Also that one who takes an accommodation note as collateral security from an antecedent debt is not a holder for value. Such is at least the law of Pennsylvania, where the note in controversy was executed. *Bank v. Dunn*, 151 Pa. St. 228, 25 Atl. 80; *Hart v. Trust Co.*, 118 Pa. St. 565, 12 Atl. 561; *Carpenter v. Bank*, 106 Pa. St. 170; *Royer v. Bank*, 83 Pa. St. 248; *Wardell v. Howell*, 9 Wend. 170; *Coddington v. Bay*, 20 Johns. 637. In the case of *Woodhull v. Holmes*, 10 Johns. 230, it was laid down as a rule that "a party to negotiable paper may be a witness to prove facts subsequent to the due

execution of the note, and which destroy the title of the holder." Defendant, McClellan, was a competent witness to show why the note was executed, and that it was afterwards misapplied by the payee. Having done this, both by the testimony of himself and the payee, Reed, the burden was then on the plaintiff to show that it was a bona fide holder before maturity, for value, without notice.

Plaintiff's second, third, and fourth instructions were properly refused for the reason that they sought to cast the burden of proving both fraud and notice upon the defendant. The second instruction goes so far as to claim that, even if the plaintiff had notice, it was entitled to recover. The fifth instruction was properly refused for the reasons, given by the court, that it was abstract, uncertain, and would tend to mislead the jury. All these instructions ignore many of the facts in the case, and were properly refused for this reason. *Storrs v. Feick*, 24 W. Va. 606; *McMechen v. McMechen*, 17 W. Va. 683. The instruction given for defendant, while it is long, yet it is hard to see how it could be any shorter, and properly state the case from the defendant's standpoint. It is too plain for the jury to have been misled by it, and it correctly propounds the law. There cannot be the possibility of a doubt but what this case was rightly decided both by the jury and the court. The preponderance of the evidence is clearly in favor of the defendant. The plaintiff appears to have entirely ignored the law that the burden was upon it of proving want of notice of the fraud vitiating its title. The only witness it could have proved this by was M. S. Stokes, its former secretary and treasurer, with whom Mr. Reed says he dealt when he transferred the note to the plaintiff, and that he had full knowledge of the purposes of its execution. Not only does this prove notice, but the presumption of the law is that Mr. Stokes would have so testified if his evidence had been taken; and it was suppressed for this reason. "No rule of law is better settled than that a party having it in his power to prove a fact, if it exist, which, if proved, would benefit him, his failure to prove it must be taken as conclusive that the fact does not exist." *City of Wheeling v. Hawley*, 18 W. Va. 472; *Hefflebower v. Detrick*, 27 W. Va. 16. And much more is this the case where the burden is on the party who fails to produce the only witness to the fact. It is true that the evidence of D. Howard Foote is taken twice on this subject. But his statements are contradictory and uncertain, and he is contradicted by both McClellan and Reed, all of which made the testimony of M. S. Stokes the more necessary, and the presumption of the adverse character of his testimony the stronger. Of two innocent sufferers from the wrong of a mutual friend the defendant, from the evi-

dence, has the better right, and for this reason the judgment is affirmed, there appearing no error in the record prejudicial to the plaintiff.

(40 W. Va. 436)

**FLANNEGAN v. CHESAPEAKE & O. RY. CO.**

(Supreme Court of Appeals of West Virginia.  
April 6, 1895.)

**FELLOW SERVANTS—WHO ARE—CONTRIBUTORY NEGLIGENCE.**

1. The first, second, and third syllabi in the case of *Haney v. Railway Co.*, 13 S. E. 748, 38 W. Va. 570, approved.

2. The telegraph operator in charge of a signal station, who has control, by means of signal orders, of the running of trains over a block section of a railroad, is not the fellow servant of a brakeman injured on such block section by reason of such operator's negligent management of the running of such trains.

3. The syllabus in the case of *Comer v. Mining Co.*, 12 S. E. 476, 34 W. Va. 534, approved.

(Syllabus by the Court.)

Error to circuit court, Fayette county.

Action by R. E. Flannegan against the Chesapeake & Ohio Railway Company, Plaintiff had judgment, and defendant brings error. Affirmed.

Simms & Enslow, for plaintiff in error.  
T. G. Mann and W. R. Thompson, for defendant in error.

DENT, J. This is a writ of error from the judgment of the circuit court of Fayette county rendered on the 6th day of March, 1894, for the sum of \$5,012.72, in favor of R. E. Flannegan against the Chesapeake & Ohio Railroad Company, on a demurrer to evidence. The facts are as follows: On the 17th day of March, 1892, while the plaintiff was in the employ of the defendant as a brakeman on a freight train, his train became uncoupled in Stretcher's Neck tunnel, and it became his duty to couple it; and, while engaged in the discharge thereof, a passenger train ran into the rear end of the train, and caused the plaintiff's right leg to be cut off near the ankle. The conductor sent the rear brakeman back to flag any approaching train, but whether he discharged this duty properly does not appear in evidence. The engineer says he did not see the flagman, but heard some one say there was a man in the tunnel. Who said this, it does not appear. But it does appear that he was on the wrong side of the engine, owing to the curvature of the road, to see the flagman, and also that he was blinded by the smoke so that he could not see a foot ahead of the engine. The fireman's evidence was not taken, and it must have been he who saw the man in the tunnel. The rear end of the freight train was about 350 feet from the west end of the tunnel when struck, which occurred but a few minutes—an uncertain time—after it became uncoupled. The trains were run through this tun-



nel by means of signals known as the "block system"; there being a telegraphic station at each end of the tunnel, in charge of an operator, whose duty it was, by signals, to notify trains when to stop, and when and at what rate to proceed. The operator at the west end gave the passenger train the wrong signal,—being that for a clear track,—and allowed it to proceed at full speed, when she should have stopped it. Defendant demurred to the evidence, but the court overruled it, and entered judgment for the plaintiff. It is now here insisted that the court erred in its judgment, for the reasons (1) that the operator was a fellow servant with the plaintiff; (2) that the accident was caused by the failure to flag the passenger train, on the part of the rear brakeman of the freight.

In passing on the first objection, the court is asked to review and overrule the case of *Haney v. Railway Co.*, 38 W. Va. 570, 18 S. E. 748, wherein this question has already been determined. The contention is that both the flagman and signal operator are called upon to perform precisely similar duties, the signal stations being simply an additional precaution provided to prevent accidents. The definition of "fellow servants," as defined and settled by recent decisions, is, those "who are so far working together as to be practically co-operating, and to have opportunity to control or influence the conduct of each other, and have no superiority, the one over another" (*Madden v. Railway Co.*, 28 W. Va. 619), while it is held that those who act in a superior position, and have the right to direct and control the conduct of others, are not fellow servants of such others, especially in discharge of superior duties (*Riley v. Railway Co.*, 27 W. Va. 146; *Core v. Railroad Co.*, 38 W. Va. 456, 18 S. E. 596). The rear brakeman or flagman on a train is the fellow servant of the front brakeman, for each has his respective, separate, yet dependent, duties to perform in the running of the train; and they may influence, and even control each other's conduct, yet they are neither superior to, nor can they control, each other. Yet the flagman occupies a far different relation towards the trainmen of all other trains, for, in giving them warning of the obstruction of the track by the train to which he belongs, he performs a duty delegated to him by the master; and for his failure to discharge it the master is liable, for it is one of the master's personal or nonassignable duties to keep the track free from obstructions, for the safety of his employes. So a flagman, in discharging the same duty, acts as a fellow servant to some, and as the superior or master to others, of his coemployes. Two persons who are called upon to perform the same duty, in effect, may occupy a relatively different position to the same employe, in its discharge. For instance, the flagman protects his coemployes by warning the ap-

proaching train, while the master, the dispatcher, and the operator render them the same protection by not allowing the train to use the track until it is clear. One stops the train. The other holds it back. The one is a part of the train, while the other belongs to an entirely different department, which has the supervision and management of all trains, and yet is no part of any train, but is entirely stationary. The one acts for self-protection. The other, being in no personal danger, acts for the safety of others, and the dispatch of his master's business. In this case the defendant, seeking to discharge its personal duty and provide a safe track, and at the same time facilitate the rapid movement of trains, established the signal station, and placed the operator in charge, with full authority, by means of a code of signal orders equally as effective as any other kind could possibly be, to control the running of all trains over this block; and all trainmen, of every train, were under absolute rule to watch for and obey her orders before they dare enter upon the block. If she had been attentive to her duties, she must have known the block was occupied and obstructed, and her knowledge was the knowledge of the master; yet, in the face of that fact, she negligently gives a peremptory signal for the train to proceed. In what way could she possibly be the fellow servant of the trainmen, who are entirely at her command and who can neither influence nor control her independent actions? She is as much the master of her section block as the master is of the whole road. In *Lewis v. Seifert*, 116 Pa. St. 647, 11 Atl. 514, it is held: "The master owes to every employe the duty of providing a reasonably safe place in which to work. This is a direct, personal, and absolute obligation; and, while the master may delegate these duties to an agent, such agent stands in the place of the principal, and the latter is responsible for the acts of the agent. And where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate." *Mullan v. Steamship Co.*, 78 Pa. St. 25; *Railroad Co. v. Bell*, 112 Pa. St. 400, 4 Atl. 50. "It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. This is a personal, positive duty; and, while a corporation is compelled to act through agents, yet the agents, in performing duties of this character, stand in the place of, and represent, the principal. In other words, they are vice principals." *Lewis v. Seifert*, 116 Pa. St. 647, 11 Atl. 514. In the case of *Railway Co. v. Salmon* it is said: "Higher officers, agents, or servants cannot, with any de-

gree of propriety, be termed fellow servants with the other employes, who do not possess any such extensive powers, and who have no choice but to obey such superior officers or servants. Such higher officers, agents, or servants must be deemed in all cases, when they act within the scope of their authority, to act for their principal, in the place of their principal, and in fact to be the principal." 14 Kan. 524; *Darrigan v. Railroad Co.*, 52 Conn. 285. A volume might be written on this subject, and numerous authorities cited for and against the rule of vice principal, as propounded in the case of *Haney v. Railway Co.*, supra; but such rule has become too firmly established in this state to be departed from now, and must be carried out to its legitimate results, until abrogated or altered by legislation. It undoubtedly bears severely on corporations, but its object is the safety and preservation of life and limb. The doctrine, as recognized and enforced in this state, is that it is the personal or nonassignable duty of the master (1) to exercise reasonable care in providing and keeping in repair suitable machinery, and all necessary appliances, including a safe place to labor; (2) to exercise a like care to provide and retain suitable servants for each department of service; (3) to establish, conform to, and enforce compliance with, proper rules and regulations. These are the superior duties, for the proper performance of which the master is responsible, whether he intrusts them to a department, or any employe, of any grade, and the neglect of which by the agent or agency to which they are intrusted renders the master liable to any one injured by reason of such neglect, against whom and to whom contributory negligence cannot be shown or imputed, from his own act or the act of a fellow servant, whether it be of commission or omission. *Daniel's Adm'r v. Railway Co.*, 36 W. Va. 397, 15 S. E. 162; *Cooper v. Railroad Co.*, 24 W. Va. 37; and other cases heretofore cited; also, *Schroeder v. Railway Co.*, 108 Mo. 323, 18 S. W. 1094; *Foster v. Railway Co.*, 115 Mo. 165, 21 S. W. 916. The decisions of many jurisdictions are not in line with our decisions on this subject. 7 Am. & Eng. Enc. Law, 821 (tit. "Fellow Servants"). The rule of stare decisis applies with impregnable force in this instance, and from which there is no way of escape, even if the court were so inclined, unless by an utter and reprehensible disregard of all precedent.

Defendant insists, even if this be true, that the plaintiff is not entitled to recover, for the reason that his fellow servant, the flagman, failed to do his duty, and that, therefore, contributory negligence is imputable to the plaintiff. The question at once presents itself as to the burden of proving neglect or nonneglect of duty on the part of the flagman. In the case of *Comer v. Mining Co.*, 84 W. Va. 534, 12 S.

E. 476, Judge Brannon propounds the law, as settled by repeated decisions of this court, as follows, to wit: "After the plaintiff has met this requirement by showing negligence of the defendant causing him injury, and not until then, the plaintiff may rest until the defendant answer it. The defendant may meet a case satisfactorily proven on the part of the plaintiff by showing contributory negligence on the part of the plaintiff as the proximate cause of the injury, but the burden of showing contributory negligence rests on the defendant." If the plaintiff's evidence shows contributory negligence, this is proof sufficient to defeat a recovery. *Riley v. Railway Co.*, 27 W. Va. 146; *Sheff v. City of Huntington*, 16 W. Va. 316; *Hesser v. Town of Grafton*, 33 W. Va. 548, 11 S. E. 211. Wherefore, we are required to determine whether the evidence justifies the inference of contributory negligence. If it is a matter of doubt, it must be resolved in favor of the demurree. The conductor of the freight testifies that he directed the rear brakeman to flag. The engineer of the passenger train says he saw no flagman, but some one informed him there was a man in the end of the tunnel. Owing to the curvature of the track, and the dense smoke, the engineer was not in position to see the flagman; and having been notified that the block was clear, by the signal given, he was not on the lookout, and had on a full head of steam, and was running rapidly. The evidence of the fireman, who, if not busy in the performance of other duties, could have seen the flagman, is not taken, and neither is the evidence of the flagman. The time elapsed between the uncoupling of the train and the collision is very uncertain. The defendant could have made these questions certain, either for or against itself, by the evidence of the fireman and flagman; and the presumption arises that the evidence, if introduced, would have been adverse to the defendant, or it would not have been withheld. *Trust Co. v. McClellan* (decided at this term) 21 S. E. 1025. On the demurrer to the evidence, the negligence of the defendant having been fully established, and the question of contributory negligence being left in an uncertain and doubtful condition, the plaintiff must prevail, as there is no obligation on him to prove that neither himself nor any of his coservants were guilty of any default or omission which might have been the proximate cause of the injury. The court cannot infer such default from the absence of any, or a doubtful state of, evidence relating thereto. *Comer v. Mining Co.*, supra. Where there is a grave doubt which of two inferences should be deduced, the court will adopt the one most favorable to the plaintiff, as the demurree. *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168; *Schwartzbach v. Union*, 25 W. Va. 642; *Miller v. Insurance Co.*, 8 W. Va. 515; *Ware v. Stephenson*, 10 Leigh, 164. The circuit court hav-

ing correctly determined the demurrer to evidence in favor of the plaintiff, the judgment is affirmed.

(40 W. Va. 553)

**LOCKHEAD v. BERKELEY SPRINGS  
WATERWORKS & IMPROVEMENT  
CO. et al.**

(Supreme Court of Appeals of West Virginia.  
April 13, 1895.)

**PLEADING—DEMURRER — MECHANICS' LIENS—FIL-  
ING CLAIM—VERIFICATION.**

1. In passing upon a demurrer to a bill with which written documents are exhibited, as parts thereof, the court is not bound to accept as true and correct the allegations contained in the bill as to what such documents prove, or what is their effect in law, but may look to and go by the documents themselves.

2. Chapter 75 of the Code creates the mechanic's lien in certain cases, on certain conditions; and section 4 of such chapter, among other things, provides that such account, to be effectually filed for record as a lien, must be sworn to by the person claiming the lien, or by some person on his behalf. Such oath is an element essential to the creation of the lien, and, to be effectual, must be in writing, as a part, in some way, of the paper writing filed for record.

3. If such affidavit be made before any officer of another state or country, such as the District of Columbia, it is not duly authenticated for record until it is subscribed by such officer, and there be annexed thereto a certificate of the clerk or other officer of a court of record of such state or country, under an official seal, verifying the genuineness of the signature of the first-mentioned officer, and his authority to administer an oath. Section 31, c. 130, of the Code.

4. A case in which these rules are discussed and applied.

(Syllabus by the Court.)

Appeal from circuit court, Morgan county.

Bill by James Lockhead against the Berkeley Springs Waterworks & Improvement Company and others to enforce a mechanic's lien. The bill was dismissed, and plaintiff appeals. Affirmed.

Flick & Westenhaver and Henry R. Elliott, for appellant. W. H. Travers, for appellees.

**HOLT, P.** The bill in this case was filed in the circuit court of Morgan county for the enforcement of a mechanic's lien, under chapter 75 of the Code. There was a demurrer to the bill, which was sustained by the court; and, the plaintiff expressing no desire to amend, the bill was dismissed, and this appeal has been allowed. The decree sustaining the demurrer is the one error complained of. The main ground of demurrer was that the mechanic's lien had not been sworn to, and the oath certified, as required by statute. The bill alleges that the plaintiff made the affidavit required by statute, and on the 29th day of June, 1894, he had the same admitted to record in the clerk's office of the county court of Morgan. A copy of the mechanic's lien, with the affidavit therein, is filed as an exhibit with the bill.

Under the provision of section 4, c. 75, of

the Code, the party claiming a lien "shall within sixty days after he ceases to labor or furnish material for such building or other structure, file with the clerk of the county court of the county in which the same is situated a just and true account of the amount due him after allowing all credits together with a description of the property intended to be covered by the lien sufficiently accurate for identification with the name of the owner or owners of the property, if known, which account shall be sworn to by the person claiming the lien or by some person on his behalf."

The affidavit is as follows: "District of Columbia, City of Washington—ss.,"—and signed, "James Lockhead," and concludes with the following certificate: "Subscribed and sworn to before me this 28th day of June, A. D. 1894. J. R. Young, Clerk Supreme Court, D. C. [with the seal of the supreme court of the District of Columbia], by M. A. Chancey, Assistant Clerk."

The case in hand has been argued by counsel as depending upon the true construction of section 31 of chapter 130 of the Code, regulating certain matters of evidence, which is as follows: "In any case in which an oath might be administered by, or an affidavit made before, a justice, the same may be done by or before a county commissioner, notary public, or a commissioner appointed by the governor, or by a court or the clerk thereof; or in case of a survey directed by a court in a case therein pending, by or before the surveyor directed to execute said order of survey. An affidavit may also be made before any officer of another state or country authorized by its law to administer an oath, and shall be deemed duly authenticated if it be subscribed by such officer, and there be annexed to it a certificate of the clerk or other officer of a court of record of such state or country, under an official seal, verifying the genuineness of the signature of the first mentioned officer, and his authority to administer an oath." It must be read in connection with section 4 of chapter 50, which reads as follows: "Where any oath may lawfully be administered, or affidavit or deposition taken within any county, it may be done by a justice therein, unless otherwise expressly provided by law."

1. It will be seen that section 31 of chapter 130 seems to be divided into two clauses, providing for two classes of cases. This law had its inception as section 3 of chapter 63 of the act of March 8, 1841 (see Acts 1840-41, p. 76), which reads as follows: "That in all cases when by law the affidavit of any person residing in another state of the United States or any district or territory thereof, or in any foreign country is required or may be necessary in any judicial proceeding in this state, the same shall be deemed duly and properly authenticated if subscribed and taken before some officer of such state, district or territory, or foreign country, author-

ized by the laws thereof to administer an oath or affirmation, and shall have annexed thereto a certificate of the clerk or other proper officer of a court of record of such state, district or territory or foreign country under the seal of such court, if there be a seal, or of any of the officers or agents before mentioned, verifying the genuineness of the signature of said officer, the existence of such office and the authority of such officer to administer an oath or affirmation." The officers and agents before mentioned in the act are "all American ministers plenipotentiary, *chargé d'affaires*, consuls general, consuls, *vice consuls* and commercial agents duly appointed and recognized in any foreign country." Chapter 67 of the act of 14th February, 1844 (see Acts 1843-44, p. 52), authorized the governor to appoint and commission in each of the other states, in the territories, and in the District of Columbia, one or more commissioners, with authority to take acknowledgments and proof of deeds, etc.; and the section 3 of the chapter provides as follows: "Every commissioner appointed by this act shall have full power and authority to administer all lawful oaths and affirmations, and his certificates of the same shall have the same effect in the courts of the commonwealth as the certificates of judges, justices and commissioners in this commonwealth." The act of April 4, 1848 (Acts 1847-48, p. 61), provided that notaries public should have the same right and power to administer oaths in all cases which justices of the peace now have and exercise, and their certificates and seals shall be entitled to the same faith and credit as those of justices of the peace. Then came the revision of the Code of 1849. See report of Revisers of 1849 (page 866). Down to this time the modes of authentication of oaths by domestic and foreign and quasi foreign officers were separate and distinct. The latter clause, as it now stands, mentioned the District, and, putting it in the same class with foreign countries proper, required an additional certificate, verifying the genuineness of the signature of the foreign officer taking and certifying the oath, the existence of such office, and the authority of such officer to administer an oath or affirmation. The revisers of 1849 put the section in its present form, including the methods of authentication by state and county officers in the first clause, and the method of authentication by foreign and quasi foreign officers in the last or second clause. See section 26, c. 176, p. 665, Code 1849. It was amended and re-enacted by the act of December 21, 1859 (see Acts 1859-60, p. 139), so as to read as we find it in the Code of 1849 (see Code 1860, § 27, c. 176, p. 726), which, for the purpose now in hand, is the same as we now have it in this state by section 31, c. 130, Code 1891, p. 827.

2. Not only does the history of the enactment in question tend to show that the first

clause of section 31 of chapter 130 is confined to authentication of oaths taken and certified by state and county officers, and that the second clause is confined to the mode of authentication of oaths taken and certified by officers of all other states and countries, including the District of Columbia, but I think such is the fair reading and meaning of the section, by its own language and terms. For we see that all the officers mentioned in the first clause are unequivocally state or county officers, unless it be the notary public, and the court or the clerk thereof; and as to those there can be no doubt, when we consider the history of the enactment, and its present apparent classification of domestic and foreign officers, but especially when we consider that the extent of the authority of the justice is made the measure of the authority of all the others named in this first class, for his authority, we see by section 4 of chapter 50, is limited to his state and county, and so we must regard the notaries public and courts and clerks mentioned as being state and county officers and tribunals; and the commissioner appointed by the governor for another state is, of course, an officer of this state.

3. The reason and purpose of the law, as founded upon the state of facts leading to the enactment of the requirement of an additional and supplementary certificate of authentication in the latter class of cases which does not exist in the other, also tend to justify the same construction. Heretofore the general rule prevailed that the law, written or unwritten, of a foreign state or country, had to be proved as a fact; but now, by section 4 of chapter 13 of the Code, the courts of this state shall take judicial notice of the laws of another state and country, whenever material, and would be thus informed that a certain class of officers are authorized by the laws of the District of Columbia to administer an oath. But they would still need to be certified in some way that the officer in question belonged to such class, and that his signature was genuine, so that some of the reasons that occasioned the law still exist. And, even if that could have any bearing, no part of the certificate has been dispensed with, but the lawmaker has seen fit to preserve it intact, notwithstanding the enactment of section 4 of chapter 13 of the Code of 1868, as borrowed from the New York Code of Procedure. *Parker v. Clark* (1874) 7 W. Va. 467, and *Dickinson v. Railroad Co.*, Id. 390, are the only cases cited, and the only ones I have been able to find in our Reports, bearing in any degree upon this point. There the authority of the clerk of the district court of the United States for the district of West Virginia to administer an oath under the first clause of section 31 of chapter 130 (section 27 of chapter 176, Ed. 1860) of the Code of Virginia is expressly put upon the ground that he was the clerk of a court holding and exercising jurisdic-

tion within the limits of this state. These courts are, in some respects enumerated, recognized as courts of the state, and are therefore within the meaning of the term "by a court or the clerk of any court," as used in the first clause of section 27 of chapter 176 of the Code (Ed. 1860) of Virginia. And in *Dickinson v. Railroad Co.*, 7 W. Va. 390, such United States district court held within this state is held to be a local court of the state, within the meaning of section 5 of chapter 130 of the Code of 1868, and not within the meaning of section 19 of chapter 130 of such Code. The clerk in this case was considered an officer of a domestic federal court, and therefore within the reason and meaning of the first clause of the section; and for that reason there was not needed to be annexed thereto any certificate under an official seal of a court of record, verifying the genuineness of the signature of the first-mentioned officer, and his authority to administer an oath, as would have been needed had such clerk been held to be an officer of another state or country, authorized by its laws to administer an oath. And the terms in the latter clause, "any officer of another state or country," are used in contradistinction to the officers mentioned in the first clause, and therefore import that such officers, so mentioned by name, are domestic officers of the state and countries, and further are, in effect, equivalent to saying all officers of another state or country, authorized by its laws to administer an oath, must have the genuineness of their signatures, and their authority to administer an oath by the laws of their respective states or countries, verified by the additional certificate annexed thereto of the clerk or other officer of a court of record of such state or country, under an official seal. But the bill alleges that the plaintiff made the affidavit required by statute. Must this allegation be taken to be true on demurrer, when the copy of the paper filed and recorded as his mechanic's lien is exhibited as a part of his bill, and may show such allegation not to be true? Such documentary evidence exhibited with and made part of the bill must at some time be read, and its legal effect, and the fact it proves, be determined by the court. The modern rule is that this may be done in passing upon the demurrer, and the court is not bound to accept as true for such purpose the allegation contained in the bill as to what fact the paper proves, or what is its effect in law. See 1 Beach, Mod. Eq. Prac. § 229; *Interstate Land Co. v. Maxwell Land-Grant Co.*, 139 U. S. 569, 11 Sup. Ct. 656; *Dillon v. Barnard*, 21 Wall. 430; *Lea v. Robeson*, 12 Gray, 280. The court will, on demurrer, construe the instrument for the pleader. See *North v. Kizer*, 72 Ill. 172. In our practice it is no longer an open question. *Bias v. Vickers*, 27 W. Va. 456. This leads to no inconvenience, as the court may, in one or more ways, when there is proper occasion

for it, hold the ultimate decision of the demurrer in suspense until a further or the final hearing. See 1 Barb. Ch. Prac. 345; 4 Minor, Inst. 1146; *Pryor v. Adams*, 1 Call, 391. For collection of authorities, and discussion of general subject, see *Kester v. Lyon*, 20 S. E. 934. 40 W. Va. —.

Another point made by counsel for appellant is: "Conceding, for the sake of argument, that the certificate annexed to the affidavit to the account filed in the clerk's office does not contain all that section 31 of chapter 130 requires, yet it does show that the affidavit was made before an officer who the court judicially know has authority to administer an oath, yet the fact of such authority, and the genuineness of his signature, may be proved by parol or otherwise by evidence aliunde at the hearing of the cause. They say that the paper [the copy of the mechanic's lien account] filed as an exhibit with the bill purports, upon its face, to have been sworn to by the plaintiff, the lienor; the bill alleges that he made up a just and true account of the amount due to him from said company, with a description of the property intended to be covered by the lien, made the affidavit thereto required by the statute, and on the 29th day of June, 1894, filed, and had the same admitted to record; that this was sufficient to require the overruling of the demurrer; that the objections to the affidavit, even if well founded, go, not to the substance of the act, but merely to the proof furnished; that it had been sworn to,—in other words, the authentication of the genuineness of the clerk's, or of the assistant clerk's, signature, and his authority to administer an oath, is defective. To authenticate a writing is to perform certain acts upon it for the purpose of rendering it admissible in evidence as being what it purports to be, without proof by witnesses that it is such. Authentication is then merely a convenient method of furnishing proof of certain things. When, therefore, the section in question says an affidavit will be sufficiently authenticated in a certain form, verifying the genuineness of the signature and the authority of the person administering the oath, it simply means this is one method of making the affidavit admissible in the evidence without other proof of such genuineness and such authority. It does not purport to be the only, or an exclusive, method. Nor does it follow that if the oath was in fact lawfully administered, if the affidavit was in fact duly made, it shall be of no effect because the officer has neglected to avail himself of the most convenient method of making it admissible in evidence without other proof. Consequently, parol evidence might be introduced at the hearing both as to the genuineness of the signature of the clerk, or the assistant clerk, and of his authority to administer an oath. Such authority the court knew, by having, under our statute, judicial knowledge there-

of, and the genuineness of the signature it also sufficiently knew, by virtue of taking as true on the demurrer the allegation of the bill to the effect that the mechanic's lien had been duly sworn to. The case was, therefore, when heard below, completely rounded out on all sides." And the cases of *Van Ness v. Bank*, 13 Pet. 17, and *Bennet v. Paine*, 7 Watts, 334, are cited as illustrations of the doctrine applied in analogous cases, and *Omealy v. Newell* (1807) 8 East. 364, as giving the common-law method of supplementary proof or verification in such cases. I do not think these cases apply, nor do I regard this view of the law of this case as tenable, either by the language of the statute, the reason of its enactment, or upon the authorities, as far as I have been able to examine them. Here it is conceded that the statute has named a method. Is it the only method of authentication, or can it be proved in some other way at the hearing? Such contention rests, I think, upon a misconception of the purpose of the authentication, the persons it is intended to satisfy, and the reason of the selection of the method which requires it to appear written upon the face of the claim authorized to be made a lien on being admitted to record. It is intended as a notice of the lien,—a creature of the statute,—to all whom it may concern. At this important stage the court, with its widespread judicial knowledge or notice of the facts of foreign law, has no concern in the matter. It is a notice, and is not intended by the lawmaker to answer the purposes of deciding subsequent demurrers. But the parties whom it does concern are not required to take judicial notice of the law of the District of Columbia saying who may administer an oath, but of the statute creating the lien, and there they find prescribed a method. So that, unfortunately for the argument, the judicial notice of foreign laws, and the concern in the validity of the lien, play somewhat at cross purposes; and for his purpose, when their coming together is important, they are not together, and when they do so come together, as to him, by the aid of the judicial notice of foreign laws as facts, his misplaced confidence in the record is past recall. For the party whom it may concern, to whom the statute requires the notice to be given, wishes to know now the present actual fact of lien or no lien, as already accomplished; and the lawmaker, intending to cut off and guard against all chance of secret liens in such a case, required such present, actual fact to be a written one, open then and there to his observation and inspection, and to be definite and particular in the creation of a new and otherwise dangerous lien,—a peculiarly dangerous lien; prescribed a method of authentication which he was to look for, and must find admitted to record, if it exists at all, and he is required to look there, and nowhere else, for all the essential, determining factors of such

ascertainment. "For here real estate in the possession of his debtor, actual or intended, is to be charged with what would otherwise be a secret lien." *Phil. Mech. Liens* (3d Ed.) §§ 63, 337. Surely, the lawmaker did not intend a matter made essential to the existence of the lien to be left at large in any such loose and undetermined attitude that it might stand or fall by words not yet written or spoken; introduced by statutory judicial notice on the hearing of some subsequent demurrer, that there was still another method of authentication, by parol or otherwise, beset in some cases, it might be, with the temptation to supply from uncertain memory, after the event, what was made known to be wanting. This would subvert the purpose and reason of requiring it to be recorded, and the hardship of the rare instance would weigh but little, when put in the balance against such general inconvenience. So the books hold, so far as I have been able to examine them, and, as we have already seen, the letter of the statute is in the very teeth of any such construction. Where the statute prescribes no method of verification of the signature of the officer before whom the affidavit is made, or of his authority to administer the oath, or if, when a method is mentioned, it does not appear to be restrictive or exclusive, the common-law mode of proof must be in the one case, may be in the other, resorted to. The common-law practice was to make affidavit before any officer of a foreign country authorized by its laws to administer the oath in question, and then his signature and authority might at any time be verified by the affidavit of some one cognizant of the fact, made within the realm. *Omealy v. Newell*, 8 East, 364. In the case of *Van Ness v. Bank* (1839) 13 Pet. 17, the court followed the case of *Connelly v. Bowie* (1823) 6 Har. & J. 141, in holding that where the certificate of acknowledgment of a deed did not state that the persons by whom it was taken were justices of the peace, and there was no evidence in the record to prove their official character, the certificate would be inadmissible, but went further, and held, expressly, that evidence aliunde was admissible to supply the omission in the certificate indorsed on the deed. In the case of *Bennet v. Paine* (1838) 7 Watts, 334, the certificate of acknowledgment contained no assertion of magisterial character. It was not affirmative of either office or place, and the court held that proof of the existence of the magisterial character could be supplied by evidence aliunde, and by the common-law methods, as there was no substitution of statutory for the common-law method of proof. This is based upon the general doctrine that where the statute is silent the common law speaks, but the general rule is equally well settled,—that where the statute comes in the common law is, to that extent, displaced. Here the statute prescribes a method of giving notice to all

whom it may concern, by requiring it to be in writing, and made matter of record, so that the lien created may not be secret, and the inherent nature of the transaction necessarily implies that such method is intended to be exclusive. Where a statute declares that the notice to create a lien shall be verified before filing, it is essential to the creation of the lien that it should be sworn to in the manner prescribed. The want of verification, or of a sufficient verification, is a defect which goes to the whole claim, and cannot be amended. "A claim for a mechanic's lien, when filed, should have been verified; and it should appear upon its face to have been verified, before it can be made the basis of a proceeding to enforce the claim based upon it. If any special form of verification is prescribed, it must be followed." See Phil. Mech. Liens (3d Ed.) §§ 366, 368a, citing *Hallagan v. Herbert*, 2 Daly, 253; *Lindsay v. Huth*, 74 Mich. 712, 42 N. W. 358. In the latter case the notice of lien filed had no verification of any kind. The verification of the demand contemplated by the statute is an oath or affirmation taken and administered by and before an officer having authority by law to administer and certify oaths and affirmations. 2 Jones, Liens, § 1451. A verification of the claim substantially as required by statute is essential to its validity. *Id.* See discussion of the subject in *Chandler v. Hanna* (1882) 73 Ala. 390; *Blowpipe Co. v. Spencer* (decided at this term) 40 W. Va. —, 21 S. E. 769. Our opinion is that in such case what is essential to create the lien, and give notice thereof to the world at large of its being filed for record as such lien, does not exist, efficiently to that end, unless it appears on the face of the paper; that the verification of the genuineness of the signature of the foreign officer before whom the affidavit was made, and his authority to administer an oath, does not in this case so appear by such certificate of the clerk or other officer of a court of record of such state or country, as section 31 of chapter 130 of the Code requires; that the decree sustaining the demurrer was therefore right; and the plaintiff declining to amend, but electing to stand by his bill as he made it, there was nothing the court could do, but dismiss it as on final hearing. Decree affirmed.

(40 W. Va. 412)

**WILSON v. PHOENIX POWDER MANUF'G CO.**

(Supreme Court of Appeals of West Virginia.  
April 3, 1895.)

**NUISANCE—ACTION FOR INJURIES—EVIDENCE—AUTHENTICATION OF DEEDS—LAWS OF ANOTHER STATE—TRESPASS.**

1. A mill, manufacturing powder and other explosives, and storing the same on the premises, situate on the bank of the Ohio river and near two railroads and a public road, is a public nuisance, and anyone injured in property by explo-

sion of powder stored there may recover damages without proof of negligence in its operation.

2. Allegations of facts not necessary to maintain an action or defense are immaterial and surplusage, and need not be proven.

3. Where a judge is ex officio clerk of a court, then both certificates specified in section 19, c. 130, are not required, his certificate as judge being sufficient.

4. Under section 4, c. 13, Code, courts take judicial notice, without proof, of the law of another state, and in so doing may consult any book purporting to contain, state, or explain the same, and consider any testimony, information, or argument offered on the subject.

5. Original deeds made outside of this state, and so certified as to warrant recordation in this state, are admissible in evidence here.

6. Actual possession, being an element of complete legal title to real estate, is prima facie evidence of such title in the possessor. One in such possession may maintain trespass or trespass on the case for damage thereto, without further proof of his title.

7. Either actual or constructive possession will maintain trespass for damage to realty.

8. An answer in chancery in another suit is admissible as evidence of an admission therein in behalf of one though not a party to the suit in which it was filed, though it would not be admissible as an estoppel under the principle of res judicata.

(Syllabus by the Court.)

Error to circuit court, Wayne county.

Action by John G. Wilson against the Phoenix Powder Manufacturing Company. Plaintiff had judgment, and defendant brings error. Affirmed.

Simms & Enslow, for appellant. Marcum, Peyton & Marcum, for appellee.

**BRANNON, J.** The Phoenix Powder Manufacturing Company was sued in an action of trespass on the case in the circuit court of Wayne county by John G. Wilson, to recover damages to Wilson's dwelling house and other buildings resulting from explosion of powder stored in buildings of the defendant company. The jury found a verdict for the plaintiff, subject to the defendant's demurrer to the plaintiff's evidence, or which demurrer the court gave judgment for the plaintiff, and the defendant resorted to the writ of error which we now decide.

There was no evidence to show negligence on the part of the defendant in the operation of its powder mill or in the storage or handling of its powder, and thus the question arises whether the plaintiff can recover by showing only the presence of the mill in the location it occupied, the storage of powder there, its explosion, and the consequent damage to the plaintiff's property, without proof of negligence. Was the defendant maintaining a public nuisance? If it was, it was engaged in the commission of a public wrong; and, injury resulting therefrom to the plaintiff, the defendant must repair such injury. Powder and nitroglycerine are commodities of essential, if not primary, importance from their wide use in war and in the construction of railroads, roads, buildings, and other varied uses, and their manufacture is a business entirely respectable and indispensable; but



that consideration is not all controlling; that consideration is not alone to be regarded. The rights and safety of those not engaged in their manufacture must not be forgotten. They are agents of magical power and wrath. When the spark or touch of ignition meets them, their subtle force is awakened to instantaneous action,—an action giving no warning, and so potent that almost in the twinkling of an eye, before thought of self-preservation can come, it wastes man and his home and his savings with its irrepressible energy. Often the explosion comes from causes not discernible, which reasonable foresight or prudence cannot see. Valuable as are these plants as auxiliaries to man in his great works, they must be limited to places and bounds of safety. Here is a mill, making powder and other explosives, standing right on the bank of the Ohio river, upon which, day and night, boats bear thousands of precious lives and thousands of dollars of property; about 200 yards from the great Chesapeake & Ohio Railroad and about 300 yards from the Huntington & Big Sandy Railroad, both great highways of the public, with trains filled with passengers and property passing over them almost hourly; and about 75 yards from a country road, also a highway in constant use. Six explosions occurred at this mill within three years, showing that it was a constant menace to life and property for a wide range around it, within which many people lived and worked, as its explosions threw large pieces of iron and large timber out into the river, and some clear across into the town of Burlington, about one-half mile away on the Ohio bank of the river, and into fields in Ohio, a mile distant. The buildings of the plaintiff which were injured in the explosion involved in this suit stood in Burlington. These explosions have injured many houses in Ohio, by shaking and jarring, damaging chimneys, walls, plastering, etc., from the force of concussion. Some of the explosions were terrible in their power and shock. This powder mill, with its great quantity of explosives in its storehouse, was a constant danger impending over those highways and all lawfully using them, and the people living in the neighborhood within the danger limit,—an ever-present peril, day and night. The manufacture and keeping of quantities of gunpowder, nitroglycerine, and other explosives in or dangerously near to public places, such as towns or highways, is a public nuisance, and indictable as such. It makes no difference whether carefully or negligently conducted and managed. Negligence is here no material element. If damage happen to a person from explosion, the injured party is entitled to compensation without proving negligence on the part of the defendant. He is injured by that which breaks the law made for his protection,—the law against public nuisance. He is in no fault, while the other man is, and he has received damage from that other's man wrongful act. He has a right to immunity from this injury, and the

other man owed him the duty of securing him immunity. The state is wronged by the maintenance of a nuisance which may at any moment take the lives and destroy the property of its people passing and repassing over its highways, and reposing and working in their accustomed places, and the particular person hurt has special cause of complaint, because he is especially injured. *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48. It is true the manufacturer owns his mill, and is engaged in lawful and honorable business; but he has violated that maxim, centuries old in the law, yet vital and indispensable in organized society, where everyone must use his property to earn bread, "*Sic utere tuo ut alienum non laedas*" (So use your own property that you injure not another). This lawful but dangerous business, being carried on where it is, is a public nuisance. No care can exempt it, situated where it is, from the charge of being a nuisance. *Wood, Nuis. § 69; Wier's Appeal*, 74 Pa. St. 230; *Heeg v. Licht*, 80 N. Y. 579; *Myers v. Malcolm*, 6 Hill, 292; *Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389, 19 Am. St. R. 34 and note p. 39; *McAndrews v. Colliard*, 42 N. J. Law, 189. In *McAndrews v. Colliard*, supra, the opinion says that "keeping powder, nitroglycerine, or other explosive substances, in large quantities, in the vicinity of a dwelling house or other place of business, is a nuisance per se, and may be abated by action at law or injunction in equity, and, if actual injury results, the person keeping them is liable therefor, even though the act occasioning the explosion is due to other persons, and is not chargeable to his personal negligence." The reason is the act is wrongful, fraught with danger, all the time, and it is illogical to call on one who, free from fault, has been injured to prove that the party who injured him conducted a business confessedly unlawful in a careless manner, and just wherein he was careless. His whole action is negligent from being wrongful, so to speak. The authorities above cited dispense with proof of negligence by the plaintiff. Later New York cases overrule the case of *People v. Sands*, 1 Johns. 78, in this regard. Now, if this mill were located in a secluded place,—one removed from highways,—being in itself a lawful business, the case would be different; it would not be a public nuisance, and to recover for injury from an explosion I apprehend the plaintiff must show negligence on the defendant's part. But it is contended that, as the declaration alleges negligence on the part of the defendant, it must be proven. That allegation was unnecessary, immaterial, and surplusage, and the law does not require anything but material allegations to be proven. *State v. Howes*, 26 W. Va. 110; *State v. Hall*, 26 W. Va. 236; 1 Greenl. Ev. § 51.

Another matter in the case relied upon as error is the introduction in evidence of a copy of a will to show title in the plaintiff to the premises injured. It was probated in Ohio, and it is said that it is insufficient-



ly authenticated in the fact that, though certified as a full, true copy by the probate judge, it wants the clerk's certificate, both being required by section 19, c. 180, Code. By the constitution of Ohio and its statute law, the probate judge is also clerk of the probate court, and keeper of its books and papers. This same person could make two certificates, but that would seem useless. The object of the statute in requiring two certificates is to double the probability of truthful certification; but this cannot be done where one man fills both places, the statute requiring the judge of the same court to certify that the clerk's certificate is in due form. It has been held that, where one person is clerk and judge both, it is sufficient. *Cox v. Jones*, 52 Ga. 438. We have the right, under section 4, c. 13, Code, to take judicial notice of the law of another state, this being a change from the former law (1 Rob. Prac. 249; 1 Greenl. Ev. § 5, note 1; Id. § 489), and, in exercising this power, can consult the statutes of Ohio, or any other book, to learn that the probate judge is by its law ex officio clerk of the probate court. *Goodrich's Case*, 14 W. Va. 840; *Manufacturing Co. v. Bennett*, 28 W. Va. 16.

It is claimed that certain deeds were improperly admitted. They were offered to show title in the plaintiff. They purport to be original deeds, not authenticated copies, and, being acknowledged in such manner as would allow them to be recorded here, that is sufficient under section 21, c. 180, Code 1891. But, even were the said will and deeds not admissible, it would be immaterial, as the plaintiff, so far as concerns his title to the premises, could maintain his action, as he was in actual possession, which is one and the first element of title, as it is *prima facie* evidence of full legal title in him who has it. 1 Lomax, Dig. 574; 2 Minor's Inst. 447; 2 Bl. Comm. 596 and note. One in actual possession may maintain trespass *quare clausum fregit*. Formerly, to maintain that action, actual possession was necessary. *Bart. Law Prac.* 182; *Kretzer v. Wysong*, 5 Grat. 9; *Cooke v. Thornton*, 6 Rand. (Va.) 8; and *Truss v. Old*, Id. 556. Therefore, a tenant being in possession, the landlord could not sue in trespass for lasting injury to the freehold, but must bring trespass on the case. 1 Tucker, 191. But now a constructive possession is sufficient to maintain trespass. *Snider v. Myers*, 3 W. Va. 195; *Storrs v. Felck*, 24 W. Va. 606. I suppose the injury to the plaintiff's property was so direct and immediate from the explosion as to warrant an action of trespass under the strict principles of the common law; but that is irrelevant, as, the action here being trespass on the case, we need not consider the nice and finespun distinction as to direct and consequential injury, on which rested the choice between the two forms of action, resulting formerly in so many nonsuits, discussed in *Jordan v. Wyatt*, 4 Grat. 151, and

elsewhere, as the enactment found in section 8, c. 103, Code, that "in any case in which an action of trespass will lie there may be maintained an action of trespass on the case," does away with it in this case.

Another error alleged in the petition for the writ of error is that the court allowed to go in evidence the answer of the Phoenix Powder Manufacturing Company filed in a suit of the Huntington & Kenova Land Development Company. The object of tendering this answer as evidence was, I suppose, to have the benefit of the statements in it as an admission that the defendant did buy land, and upon it erect and operate a powder manufactory. Was it admissible? It was a pleading in a case to which Wilson was a stranger. A judicial record is not admissible against or binding upon parties to it in favor of strangers to it, its effect being confined to the parties and their privies, that is, when offered to have the effect of estoppel, under the principle of *res judicata*; but that was not the purpose of its introduction here, it being offered only as an item of evidence as an admission by the defendant, open to explanation or rebuttal. There is a volume of law to show that pleadings in another cause may be used for evidentiary or collateral purposes where only one party to the case on trial was a party to the former one. An answer in chancery may be used as evidence of an admission of a fact or facts. *Hunter v. Jones*, 6 Rand. (Va.) 541; *Tabb v. Cabell*, 17 Grat. 160; 1 Greenl. Ev. § 527a; 1 Whart. Ev. §§ 836, 838. Moreover, without the admission contained in the answer, there was plenty of evidence to show that the defendants built and operated the mill, and stored powder there, especially on a demurrer to evidence. There was ample evidence to sustain the verdict, especially considered upon a demurrer to the evidence. We cannot set aside the verdict for excessiveness of damages. Therefore we affirm the judgment.

(40 W. Va. 711)

HUNTINGTON & KENOVA LAND DEVELOPMENT CO. v. PHOENIX POWDER MANUF'G CO.

(Supreme Court of Appeals of West Virginia.  
May 1, 1895.)

NUISANCE—MANUFACTURING EXPLOSIVES—INJUNCTION.

1. A mill, manufacturing powder and other explosives, and storing the same on the premises, situate on the bank of the Ohio river and near two railroads and a public road, is a nuisance per se. *Wilson v. Manufacturing Co.*, 21 S. E. 1035, 40 W. Va. —.

2. When a company engaged in the manufacture of powder and other explosives, without misrepresentation or concealment on its part, is induced to locate its works at great expense on lands adjacent to the property, and for the prospective benefit of a land development and improvement company, such latter company cannot, on discovering that the proximity of such powder works has diminished instead of enhanced

the value of its adjoining territory, enjoin the continuance of such works as a nuisance.

(Syllabus by the Court.)

Appeal from circuit court, Wayne county.

Bill for an injunction by the Huntington & Kenova Land Development Company against the Phoenix Powder Manufacturing Company. From a decree for plaintiff, defendant appeals. Reversed.

Simms & Enslow, for appellant. Campbell & Holt, for appellee.

DENT, J. The Huntington & Kenova Land Development Company filed its bill in chancery in the circuit court of Wayne county at the December Rules, 1892, against the Phoenix Powder Manufacturing Company, for the the purpose of perpetually enjoining the works of the defendant as a nuisance. The allegations of the bill are in substance as follows, to wit: That the plaintiff is a corporation for the purpose of laying out towns and selling lots therein, and doing and engaging in all manner of manufacturing and developing business of all kinds; that it owns about 2,000 acres of valuable lands lying in the counties of Wayne and Cabell, along the Ohio river, between the city of Huntington and the towns of Kenova and Ceredo; that the greater part of this land has been laid off into lots, a large portion thereof sold, and numerous manufactories in full operation thereon; that the defendant is the owner of about 50 acres of land, on which it has an extensive plant for the manufacture of powder, dynamite, and other explosive substances, and is engaged in the manufacture of the same, and keeps stores of such substances in large quantities continually on hand, thereby creating a dangerous and threatening nuisance, which is surrounded on three sides by plaintiff's land aforesaid, and especially that portion of it which has been laid off into a proposed town to be known as the "Town of Kellogg"; that, by reason thereof, a large portion of plaintiff's lands have been rendered valueless for the purpose for which they were purchased, and cannot be used in safety, even for the purpose of farming, and are thereby greatly diminished and decreased in value, and are undesirable and unsalable. Defendant answered, admitting most of plaintiff's allegations, but denied that its works were a dangerous nuisance or had to any extent materially diminished the value of plaintiff's lands; that it had been induced to purchase the land and locate its works thereon by the original incorporators and principal stockholders of the plaintiff, immediately prior to its incorporation, for the prospective benefit of the plaintiff and to increase the value of its property and boom it on the market; that the plaintiff had used it for that purpose in its original prospectus and advertisements, and, now that its boom had collapsed, it was endeavoring

to shoulder the blame onto the defendant; that its plant has cost it at least \$250,000, and it has built up an extensive and profitable business, and now to destroy it would produce irreparable loss, and be inequitable, especially, to do so at the instance of the plaintiff. On a final hearing of the case the circuit court granted a perpetual injunction, and from its decree the defendant appeals.

There are virtually two questions presented for the consideration and determination of this court. (1) Are the defendant's works a dangerous nuisance per se? (2) Is the plaintiff in a position to invoke the aid of a court of equity for their abatement? The first of these questions has been answered in the affirmative upon about the same facts in the case of *Wilson v. Same Defendant* (decided at this term of the court) 21 S. E. 1035. The first clause of the first syllabus is as follows, to wit: "A mill, manufacturing powder and other explosives, and storing the same on the premises, situate on the bank of the Ohio river and near two railroads and a public road, is a public nuisance." Judge Brannon in his able opinion elaborately discusses the question, and arrives at a conclusion which is sustained by reason and authority and was fully concurred in by the court, and it becomes unnecessary to repeat what has been so exhaustively treated in that case here. That the defendant's immense works were a dangerous and threatening nuisance is established beyond controversy or doubt.

The second proposition is not so easily disposed of, as it presents a question of equitable interference of the gravest character and highest importance. It is plain from the evidence that the original promoters, landowners, and now the principal stockholders and officers of the plaintiff, for the benefit of the plaintiff in enhancing its lands and rendering them salable, induced the defendant to purchase the land of them and locate its works at the present place. This it did at an immense cost, and the works as they now stand are estimated at over \$250,000 in value. Afterwards it is discovered that instead of the defendant's works being an advantage to, they actually diminish and almost totally destroy the value of, a large portion of its lands for the purpose for which purchased, and the plaintiff becomes as anxious to rid itself of the defendant as before its original promoters and many of its stockholders and officers were anxious to have it come and locate in their midst; that is, including its immediate predecessor, the Continental Powder Manufacturing Company, from whom defendant derives its title. When the plaintiff found out the injury the defendant's works were to its lands, it endeavored to get the defendant to move them to another point, and, as an inducement, offered to take the land at \$10,000, give a note for \$10,000, and 500 acres of land, and put

in a switch. The defendant declined this offer, for the reason, as claimed, the offer would be nothing in comparison with the loss of removal. Those representing plaintiff then notified defendant that "we propose to have you go up in the valley, if not by fair means, by foul." There is some little attempt in the evidence on behalf of plaintiff to show that the agents of the defendant misrepresented the dangerous character of its works, but there is no allegation in the pleadings to this effect, and the evidence on the subject is at least a stand-off. The promoters of plaintiff, being men of wide business experience, were certainly aware of the dangerous nature of powder and dynamite, although not acquainted with the manner of their manufacture. Plaintiff, failing to make an offer sufficient to justify defendant to remove, instituted this suit in furtherance of the threat to use fair or foul means. The defendant has indicated its willingness to move, provided it receive a sufficient consideration to cover the loss occasioned thereby. There is no evidence to show what this loss would be, other than it would be greatly in excess of the offer submitted by the plaintiff. This offer is not claimed to have been, nor is there any proof to show that it would be, an ample indemnity to the plaintiff, but counsel insist that it was a mere proffer of charity. If the evidence had shown that the amount offered was a sufficient indemnity to defendant, and was made and continued for that purpose, plaintiff would have had a much surer standing in a court of equity. But, from the pleadings and evidence in this case, the only question in controversy is as to which of the parties to this suit should bear the expense of the removal of defendant's works to a more suitable location, and this is still narrowed down to the difference between the proffer made and the actual expense of the removal; and, because the defendant will not make the removal unless this expense is secured to it, plaintiff seeks the assistance of a court of equity. A "fair means" to have otherwise accomplished its purpose would have been to have assumed this expense. Defendant was sold the land and granted the privilege of constructing its works by those under whom plaintiff claims, for plaintiff's benefit, and did so construct its works, and has not enlarged them beyond the original intention as understood by plaintiff, shown by its prospectus. *Bankart v. Houghton*, 27 Beav. 425. Defendant has suffered serious losses by several explosions through the negligence of its employes or the interference of others. Its damages have not been less than those of the plaintiff from these accidents, while its expenses for rebuilding and repairs have been very great, and, for these reasons, plaintiff asks the entire destruction of its works, without recompense. Is this equity? Should the plaintiff, a speculative corporation, be permitted to induce various kinds of manufacturers to purchase of its lands, make great outlays in creating plants, and then, because plaintiff ascertains that any

such manufactory is an injury to the sale of others of its lands, is it to have the privilege of calling upon a court of equity to destroy the property and investment of those who have been induced to purchase of it in good faith, and without any attempt to deceive it as to the character of the manufactory to be established? Plaintiff says, "I was mistaken." Equity says: "Make good the loss the defendant will incur, and you will be relieved of its obnoxious presence; otherwise, you must bear it as a burden of your own assuming. At least, a court of equity will not lend you its assistance under such circumstances. If you would be heard, come with clean hands and a righteous cause." A person who licenses, permits, or acquiesces in the establishment of a costly and expensive nuisance cannot invoke the aid of a court of equity, even though it prove more annoying and injurious than he anticipated, but he will be left to his remedy at law, if any. If he cannot sue at law, neither can he sue in equity. 16 Am. & Eng. Enc. Law, 960; 2 Wood, Nuis. §§ 785, 804, 805, 806; *Hulme v. Shreve*, 4 N. J. Eq. 116. "A person may so encourage another in the erection of a nuisance as not only to be deprived of the right of equitable relief but also to give the adverse party an equity to restrain him from recovering damages at law for such nuisance." *Williams v. Earl of Jersey*, 1 Craig & P. 91; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Eden, Inj.* 274; *High, Inj.* § 756; *Whitney v. Railway Co.*, 11 Gray, 359; *Swain v. Seamen*, 9 Wall. 254. For the foregoing reasons, the decree complained of is reversed, injunction dissolved, and bill dismissed.

(94 Ga. 338)

## MATHIS v. WESTERN UNION TEL. CO.

(Supreme Court of Georgia. June 2, 1895.)

Dissenting opinion. For majority opinion, see 21 S. E. 564.

SIMMONS, J. (dissenting). That a corporation transacting business with the public has a right to make all reasonable rules and regulations for the government of its business is too well settled to require the citation of authorities; it is universally held by all courts. On this principle, courts hold that an insurance company has a right to stipulate with the assured that, in case of loss, he must make out his proof of loss, and submit it to the company within a specified time, or his right of action to recover for his loss is barred. On the same principle, courts hold that a telegraph company has the right to contract with the sender of a message that he must give written notice of his claim for damages arising from a breach of contract within a specified time, or his right to recover will be barred. This is held, too, in the face of the statute which gives the sender a much longer time to bring his action for his damages. It is held on the principle that the company has a right to make reasonable rules and regulations in the transaction of its business with the public; and such rules and regulations are held to be reasonable on the ground that the telegraph company receives and transmits thousands of telegrams in the course of the time prescribed in the rule, and that it would be impossible, after this time, for it to preserve its evidence so as to meet and defend actions brought against it for damages within the time allowed the sender by the statute of limitations to sue for the breach of a contract. The courts, in

holding this rule to be a reasonable one, have virtually allowed it to abolish the statute of limitations by contract with the sender. The contracts thus made do not relieve the telegraph company from any part of its obligation. It is bound to the same care, diligence, and fidelity as the law requires it to exercise if no such contract had been made. All the contract requires is that the sender of a telegram should give notice of his claim for damages within the time agreed upon in the contract, so as to enable the company to ascertain the facts, and to preserve the same for its defense. This being true, it is difficult for me to see why the company cannot make the same contract in relation to a penalty imposed by law for a violation of its statutory duty, when the penalty is to be recovered by an individual, and not by the public. I admit that it cannot make a contract that will relieve it from the penalty, or that will relieve it from its breach of duty, either by omission or commission. But the contract under consideration does not undertake to do that. It simply means that, if the company fails to discharge its duty to the sender, as required of it by law, the sender agrees to present to it in writing his claim for the statutory penalty within 60 days after the message is filed with the company. It does not relieve the company of the penalty. The same obligation rests upon it to send or deliver the message "with impartiality and good faith and due diligence." If it fails to do so, and the sender complies with the stipulation to make his claim for the penalty within 60 days, the company is as much bound for the penalty as if the stipulation had not been made. It is no hardship upon him. In these days of intelligence and rapid communication, he can certainly ascertain within a much shorter time than this the failure on the part of the company to comply with the law. If he sends a message, he can, within a few hours, or days at least, ascertain whether it was transmitted and delivered as the statute requires. Why should he have more time to bring his action for a penalty of \$100 than he would to bring it for damages involving \$1,000? It is said that the reason is that in the one case it is for a penalty, and in the other for damages; that the penalty implies public policy, and that the law forbids any one to contract contrary to that; that the object of the legislature was to quicken the diligence of these companies in the performance of their duties, and that this act is based upon public policy. I think that I have already shown that the company is not relieved from any of its duties by this stipulation in the contract; that the sender waives no right that the statute gives him by agreeing to the stipulation. All that he does waive is the general statute of limitations, in case he fails to give the notice. He agrees with the company to make a limitation of their own in lieu of the general statute prescribed for the breach of all contracts, if he fails to give the notice according to his agreement. Upon this subject I think the case of *Telegraph Co. v. Jones*, 95 Ind. 228, and the case of *Montgomery v. Telegraph Co.*, 50 Mo. App. 591, cited by Mr. Justice LUMPKIN in the opinion of the court in this case, is directly in point. I call particular attention to the reasoning of Chief Justice Elliott in *Jones' Case*. While it is not binding upon us, the reasoning is very forcible, and is entitled to great weight.

Now, as to the public policy of the act of 1887, which gives this right of action. It will be observed that the act declares that the penalty may be recovered by "either the sender of the dispatch or the person to whom sent or directed, whichever may first sue." It does not give the right of action to the public. It does not provide that any part of the recovery shall go to the public, or to any portion of it. It gives the whole to the sender if he first brings his action. The suit under consideration was brought by the sender. I am free to admit that if the recovery, or a portion of it, went to the public, the sender could not agree to any stipulation which would deprive the public of its portion. The rule seems to be that where the public, or a portion thereof, are interested in a fine or penalty, the person or informer who brings the action cannot

settle or compound with the defendant so as to deprive the public of its interest therein. 18 Am. & Eng. Enc. Law, 281, and authorities cited. But where the penalty or fine goes alone to the informer or person who institutes the action therefor, he may settle or compound with the defendant, or withdraw his suit, or waive his right to recover the same. He, being alone interested in the matter, may make any kind of agreement about it that he pleases. He is not compelled to sue; and, if he does so, he can withdraw the suit, or settle it by compromise. If he is entitled to receive half of the penalty, he can compromise with the defendant for his half, or he may release the defendant from his part thereof. *Wardens of Poor v. Cope*, 2 Ired. 44; *Haskins v. Newcomb*, 2 Johns. 404; *Telegraph Co. v. Taylor*, 84 Ga. 408, 11 S. E. 396; *Telegraph Co. v. Buchanan*, 35 Ind. 430. If he can do this, what prevents him from stipulating in advance that, if the defendant becomes liable to the penalty, he will give him notice thereof within 60 days? Section 10 of our Code provides that: "Laws made for the preservation of public order or good morals cannot be done away with or abrogated by any agreement; but a person may waive or renounce what the law has established in his favor, when he does not thereby injure others or affect the public interest." The act of 1887 was not enacted for the preservation of public order or good morals, but, as announced in the opinion of the majority of the court, was made for the purpose of quickening the diligence of these companies in the performance of their duties. The act of 1887, as before remarked, declares that the whole recovery shall go to the sender if he is the first to sue. His stipulating that he will give notice of the liability of the company for the penalty within 60 days affects only his own right to recover, and does not injure or affect the public interest in any manner. Under this section of the Code this court held, in the case of *Simmons v. Anderson*, 56 Ga. 53, that *Simmons*, as head of a family, could waive his right to a homestead, although the constitution of the state expressly declared that he was entitled to one, and that it should not be subject to levy and sale. Section 2040 of the Code provides that certain property of every debtor who is the head of a family shall be exempt from levy and sale, nor shall any valid lien be created thereon. Yet this court, in *Flanders v. Wells*, 61 Ga. 195, held that *Wells* could waive this exemption on property described in the section, and that it was subject to sale under a mortgage lien thereon which contained the waiver. These decisions were pronounced before the adoption of our present constitution, which allows a waiver of homestead and exemption. This constitutional provision allowing the homestead, and section 2040, providing for what is called the "pony homestead," were enacted to prevent families from being thrown out of house and home, and thus keep them from becoming charges upon the public. The public had, therefore, an indirect interest in seeing that each head of a family had a home. Yet with this interest of the public, a waiver by the head of a family was held valid and binding. If it was not contrary to public policy to waive a homestead, which was enacted for the protection of the women and children of the state, and to prevent them from becoming charges on the public, how much less is it contrary to that policy to allow a sender of a telegram to stipulate that he will not hold the company liable for a penalty unless he gives it notice within 60 days from the filing of the message?

To repeat, he does not waive his right of action; he only waives the general limitation act, in case he fails to give notice of his claim for the penalty. If he gives the notice, he can still bring his action within the time prescribed by the statute of limitations. His doing so affects no one but himself. If he fails to give the notice which he stipulates to do, it is his own fault; and his failure injures no one but himself. In my opinion, the plaintiff in this case had the right to make the agreement in question. It was not contrary to public policy, and he should not be allowed to recover.







